NORTH CAROLINA REPORTS

Vol. 260

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1963

FALL TERM, 1963

JOHN M. STRONG

REPORTER

RALEIGH:
Bynum Printing Company
Printers to the Supreme Court
1963

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7 " "	"	42 "
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Busbee Law	"	44 "
" Eq.	"	45 "
1 Jones Law	"	46 "
2 " "	"	47 "
3 " "	"	48 "
4 " "	"	49 "
5 " "	"	50 "
6 " "	"	51 "
7 " "	"	52 "
8 " "	"	53 "
1 " Eq.	"	54 "
2 " "	"	55 "
3 " "	"	56 "
4 " "	"	57 "
5 " "	"	58 "
6 " "	"	59 "
1 and 2 Winston	"	60 "
Phillips Law	"	61 "
" Eq.	"	62 "

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

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

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1963

FALL TERM, 1963

CHIEF JUSTICE:

EMERY B. DENNY.

ASSOCIATE JUSTICES:

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

EMERGENCY JUSTICES:

M. V. BARNHILL.[1]
J. WALLACE WINBORNE.

ATTORNEY-GENERAL:

THOMAS WADE BRUTON.

DEPUTY ATTORNEYS-GENERAL:

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PEYTON B. ABBOTT,
RALPH MOODY.

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BERT M. MONTAGUE.

[1]Died 12 October 1963.

JUDGES
OF THE
SUPERIOR COURTS OF NORTH CAROLINA

FIRST DIVISION

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

SECOND DIVISION

Name	*District*	*Address*
HAMILTON H. HOBGOOD	Ninth	Louisburg.
WILLIAM Y. BICKETT	Tenth	Raleigh.
CLAWSON L. WILLIAMS	Eleventh	Sanford.
E. MAURICE BRASWELL	Twelfth	Fayetteville.
RAYMOND B. MALLARD	Thirteenth	Tabor City.
C. W. HALL	Fourteenth	Durham.
LEO CARR	Fifteenth	Burlington.
HENRY A. MCKINNON, JR.	Sixteenth	Lumberton.

THIRD DIVISION

Name	*District*	*Address*
ALLEN H. GWYN	Seventeenth	Reidsville.
WALTER E. CRISSMAN	Eighteenth-B	High Point.
EUGENE G. SHAW	Eighteenth-A	Greensboro.
FRANK M. ARMSTRONG	Nineteenth	Troy.
JOHN D. MCCONNELL	Twentieth	Southern Pines.
WALTER E. JOHNSTON, JR.	Twenty-First	Winston-Salem.
JOHN R. MCLAUGHLIN	Twenty-Second	Statesville.
ROBERT M. GAMBILL	Twenty-Third	North Wilkesboro.

FOURTH DIVISION

Name	*District*	*Address*
J. FRANK HUSKINS	Twenty-Fourth	Burnsville.
JAMES C. FARTHING	Twenty-Fifth	Lenoir.
FRANCIS O. CLARKSON	Twenty-Sixth-B	Charlotte.
HUGH B. CAMPBELL	Twenty-Sixth-A	Charlotte.
P. C. FRONEBERGER	Twenty-Seventh	Gastonia.
W. K. MCLEAN	Twenty-Eighth	Asheville.
J. WILL PLESS, JR.	Twenty-Ninth	Marion.
GEORGE B. PATTON	Thirtieth	Franklin.

SPECIAL JUDGES.

H. L. RIDDLE, JR.	Morganton.	WALTER E. BROCK	Wadesboro.
HAL HAMMER WALKER	Asheboro.	JAMES F. LATHAM	Burlington.
HARRY C. MARTIN	Asheville.	EDWARD B. CLARK	Elizabethtown.
J. WILLIAM COPELAND	Murfreesboro.	HUBERT E. MAY	Nashville.[1]

EMERGENCY JUDGES.

H. HOYLE SINK	Greensboro.	J. PAUL FRIZZELLE	Snow Hill.
W. H. S. BURGWYN	Woodland.	WALTER J. BONE	Nashville.
Q. K. NIMOCKS, JR.	Fayetteville.	HENRY L. STEVENS, JR.	Warsaw.
ZEB V. NETTLES	Asheville.	HUBERT E. OLIVE	Lexington.

F. DONALD PHILLIPS........Rockingham.

[1]Appointed 12 February 1964.

SOLICITORS

EASTERN DIVISION

Name	*District*	*Address*
Walter W. Cohoon	First	Elizabeth City.
Roy R. Holdford, Jr.	Second	Wilson.
W. H. S. Burgwyn, Jr.	Third	Woodland.
Archie Taylor	Fourth	Lillington.
Luther Hamilton, Jr.	Fifth	Morehead City.
Walter T. Britt	Sixth	Clinton.
William G. Ransdell, Jr.	Seventh	Raleigh.
James C. Bowman	Eighth	Southport.
Lester G. Carter, Jr.	Ninth	Fayetteville.
John B. Regan	Ninth-A	St. Pauls.
Dan K. Edwards	Tenth	Durham.
Thomas D. Cooper, Jr.	Tenth-A	Burlington.

WESTERN DIVISION

Name	*District*	*Address*
Harvey A. Lupton	Eleventh	Winston-Salem.
L. Herbin, Jr.	Twelfth	Greensboro.
M. G. Boyette	Thirteenth	Carthage.
Max L. Childers	Fourteenth	Mount Holly.
Kenneth R. Downs	Fourteenth-A	Charlotte.
Zeb. A. Morris	Fifteenth	Concord.
B. T. Falls, Jr.	Sixteenth	Shelby.
J. Allie Hayes	Seventeenth	North Wilkesboro.
Leonard Lowe	Eighteenth	Caroleen.
Robert S. Swain	Nineteenth	Asheville.
Glenn W. Brown	Twentieth	Waynesville.
Charles M. Neaves	Twenty-first	Elkin.

SUPERIOR COURTS, SPRING TERM, 1964

FIRST DIVISION

First District—Judge Cowper.
Camden—Apr. 6;
Chowan—Mar. 30; Apr. 27†
Currituck—Jan. 27†, Mar. 2.
Dare—Jan.† (2); May 25;
Gates—Mar. 23; May 18†;
Pasquotank—Jan. 6†; Feb. 17* (2); Mar. 16†, May 4† (20); June 1*; June 8†.
Perquimans—Feb. 3†; Mar. 9†; Apr. 13.

Second District—Judge Morris.
Beaufort—Jan. 20*; Jan. 27, Feb. 17†(2); Mar. 16*; May 4†(2); June 8†; June 22;
Hyde—May 18;
Martin—Jan. 6†; Mar. 9; Apr. 6†(2); May 25†(2); June 15.
Tyrell—Apr. 20.
Washington—Jan. 13*; Feb. 10†; Mar. 30†; Apr. 27*.

Third District—Judge Peel.
Carteret—Mar. 9†(2); Mar. 30, Apr. 27† (a)(2); June (2).
Craven—Jan. 6(2); Feb. 7†(3); Mar. 9 (a); Apr. 6, May 4†(2); May 25(2).
Pamlico—Jan. 20(a); Apr. 13.
Pitt—Jan. 20†; Jan. 27; Feb. 24†(2); Mar. 16(a); Mar. 23; Apr. 13†(a); Apr. 20; May 18; May 25†(a); June 22.

Fourth District—Judge Bundy.
Duplin—Jan. 20*; Mar. 9†(2); May 11*; May 18†(2).
Jones—Jan. 13†; Mar 2.
Onslow—Jan. 6; Feb. 24; Mar. 23†(2); May 18(a).
Sampson—Jan. 27; Apr. 6†(2); Apr. 27*; May 4†; June 1†(2).

Fifth District—Judge Hubbard.
New Hanover—Jan. 13; Jan. 20†(2); Feb. 10†(2); Feb. 24*(2); Mar. 9†(2); Apr. 6*; Apr. 13†(2); May 4†(2); May 18*; May 25†(2); June 8*; June 15†(2).
Pender—Jan. 6; Feb. 3†; Mar. 23; Apr. 27†.

Sixth District—Judge Mintz.
Bertie—Feb. 10(2); May 11(2).
Halifax—Jan. 27(2); Mar. 2†; Apr. 27; May 25†(2); June 8*.
Hertford—Feb. 24; Apr. 13(2).
Northampton—Jan. 20†; Mar. 30(2).

Seventh District—Judge Parker.
Edgecombe—Jan. 20*; Feb. 10†(a); Feb. 24*; Apr. 20*; May 18†(2); June 8.
Nash—Jan. 6*(a); Jan. 27†; Feb. 3*; Mar. 2†(2); Mar. 30*; May 4†(2); June 1*.
Wilson—Jan. 6†(2); Feb. 10*(2); Mar. 16*(2); Apr. †(2); May 4*(a)(2); June 15†(2).

Eighth District—Judge Fountain.
Greene—Jan. 4†; Feb. 24; Apr. 27(a).
Lenoir—Jan. 13*; Jan. 20†(a); Feb. 10† (2); Mar. 16(2); Apr. 13†(2); May 18†(2); June 15*(2).
Wayne—Jan. 20*(2); Feb. 3†; Mar. 2† (2); Mar. 3*(2); May 4†(2). June 1†(2).

SECOND DIVISION

Ninth District—Judge McKinnon.
Franklin—Feb. 3*; Feb. 24†; Apr. 20† (2); May 11*.
Granville—Jan. 20; Jan. 27†(a); Apr. 6 (2).
Person—Feb. 10; Feb. 17†; Mar. 23†(2); May 18; May 25†.
Vance—Jan. 13*; Mar. 2*; Mar. 16†; June 8†; June 22*.
Warren—Jan. 6*; Jan. 27†; Mar. 9†(a); May 4†; June 1*.

Tenth Disrict—Judge Hobgood.
Wake—Jan. 6*(a); Jan. 6†(2); Jan. 13† (a)(2); Jan. 20*(2); Jan. 27†(a)(2); Feb. 3†(2); Feb. 10†(a)(2); Feb. 17*(2); Feb. 24†#(a); Mar. 2†(2); Mar. 16†(a)(2); Mar. 16#(2); Mar. 30†(a); Apr. 6*(a)(2); Apr. 6†(2); Apr. 20†#(a); Apr. 20†(2); Apr. 27*A(2); May 4†(2); May 18†(2); May 25 †#(a); June 1†(a)(2); June 1*(2); June 15†(2); June 22*(a).

Eleventh District—Judge Bickett.
Harnett—Jan.6*; Jan. 13†(a)(2); Feb. 10†(a); Feb. 17†(2); Mar. 16*; Apr. 6†(2); Apr. 20†(2); May 18*; May 25†(a)(2); June 8†(2).
Johnston—Jan. 13†(2); Jan. 27†(a)(2); Feb. 10; Feb. 17(a); Mar. 2†(2); Mar. 30† (2); Apr. 13*(a); May 4†(2); June 1; June 22*.
Lee—Jan. 27; Feb. 3†; Mar. 2†(a); Mar. 23*; May 4†(a); May 25*.

Twelfth District—Judge Williams.
Cumberland—Jan. 6*(2); Jan. 20†(2); Feb. 3†(a)(2); Feb. 3*(2); Feb. 17*(a); Feb. 17†(2); Mar. 2†(a)(2); Mar. 9*(2); Mar. 30*(a); Mar. 30†(2); Apr. 13#(2); Apr. 20†(a)(2); May 4†(2); May 18*(2); June 1†(2); June 15*(2).
Hoke—Jan. 27(a); Mar. 2†; Apr. 22.

Thirteenth District—Judge Braswell.
Bladen—Feb. 17; Mar. 16†(2); Apr. 20; May 18†.
Brunswick—Jan. 20; Feb. 24†; Apr. 27†; May 11; June 1†(2).
Columbus—Jan. 10†(2); Jan. 27*(2); Mar. 2*(2); May 4*; June 15.

Fourteenth District—Judge Mallard.
Durham—Jan. 6*; Jan. 13*(a); Jan. 13† (2); Jan. 27†(a); Jan. 27*(2); Feb. 10†; Feb. 17†(a); Feb. 17*(2); Mar. 2†(2); Mar. 9*A(2); Mar. 16†; Mar. 30†; Apr. 6†(a) (2); Apr. 6*(2); Apr. 20†; May 4†(a)(2); May 4*(2); May 18†(2); June 1*; June 1*(a)(2); June 8†(3).

Fifteenth District—Judge Hall.
Alamance—Jan. 6†(2); Jan. 20*(a); Feb. 3†(2); Mar. 2*(2); Mar. 30†(a); Apr. 13† (2); May 4*; May 18†(2); June 8*(2).
Chatham—Jan. 27†(a); Feb. 17; Mar. 16†; May 11; June 1†.
Orange—Jan. 20†(2); Feb. 24*; Mar. 23 †(2); Apr. 27*; June 15†A(2).

Sixteenth District—Judge Carr.
Roberson—Jan. 6†(2); Jan. 20*(2); Feb. 24†(2); Mar. 9*; Mar. 23†(2); Apr. 6*(2); Apr. 20†; May 4*(2); May 18†(2); June 8*(2).
Scotland—Feb. 3†; Mar. 16; Apr. 27†(a) June 22.

THIRD DIVISION

Seventeenth District—Judge Gambill.
Caswell—Feb. 24†; Mar. 23(a).
Rockingham—Jan. 20*(2); Mar. 2†(2); Mar. 16*(a); Apr. 20†(2); May 18†(2); June 15(2).
Stokes—Feb. 3; Apr. 6(2); June 22(a).
Surry—Jan. 6*(2); Feb. 10†(2); Mar. 23†(2); May 4*(2); June 1†(2).

Eighteenth District—Judge Gwyn.
Schedule A—Judge
Guilford Gr.—Jan. 6†(2); Jan. 20†(2); Feb. 3*(2); Feb. 24†(2); Apr. 13†(2); May 11*(2); June 1†#; June 8†(2).
Guilford H.P.—Feb. 17†; Mar. 9*; Mar. 16†(2); Mar. 30*; Apr. 27†; May 4#; May 25*.
Schedule B—Judge Shaw.
Guilford Gr.—Jan. 6*(2); Feb. 3†(2); Feb. 17†; Feb. 24*(2); Mar. 9†(2); Mar. 23*; Mar. 30†(2); Apr. 13*(2); Apr. 27†(2); May 25†(2); June 8†(2).
Guilford H.P.—Jan. 20*; Jan. 27†; May 18†; June 22†.
Schedule C—
Guilford Gr.—Jan. 13†#(a); Feb. 17†(a); Mar. 23†(a); Apr. 27†#(a).
Guilford H.P.—Jan. 6†(a); Feb. 10*(a).

Nineteenth District—Judge Crissman.
Cabarrus—Jan. 6*; Jan. 13†; Feb. 3†(a)(2); Mar. 2†(2); Apr. 20(2); May 25(a); June 8†(2).
Montgomery—Jan. 20*; Apr. 6(a); May 25†.
Randolph—Jan. 6†A(2); Jan. 27*; Feb. 3†(2); Mar. 2†(a)(2); Mar. 30*(a); Apr. 6†(2); May 4†A(2); June 1†(a)(2); June 22*.
Rowan—Jan. 20†A(2); Feb. 17*(2); Mar. 16†(2); May 4(2); May 18†; June 1*.

Twentieth District—Judge Armstrong.
Anson—Jan. 13*; Mar. 2†; Apr. 13(2); June 8*; June 15†.
Moore—Jan. 20†; Jan. 27*; Mar. 9†; Apr. 27*; May 18†.
Richmond—Jan. 6*; Feb. 10†; Mar. 16†(2); Apr. 6*; May 25†(2); June 22†.
Stanly—Feb. 3†; Mar 30(a); May 11†.
Union—Feb. 17(2); May 4.

Twenty-First District—Judge McConnell.
Forsyth—Jan. 6#(a); Jan. 6(2); Jan. 13†(a); Jan. 20†(3); Feb. 3A(3); Feb. 10†(3); Mar. 2†(a)(2); Mar. 2(2); Mar. 23†(2); Apr. 6†(a); Apr. 6(2); Apr. 13†#(a); Apr. 20†(3); May 11†(a)(2); May 11(2); May 25†(2); June 8(3); June 15†(a)(2).

Twenty-Second District—Judge Johnston.
Alexander—Mar. 9; Apr. 13.
Davidson—Jan. 20†(a); Jan. 27; Feb. 17†(2); Mar. 9†(a); Mar. 16; Mar. 30†(2); Apr. 27; May 18(a); June 1†(2); June 22.
Davie—Jan. 20*; Mar. 2†; Apr. 20(a).
Iredell—Feb. 3(2); Mar. 16†(a); Mar. 23*; May 4†; May 18(2).

Twenty-Third District—Judge McLaughlin.
Alleghany—Jan. 27; Apr. 20.
Ashe—Mar. 30*; May 25†.
Wilkes—Jan. 13; Jan. 20†; Feb. 17†(2); Mar. 9*(2); May 4†; June 1; June 15†(2).
Yadkin—Feb. 3(2); May 11.

FOURTH DIVISION

Twenty-Fourth District—Judge Patton.
Avery—Apr. 27(2).
Madison—Feb. 24; Mar. 23†(2); May 25*(2); June 22†.
Mitchell—Apr. 6(2).
Watauga—Jan. 20*; Apr. 20*; June 8†(2).
Yancey—Mar. 2(2).

Twenty-Fifth District—Judge Huskins.
Burke—Feb. 17; Mar. 9; Mar. 16(a); June 1(2).
Caldwell—Jan. 20†(2); Feb. 24(2); Mar. 23†(2); May 18(2).
Catawba—Jan. 6†(2); Feb. 3(2); Apr. 6(2); Apr. 20†(2); June 15†(2).

Twenty-Sixth District—
Schedule A—Judge Farthing.
Mecklenburg—Jan. 6*(2); Jan. 20†(2); Feb. 3†(2); Feb. 17†(3); Mar. 9*(2); Mar. 23†; Mar. 30†(a); Apr. 6*(2); Apr. 20†(2); May 4†(2); May 18†(2); June 1†(2); June 15*(2).
Schedule B—Judge Campbell.
Mecklenburg—Jan. 6†(2); Jan. 20†(2); Feb. 3*(3); Feb. 24†(2); Mar. 9†(2); Mar. 23†(a); Mar. 30†; Apr. 6†(2); Apr. 20†(2); May 4*(2); May 18†(2); June 1†(2); June 15†(2).
Schedule C—
Mecklenburg—Jan. 6†(a)(2); Jan. 2†(a)(2); Feb. 3†(a)(2); Feb. 17†(a)(2); Mar. 9†(a)(2); Mar. 23†(a)(2); Apr. 6†(a)(2); Apr. 20†(a)(2); May 4†(a)(2); May 18†(a)(2); June 1†(a)(2); June 15†(a)(2).
Schedule D—
Mecklenburg—Jan. 6†(a)(2); Jan. 20†(a)(2); Feb. 3† (a)(2); Feb. 17†(a)(2); Mar. 9†(a)(2); Mar. 23†(a)(2); Apr. 6†(a)(2); Apr. 20†(a)(2); May 4†(a)(2); May 18†(a)(2); June 1†(a)(2); June 15†(a)(2).

Twenty-Seventh District—Judge Clarkson.
Cleveland—Jan. 27; Mar. 23†(2); Apr. 27(2).
Gaston—Jan. 6†(a); Jan. 6*; Jan. 13†A(3); Feb. 3*A; Feb. 3†; Feb. 10(2); Feb. 24*(2); Mar. *(a); Mar. 9†(2); Mar. 23†(a); Mar. 30*(a)(2); Apr. 6†(a); Apr. 13†(2); Apr. 27*(a)(2); May 4†(a); May 11†(a)(2); May 25†; June 1†(a); June 1*(3); June 8†(a).
Lincoln—Jan. 13(2); May 11(2).

Twenty-Eighth District—Judge Froneberger.
Buncombe—Jan. 6#(2); Jan. 20†(3); Feb. 10#(2); Feb. 17†#(a); Feb. 24†(3); Mar. †(a)(3); Mar. 16*(2); Apr. 6†; Apr. 13*(2); Apr. 27†(2); May 11†(a)(2); May 11*(2). May 25†(2); June 8†#(a); June 8*; June 15†(2).

Twenty-Ninth District—Judge McLean.
Henderson—Feb. 10(2); Mar. 16†(2); May 4*; May 25†(2).
McDowell—Jan. 6*; Feb. 24†(2); Apr. 13*(a); June 8(2).
Polk—Jan. 27; Feb. 3†(2); June 22.
Rutherford—Jan. 13†#(2); Mar. 9*†; Apr. 20†*(2); May 11*†(2).
Transylvania—Feb. 3; Mar. 30(2).

Thirtieth District—Judge Pless.
Cherokee—Mar. 30(2); June 22†.
Clay—Apr. 27.
Graham—Mar. 16; June 1†(2).
Haywood—Jan. 6†(2); Feb. 3(2); May 4†(2).
Jackson—Feb. 17(2); May 18; June 15†.
Macon—Apr. 13(2).
Swain—Mar. 2(2).

UNITED STATES COURTS FOR NORTH CAROLINA

EASTERN DISTRICT

Judges

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

U. S. Attorney

ROBERT H. COWEN, RALEIGH, N. C.

Assistant U. S. Attorneys

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

U. S. Marshal

HUGH SALTER, RALEIGH, N. C.

Clerk U. S. District Court

SAMUEL A. HOWARD, RALEIGH, N. C.

Deputy Clerks

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

Senior Judge

JOHNSON J. HAYES, WILKESBORO, N. C.

U. S. Attorney

WILLIAM H. MURDOCK, GREENSBORO, N. C.

Assistant U. S. Attorneys

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

U. S. Marshal

E. HERMAN BURROWS, GREENSBORO, N. C.

Clerk U. S. District Court

HERMAN AMASA SMITH, GREENSBORO, N. C.

Deputy Clerks

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

WESTERN DISTRICT

Judges

J. B. CRAVEN, JR., *Chief Judge*, MORGANTON, N. C.
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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1963

NORMAN A. COCKE, WILBURT C. DAVIDSON, DORIS DUKE, BENJAMIN F. FEW, BENNETTE E. GEER, PHILIP B. HEARTT, THOMAS F. HILL, AMOS R. KEARNS, THOMAS L. PERKINS, MARSHALL I. PICKENS, R. GRADY RANKIN, WATSON S. RANKIN, W. S. O'B. ROBINSON, JR., MARY D. B. T. SEMANS AND KENNETH C. TOWE, AS TRUSTEES OF THE DUKE ENDOWMENT, A TRUST ESTABLISHED BY JAMES B. DUKE BY INDENTURE DATED DECEMBER 11, 1924 v. DUKE UNIVERSITY, THE TRUSTEES OF DAVIDSON COLLEGE; FURMAN UNIVERSITY; JOHNSON C. SMITH UNIVERSITY, INCORPORATED; CABARRUS MEMORIAL HOSPITAL, A CORPORATION, AND GREENVILLE GENERAL HOSPITAL, A CORPORATION, INDIVIDUALLY AND AS REPRESENTATIVES OF THE CLASS OF HOSPITALS SIMILARLY SITUATED; BAPTIST CHILDREN'S HOME OF NORTH CAROLINA, INC., A CORPORATION, AND EPWORTH CHILDREN'S HOME, A CORPORATION, INDIVIDUALLY AND AS REPRESENTATIVES OF THE CLASS OF CHILD-CARING INSTITUTION SIMILARLY SITUATED; QUARTERLY CONFERENCE OF DUKE'S CHAPEL METHODIST CHURCH, AN UNINCORPORATED ASSOCIATION, AND QUARTERLY CONFERENCE OF HILL'S CHAPEL METHODIST CHURCH, AN UNINCORPORATED ASSOCIATION, INDIVIDUALLY AND AS REPRESENTATIVES OF THE CLASS OF RURAL CHURCHES SIMILARLY SITUATED; REV. LOY D. THOMPSON, INDIVIDUALLY AND AS A REPRESENTATIVE OF THE CLASS OF SUPERANNUATED PREACHERS SIMILARLY SITUATED; MARY JANE WALTON, INDIVIDUALLY AND AS A REPRESENTATIVE OF THE CLASS OF WIDOWS OF METHODIST MINISTERS SIMILARLY SITUATED; PATRICIA JANE WALTON, INDIVIDUALLY AND AS A REPRESENTATIVE OF THE CLASS OF ORPHANS OF METHODIST MINISTERS SIMILARLY SITUATED; HONORABLE WADE BRUTON, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA; HONORABLE DAN McLEOD, ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA; NORTH

CAROLINA HOSPITAL ASSOCIATION, INCORPORATED, A CORPORATION; SOUTH CAROLINA HOSPITAL ASSOCIATION, A CORPORATION; NORTH CAROLINA ASSOCIATION OF CHILD-CARING INSTITUTIONS, AN UNINCORPORATED ASSOCIATION; NORTH CAROLINA ANNUAL CONFERENCE OF THE METHODIST CHURCH, SOUTHEASTERN JURISDICTION, AN UNINCORPORATED ASSOCIATION; WESTERN NORTH CAROLINA ANNUAL CONFERENCE OF THE METHODIST CHURCH, SOUTHEASTERN JURISDICTION, AN UNINCORPORATED ASSOCIATION; JOHN S. CANSLER, AS GUARDIAN AD LITEM FOR ALL MINORS, UNBORN PERSONS, UNKNOWN PERSONS, CORPORATIONS, ASSOCIATIONS AND ENTITIES, AND ALL OTHER PERSONS, CORPORATIONS, ASSOCIATIONS AND ENTITIES, WHETHER NOW IN BEING OR HEREAFTER COMING INTO BEING WHICH MAY NOW HAVE OR MIGHT HEREAFTER ACQUIRE AN INTEREST, WHETHER VESTED OR CONTINGENT, IN THE SUBJECT MATTER REFERRED TO IN THE COMPLAINT IN THIS ACTION OR ANY INTEREST UNDER THE INDENTURE OF TRUST DESCRIBED IN THE COMPLAINT IN SAID ACTION AND WHO ARE NOT REPRESENTED BY REPRESENTATIVES OF THEIR CLASS OR OTHERWISE; AND MARY JANE WALTON, AS GENERAL GUARDIAN OF THE ESTATE OF THE DEFENDANT PATRICIA JANE WALTON, A MINOR, AND AS A REPRESENTATIVE OF THE CLASS OF ORPHANS OF METHODIST MINISTERS SIMILARLY SITUATED.

(Filed 19 July 1963.)

1. Courts § 3—

The Superior Court is a court of general legal and equitable jurisdiction. G.S. 7-63.

2. Same; Courts § 20—

Our courts have jurisdiction of an action to modify a trust when the trust operates principally in this State, a majority of the trustees reside here, and the trustees, pursuant to authority conferred upon them by the trust, have established administrative offices in this State, notwithstanding the trustor resided in another state and executed the instrument there, but in determining the right to modify the trust our courts will apply the laws of such other state.

3. Parties § 5—

Where the potential beneficiaries of a trust are so numerous that it is practically impossible to bring them all before the court in an action seeking modification of the trust, a beneficiary of each class may be made a party and represent the class. G.S. 1-70.

4. Trusts § 5—

Courts of equity have jurisdiction to modify a trust indenture, but in order to invoke such equitable power it must be made to appear that some exigency, contingency, or emergency not anticipated by the trustor has arisen requiring a disregard of some specific provision of the trust in order to preserve the trust estate or protect the *cestuis*.

5. Same— Evidence held insufficient to invoke power of equity to modify trust indenture.

The evidence disclosed that the trustor, a man of exceptional business ability, gave a great deal of time and thought to the language of the

trust endowment created by him, and that the trust indenture provided that the trustees could invest funds of the trust only in the securities of a power company which the trustor had helped create, or in governmental or municipal bonds. The trustees instituted this action for a modification of the trust to permit them to invest in stocks and bonds of other corporations in their discretion as they deemed advisable. There was testimony by investment experts that a greater degree of diversification is advisable and recommended under general trust investment principles. *Held:* In the absence of a showing that a modification of the provisions for investment of the trust funds is necessary to preserve the *corpus* of the trust or protect the interests of the beneficiaries, there is insufficient evidence to invoke the equitable power of the court to authorize the trustees to disregard the express provisions of the trust indenture, and nonsuit should have been entered.

HIGGINS, J., concurring.

APPEAL by John S. Cansler, guardian *ad litem,* and Mary Jane Walton, individually and as general guardian for Patricia Jane Walton, from *Campbell, J.*, December 10, 1962 Special Civil Term of MECKLENBURG.

On 11 December 1924 James B. Duke, a resident of New Jersey, transferred in trust to twelve named individuals 122,647 shares of Duke Power Co., 100,000 shares of British-American Tobacco Co., Ltd., 75,000 shares of R. J. Reynolds Tobacco Co. B stock, 5,000 shares of George W. Helme Co., 12,325 shares of Republic Cotton Mills, and 7,935 3/10 shares of Judson Mills to be by them and their successors held in trust for the uses and purposes set out in a trust indenture of that date executed by Mr. Duke and the twelve named trustees.

The trust then created is by the indenture denominated "the Duke Endowment." It has perpetual existence and is governed by a self-perpetuating board of fifteen members. It gives blanket authority to the trustees to sell any stocks except shares of Duke Power Co. As to the shares of that corporation and its subsidiaries, no sale can be made "except upon and by the affirmative vote of the total authorized number of trustees at a meeting called for the purpose, the minutes of which shall state the reasons for and terms of such sale."

The motives prompting the creation of the trust and its general purposes are detailed in the seventh division of the indenture in this language:

"For many years I have been engaged in the development of water powers in certain sections of the States of North Carolina and South Carolina. In my study of this subject I have observed how such utilization of a natural resource, which otherwise would run in waste to the sea and not remain and increase as a forest, both gives impetus

to industrial life and provides a safe and enduring investment for capital. My ambition is that the revenues of such developments shall administer to the social welfare, as the operation of such developments is administering to the economic welfare, of the communities which they serve. With these views in mind I recommend the securities of the Southern Power System (the Duke Power Company and its subsidiary companies) as the prime investment for the funds of this trust; and I advise the trustees that they do not change any such investment except in response to the most urgent and extraordinary necessity; and I request the trustees to see to it that at all times these companies be managed and operated by the men best qualified for such a service.

"I have selected Duke University as one of the principal objects of this trust because I recognize that education, when conducted along sane and practical, as opposed to dogmatic and theoretical, lines, is, next to religion, the greatest civilizing influence. I request that this institution secure for its officers, trustees and faculty men of such outstanding character, ability and vision as will insure its attaining and maintaining a place of real leadership in the educational world, and that great care and discrimination be exercised in admitting as students only those whose previous record shows a character, determination and application evincing a wholesome and real ambition for life. And I advise that the courses at this institution be arranged, first, with special reference to the training of preachers, teachers, lawyers and physicians, because these are most in the public eye, and by precept and example can do most to uplift mankind, and, second, to instruction in chemistry, economics and history, especially the lives of the great of earth, because I believe that such subjects will most help to develop our resources, increase our wisdom and promote human happiness.

"I have selected hospitals as another of the principal objects of this trust because I recognize that they have become indispensable institutions, not only by way of ministering to the comfort of the sick but in increasing the efficiency of mankind and prolonging human life. The advance in the science of medicine growing out of discoveries, such as in the field of bacteriology, chemistry and physics, and growing out of inventions such as the X-ray apparatus, make hospital facilities essential for obtaining the best results in the practice of medicine and surgery. So worthy do I deem the case and so great do I deem the need that I very much hope that the people will see to it that adequate and convenient hospitals are assured in their respective communities, with especial reference to those who are unable to defray such expenses of their own.

"I have included orphans in an effort to help those who are most unable to help themselves, a worthy cause, productive of truly beneficial results in which all good citizens should have an abiding interest. While in my opinion nothing can take the place of a home and its influences, every effort should be made to safeguard and develop these wards of society.

"And, lastly, I have made provision for what I consider a very fertile and much neglected field for useful help in religious life, namely, assisting by way of support and maintenance in those cases where the head of the family through devoting his life to the religious service of his fellow men has been unable to accumulate for his declining years and for his widow and children, and assisting in the building and maintenance of churches in rural districts where the people are not able to do this properly for themselves, believing that such a pension system is a just call which will secure a better grade of service and that the men and women of these rural districts will amply respond to such assistance to them, not to mention our own Christian duty regardless of such results. Indeed, my observation and the broad expanse of our territory make me believe it is to these rural districts that we are to look in large measure for the bone and sinew of our country.

"From the foregoing it will be seen that I have endeavored to make provision in some measure for the needs of mankind along physical, mental and spiritual lines, largely confining the benefactions to those sections served by these water power developments."

By the fourth division of the indenture the trustees were authorized to expend $6,000,000 of the corpus in acquiring property and construing buildings for Duke University.

The fifth division makes provision for the use of the income from the corpus of the estate (the portion not expended in establishing Duke University plus such funds as Mr. Duke might thereafter add to the trust). The trustees are directed to set aside 20% of the net income until an additional $40,000,000 has been added to the corpus of the trust. The remaining income is payable 32% to Duke University, 32% to such nonprofit hospitals located in North Carolina and South Carolina as the trustees may select for assistance in constructing and equipping such hospitals and to help cover the cost of the treatment of the indigent, 5% to Davidson College, 5% to Furman University, 4% to Johnson C. Smith University, 10% to nonprofit organizations selected by the trustees from those in North or South Carolina which are engaged in caring for orphans, 2% for the care and maintenance of needy superannuated Methodist preachers and

widows and orphans of deceased Methodist preachers residing in North Carolina, 6% to such Methodist churches in North Carolina as the trustees might select to be used by them in erecting churches in rural areas, and 4% for the maintenance and operation of such churches.

The third division of the indenture limits the authority of the trustees with respect to investments in the following language:

"To invest any funds from time to time arising or accruing through the receipt and collection of incomes, revenues and profits, sale of properties, or otherwise, provided the said trustees may not lend the whole or any part of such funds except to said Duke Power Company, nor may said trustees invest the whole or any part of such funds except to said Duke Power Company, nor may said trustees invest the whole or any part of such funds in any property of any kind except in securities of said Duke Power Company, or of a subsidiary thereof, or in bonds validly issued by the United States of America, or by a State thereof, or by a district, county, town or city which has a population in excess of fifty thousand people according to the then last Federal census, which is located in the United States of America, which has not since 1900 defaulted in the payment of any principal or interest upon or with respect to any of its obligations, and the bonded indebtedness of which does not exceed ten per cent of its assessed values. Provided further that whenever the said trustees shall desire to invest any such funds the same shall be either lent to said Duke Power Company or invested in the securities of said Duke Power Company or of a subsidiary thereof, if and to the extent that such a loan or such securities are available upon terms and conditions satisfactory to said trustees."

This action was begun by plaintiffs, trustees, on 5 October 1962. They seek to have the court insert immediately before the proviso in the quoted portion of the third division of the trust limiting the authority of the trustees with respect to investments, the following: "or in such other securities, including common and preferred stocks, bonds and debentures of private corporations, and other property, real or personal, as said Trustees shall, in their discretion, deem advisable, without being restricted to such investments or reinvestments as are permissible for Executors or Trustees under any present or future applicable law, rule of court or court decision."

By order entered on 11 October 1962 defendant Cansler was appointed as guardian *ad litem* "for all minors, unborn persons, unknown persons, corporations, associations and entities and all other persons, corporations, associations and entities whether now in being or here-

after coming into being who may now have or might hereafter acquire an interest in the subject matter of this suit. . ."

By order entered 14 November 1962 it was found that Cabarrus Memorial Hospital and Greenville General Hospital, Baptist Children's Homes of North Carolina, Inc., and Epworth Children's Home, Quarterly Conference of Duke's Chapel Methodist Church, Quarterly Conference of Hill's Chapel Methodist Church, Rev. Loy D. Thompson, Mary Jane Walton, and Mary Jane Walton, general guardian of Patricia Jane Walton, were members of the different classes of beneficiaries named in the indenture; and the members of the several classes were so numerous that it was impracticable to bring all potential beneficiaries before the court. The court directed the named beneficiaries to represent their respective classes.

All defendants except defendant Western North Carolina Annual Conference of the Methodist Church, Southeastern Jurisdiction, answered. The answers, other than the answers of defendants Cansler and Walton, raised no issues of fact but requested the court to investigate and make appropriate orders. The answers of defendants Cansler and Walton deny some of the allegations because of lack of information. They challenge the conclusions which plaintiffs draw from the facts alleged.

After the answers were filed, defendant Cansler filed a demurrer challenging the jurisdiction of the court. The demurrer was overruled. A jury trial was waived. Judge Campbell, after hearing the evidence, made findings of fact on which he concluded plaintiffs were entitled to the relief sought. Judgment was entered giving the trustees power and authority to invest in accordance with the prayer of the complaint.

Defendants Cansler and Walton, having noted exceptions to findings and rulings, appealed.

Lassiter, Moore and Van Allen by Robert Lassiter, Jr., and Perkins, Daniels, McCormack & Collins of counsel, for plaintiff appellees.

John S. Cansler and Cansler & Lockhart for defendant appellants.

RODMAN, J. Before considering the correctness of the judgment permitting plaintiffs, trustees, to make investments expressly prohibited by the trust indenture, we must dispose of the questions presented by the demurrer filed by defendant Cansler in the Superior Court and the demurrer filed in this Court by defendants Cansler and Walton.

For practical purposes the demurrers present these questions: (1) Does the due process clause of the Fourteenth Amendment to the Constitution of the United States forbid this Court from exercising

its equitable jurisdiction with respect to the administration of a trust which by its express language is "executed by a resident of the State of New Jersey in said State, is intended to be made, administered and given effect under and in accordance with the present existing laws and statutes of said State, notwithstanding it may be administered and the beneficiaries hereof may be located in whole or in part in other states, and the validity and construction thereof shall be determined and governed in all respects by such laws and statutes?" (2) Is the court without authority to act because it has not acquired jurisdiction of all necessary parties?

The argument made by appellants that the authority to control and supervise the administration of the trust is limited to the courts of New Jersey, because made in that state by a citizen thereof and by its terms must be interpreted and administered in accordance with the laws of that state, is lacking in merit. Appellants in their brief frankly say they "know of no controlling authority in support of the grounds of such demurrer" but believe it their duty to present the question for decision.

The general rule with respect to the interpretation of contracts was stated by Connor, J., in *Cannaday v. R.R.*, 143 N.C. 439, 55 S.E. 836. He said: "It is settled that 'Matters bearing upon the execution, interpretation and validity of a contract are determined by the law of the place where it is made.'" The statement made in the *Cannaday* case was repeated by Winborne, C.J., in *Roomy v. Ins. Co.*, 256 N.C. 318, 123 S.E. 2d 817. This rule is generally recognized. *Bundy v. Commercial Credit Co.*, 200 N.C. 511, 157 S.E. 860; 12 Am. Jur. 771; 17 C.J.S. 341.

But the rule, like most general rules, is subject to qualifications and exceptions. *Bundy v. Commercial Credit Co., supra.* It has been said: "Where a contract is to be performed wholly outside the state in which the contract was made the parties are presumed to adopt the law of the place of performance as the law of the contract." *Elk River Coal & Lumber Co. v. Funk*, 271 N.W. 204, 110 A.L.R. 1415; 17 C.J.S. 342-3.

American Institute's Restatement of Conflict of Laws sec. 297 states the general rule governing the administration of an *inter vivos* trust of movables: "A trust of movables created by an instrument *inter vivos* is administered by the trustee according to the law of the state where the instrument creating the trust locates the administration of the trust." Comment "a" thereunder states: "The administration by the trustee is the action of the trustee in carrying out the duties of the trust. In what securities can he invest? What interest should he receive

on investment? To whom shall he pay the income? To whom shall he render an account? These are questions of administration and the rule stated in this Section is applicable to them." In comment "d" it says: "In order to determine where the administration of the trust is located, consideration is given to the provisions of the instrument, the residence of the trustees, the residence of the beneficiaries, the location of the property, the place where the business of the trust is to be carried on." The rule there enunciated is seemingly the law of New Jersey. *Swetland v. Swetland*, 149 A 50.

But like the rule for the interpretation of contracts the general rule in trust administration is subject to exceptions and not universally applied. *Haag v. Barnes*, 175 N.E. 2d 441, 87 A.L.R. 2d 1301; *Wilmington Trust Co. v. Wilmington Trust Co.*, 24 A 2d 309, 139 A.L.R. 1117; *Hutchinson v. Ross*, 187 N.E. 65, 89 A.L.R. 1007; and the annotations to those cases; 11 Am. Jur. 382-3.

Here the trust agreement had each of the elements referred to in comment "d" interpreting the Restatement rule. Some of the original trustees were residents of New Jersey, others of North Carolina, South Carolina, and New York. The instrument was executed and acknowledged in New Jersey. The trustees were authorized to select places from which the trust would be administered. Doubtless the draftsman saw that controversy might arise with respect to the administration of the trust and for that reason said the laws of New Jersey should provide the rule to govern the trustees in the administration of the trust; but this declaration was not intended to vest sole control over the administration of the trust in the courts of that state. Doubtless Mr. Duke and the draftsman saw that the courts of New Jersey might not be able to exercise any jurisdiction because of the nonresidence of the trustees and beneficiaries and the lack of control over the trust assets. A court called upon to supervise the administration should have no doubt as to what law the donor intended the trustees to obey.

The Superior Courts of this State are courts of general jurisdiction, G.S. 7-63, exercising equitable powers. *Settle v. Settle*, 141 N.C. 553. They may, when all necessary parties are before the court, determine questions relating to the administration of trusts operating in this state.

There can be no doubt that this trust operates principally in this state and that this state has substantial contact with and interest in the trust. The trust instrument declares the trust was created to further the economic and social welfare of the states of North Carolina and South Carolina; donor wished the majority of the trustees to be natives of those states; the trustees have acted accordingly—nine are

residents of North Carolina, one is a resident of South Carolina, and the others live in Hawaii, New York, or Connecticut; the trustees, pursuant to the authority given them, have established their principal office in Charlotte, N. C., with another office in Durham, N. C.; the principal office of Duke Power Co., the instrumentality expected to provide the bulk of the funds to be distributed to beneficiaries of the trust, is located in Charlotte, N. C.; five of the ten annual meetings required by the trust are held in North Carolina; most of the beneficiaries of the trust have their residence and operate in this state; substantial bank accounts are maintained in this state for distribution to the beneficiaries; the books and records of the trustees are maintained in this state. No fact alleged indicates the trust presently has any connection with the state of New Jersey or that any of its assets are in that state or that any beneficiary lives in New Jersey.

The due process clause does not forbid the courts of this state from exercising jurisdiction over the trust under the facts alleged and admitted by the demurrer.

Appellant's second position is: The court lacked authority to act because all potential beneficiaries have not been personally served with process and have not voluntarily submitted themselves to the jurisdiction of the court.

All specific beneficiaries are before the court. Representatives of all classes, where no specific beneficiary is named, are before the court. The agreement authorizes the trustees to select for donations non-profit hospitals in North Carolina and South Carolina. The complaint alleges and the demurrer admits there are approximately 175 eligible hospitals in North Carolina and approximately 80 eligible hospitals in South Carolina. Cabarrus Memorial Hospital, a North Carolina corporation now a recipient of funds, and Greenville General Hospital, a South Carolina corporation now a recipient of funds, are parties and were specifically directed to represent this class of beneficiaries.

There are approximately 30 institutions in North Carolina that care for orphans and 15 such institutions in South Carolina. Defendant Baptist Children's Homes of North Carolina and Epworth Children's Home of South Carolina typify this class of beneficiaries. They were by order of court specifically directed to represent the class. There are approximately 1450 rural churches in North Carolina eligible for selection by the trustees for benefits under the trust. The Quarterly Conference of Duke's Chapel Methodist Church and the Quarterly Conference of Hill's Chapel Methodist Church are representatives of that class. There are approximately 225 superannuated preachers, any of whom might be selected to receive benefits under the trust. Defend-

ant Thompson, a citizen of North Carolina, is a representative of that class. There are approximately 240 eligible widows in North Carolina, any of whom might be selected for benefits under the trust. Defendant Mary Jane Walton typifies the class she is specifically directed to represent. She has employed counsel and challenges the right of the court to grant the relief sought. There are approximately 25 eligible orphans in North Carolina, any of whom might be selected for benefits. Defendant Patricia Jane Walton typifies that class. Thus, according to the allegations of the complaint, some 2240 individuals or associations might, under the terms of the trust, be selected by the trustees as recipients of Mr. Duke's beneficence. None of these potential beneficiaries is specifically designated. None could as a matter of right assert any claim against the trust. When and to what extent payments will be made to members of the class or to the particular class are matters left to the discretion of the trustees.

The demurrer requires us to decide whether under the facts alleged and admitted the court was powerless to act until all 2240 or more of the potential beneficiaries had in some manner submitted their person to the jurisdiction of the courts of North Carolina. To support their contention that a court of this state could not act unless and until it had acquired personal jurisdiction over each of the potential beneficiaries, appellants rely on *Hanson v. Denckla*, 357 U.S. 235, 2 L. ed. 1283, 78 S. Ct. 1228. The facts in that case are so different from the facts presented by this case that it cannot in our opinion be controlling. There the trustees, residents of another state, were not before the courts of Florida which held the trust invalid. They had not undertaken to exercise any trust authority in Florida. Here the trustees are seeking the aid of the court. A majority are residents of this state. The trust is and has been for twenty-five years engaged in business in this state. Here representatives of each class of beneficiaries are before the court.

Our statute, G.S. 1-70, provides: "When the question is one of a common or general interest of many persons, or where the parties are so numerous that it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." This statutory provision has its counterpart in Rule 23a of the Federal Civil Rules of Procedure.

Our statute and the Federal rule, promulgated with the approval of the Supreme Court of the United States, merely provide a ready means for dispatch of business. Apt illustrations of their usefulness may be found in *Mills v. Cemetery Park Corp.*, 242 N.C. 20, 86 S.E. 2d 893; *Taylor v. Ins. Co.*, 214 N.C. 770, 200 S.E. 882; *Bronson v. Ins.*

Co., 85 N.C. 411; *Fox Publishing Co. v. U.S.*, 366 U.S. 683, 6 L. ed. 2d 604; *Supreme Tribe of Ben Hur v. Cauble,* 255 U.S. 356, 65 L. ed. 673; *Wallace v. Adams,* 204 U.S. 415, 51 L. ed. 547; *Advertising Special. Nat. Ass'n. v. Federal Trade Com'n.*, 238 F. 2d 108; 39 Am. Jur. 919; 67 C.J.S. 947.

Not only were the class representatives parties but North Carolina Hospital Association, South Carolina Hospital Association, North Carolina Association of Child-Caring Institutions, the Annual Conference of the North Carolina Methodist Episcopal Church, and Western North Carolina Annual Conference of the Methodist Church, Southeastern Jurisdiction were parties. Practically all of the institutional potential beneficiaries are, according to the court's findings, active participating members of these associations or organizations. The court's order made express provision for any potential beneficiaries desiring to do so, to make themselves parties to the proceeding. It is appropriate also, we think, in considering the demurrer to take note of the cautionary steps taken by the court to see that all possible beneficiaries had notice of the pendency of the action. Letters were mailed to all known potential beneficiaries of each class and notice of the institution and purpose of the action was given by publication.

The court having jurisdiction of the trust assets, the trustees, and representatives of all classes of beneficiaries, had authority to hear and decide the questions raised by the pleadings. *Ferguson v. Price,* 206 N.C. 37, 173 S.E. 1.

No one has questioned the authority of the court to grant the relief sought without making Duke Power Co. a party. We merely note its absence, finding it unnecessary because of our conclusions on the merits to decide whether it is a necessary party.

Touching the merits of the controversy the court made findings which we summarize in part and quote in part: The approximate value of the securities placed in the trust in 1924 was $40,000,000; the 122,674 shares of Duke Power Co. then given the trust had an appraised value of $29,135,280; by 30 November 1962 these shares had increased to 1,899,411 shares with a market value of $110,165,838; the trust had a net income in 1925, the first year of its operation, of $386,714.16; by 1952 its net income had increased to $5,601,951.99, and for 1961 the net income was $12,592,062.97; Mr. Duke died in 1925; he bequeathed additional funds to the trust for use by Duke University; other members of the Duke family have made gifts to the trust approximating $725,000; no restrictions are imposed on the trustees with respect to the investment of gifts to the trust other than

those made by Mr. Duke himself; as of 30 November 1962 assets of the trust restricted as to reinvestment consisted of stocks worth at market and bonds at par $471,764,417. The following is a list of the stocks and bonds then held:

Shares	Issuer	Value
6,517,550	Duke Power Co. common	$378,017,900
2,348	Duke Power Co. preferred	378,028
791,040	Aluminium Ltd.	17,402,880
59,300	Aluminum Co. of Am. preferred	5,040,500
639,644	Aluminum Co. of Am. common	35,180,420
19,031	Piedmont & Northern Ry. common	2,264,689
30,000	U. S. Tobacco Co. common	810,000
	Duke Power Co. bonds	15,300,000
	U. S. bonds and notes	17,370,000

At the end of 1961 there had been added to the corpus of the trust as required by division five $15,500,000, of which approximately $1,000,000 was added in 1961. Stocks of Aluminum Co. and Aluminium Ltd. represent approximately 95% of the stock held other than stocks of Duke Power Co. The 122,647 shares of Duke Power Co. given when the trust was created represented 42 % of the voting stock of that company. The trustees now have approximately 57% of the voting stock of that company. Duke Power Co. is constructing a hydro-electric plant on Catawba River to have an initial capacity of 262,500 kw and an ultimate capacity of 350,000 kw. This will cost between $60,000,000 and $70,000,000 and will create a lake covering approximately 33,000 acres. Serious inflation has affected the economy of the United States since 1924. Consumer prices were about 70% higher in 1961 than in 1924. "(I)n recent years, the average cost per student in institutions of higher education have increased by between 7% and 8% per year, on the average, and the corresponding increase figure in respect of hospital costs per patient day has been close to 9%." The purchasing power of the dollar in 1961 was only 57% of its value in 1924. Since 1924 there has been a change in the acceptability of common stocks as an investment medium. They are now looked upon as desirable investments. "(A)ll indications are that the effects of inflation will continue for the foreseeable future and at a projected rate of between one and one and one-half per cent per year." Needs of the colleges and other beneficiaries of the trust will increase not only because of depreciation in the value of the dollar but because of expected expanded population and for that reason the number of individuals hoping to benefit by the allocation of trust funds. The

Federal debt in 1924 approximated $20 billion. Today it approximates $300 billion.

"That, in the opinion of the investment experts who testified in this proceeding, a greater degree of diversification is necessary, under general trust investment principles, than exists (a) in the holdings of the Endowment in stocks of corporations other than Duke Power Company, insofar as the percentage thereof represented by the holdings of two aluminum corporations is concerned, and (b) in the holdings of the Endowment insofar as the percentage of such holdings represented by the stock of Duke Power Company is concerned.

"That the investment experts who testified in this proceeding are of the opinion that proper safeguarding of the corpus of the Endowment requires a greater degree of diversification in the respects mentioned in the immediately preceding finding.

"That the experts in problems facing foundation trustees and trust investment matters who testified in this proceeding are of the opinion that the restrictive investment provisions set forth in the Indenture constitute a threat to the safety of the Endowment corpus.

"That the experts in problems facing foundations trustees and trusts investment matters who testified in this proceeding are of the opinion that the Endowment Trustees should have greater flexibility in investment provisions and that the need for such flexibility, as of the present time, has greatly increased from the corresponding situation in 1924 due to factors which are present in the political and economic situation which exists today as compared with 1924 and that such need is greater today than in 1924 by reason of the greatly increased size of the fund today as compared with 1924."

The court concluded: "That the circumstances in this case constitute a case of emergency arising through exigencies not contemplated by James B. Duke, the creator of the trust. . . .That a change in conditions has occurred since the creation of the Endowment and a change in conditions may be reasonably foreseen, as a result of which the objects of the trust under the Indenture may be defeated in whole or in part by the investment, or continuation of investment, of all the funds of such trust in the kinds of investments to which the plaintiffs, as Trustees, are now limited by the Indenture and the objects of such trust and the interests of all the beneficiaries thereof, whether vested or contingent, will be promoted by changing the Indenture. . ."

On the findings and conclusions the court ordered the trust be modified with authority in the trustees to invest in "common and preferred stocks, bonds and debentures of private corporations, and other property, real or personal, as said Trustees shall, in their dis-

cretion, deem advisable, without being restricted to such investments or reinvestments as are permissible for Executors or Trustees under any present or future applicable law, rule of court or court decision."

Appellants, by motion to nonsuit and by exceptions to the court's findings and conclusions, raise these questions: (1) May a court of equity authorize a trustee to ignore the provisions of the trust instrument limiting his authority with respect to the kind of securities in which he may invest? (2) If so, does the evidence offered in this case justify the exercise of that power?

Our decisions answer the first question in the affirmative. "But the power of the court should not be used to direct the trustee to depart from the express terms of the trust, except in cases of emergency or to preserve the trust estate." *Penick v. Bank,* 218 N.C. 686, 12 S.E. 2d 253. "It must be made to appear that some exigency, contingency, or emergency has arisen which makes the action of the court indispensable to the preservation of the trust and the protection of infants." *Redwine v. Clodfelter,* 226 N.C. 366, 38 S.E. 2d 203. "To invoke the jurisdiction of a court of equity the condition or emergency asserted must be one not contemplated by the testator, and which, had it been anticipated, would undoubtedly have been provided for; and in affording relief against such exigency or emergency, the court must, as far as possible, place itself in the position of the testator and do with the trust estate what the testator would have done had he anticipated the emergency. *Cutter v. Trust Co.,* 213 N.C. 686, 197 S.E. 542. It is not the province of the courts to substitute their judgment or the wishes of the beneficiaries for the judgment and wishes of the testator." *Carter v. Kempton,* 233 N.C. 1, 62 S.E. 2d 713.

Decisions of this court accord with the law of New Jersey as declared by its courts. Buchanan, V.C., said in *New Jersey National Bank & Trust Co. v. Lincoln Mortgage & Title Guaranty Co.,* 105 N.J. Eq. 557, 148 A. 713: "It is of course quite true that *ordinarily* the trustee is bound, in the administration of the trust, by the terms of the trust, and that even his (sic) court has no right to authorize the trustee to depart therefrom; but it is also true that a court of equity, in its capacity as universal trustee, may in cases of emergency, for the preservation of the trust estate and protection of the *cestuis,* authorize and direct the trustees to do acts which under the terms of the trust and under ordinary circumstances they would have no power to do. This power resides in the court of chancery as a part of its original inherent jurisdiction—its general administrative jurisdiction in cases of trusts." After citing cases in support of the foregoing statement, he adds: "It is of course recognized that the jurisdiction is one which

should not be exercised except in an emergency and then only for the preservation of the trust estate and the protection of the cestuis." *First Nat. Bk. of Jersey City v. Stevens,* 9 N.J. Super. 324; *Fidelity Ins. Co. v. United Co.,* 36 N.J. Eq. 405; *Pennington v. Metropolitan Museum of Art,* 65 N.J. Eq. 11, 55 A 468; *Price v. Long,* 87 N.J. Eq. 578, 101 A 195; *Trust Co. of N. J. v. Glunz,* 181 A 27; *Lambertville Nat. Bk. v. Bumster,* 141 N.J. Eq. 396, 57 A 2d 525.

In 1898 the legislature of New Jersey enacted a statute permitting fiduciaries to invest in bonds of the United States, bonds of the state of New Jersey or political subdivisions thereof, or bonds secured by first mortgage on real estate. These are referred to in New Jersey as "legal investments."

In 1937 the New Jersey legislature enacted a statute authorizing a trustee or a beneficiary of a trust, when an emergency arose, to apply to the chancery court for authority to invest in securities other than those designated by the statutes as "legal investments" or defined by the terms of the trust. The statute was incorporated as 3:16-17 and 3:16-18 in the Revised Statutes of New Jersey 1937—reenacted in substance in the Revised Statutes of 1951 as subsections a and b of 3A:15-15. Subsection b. of that statute now reads: "If the court shall find that by reason of a change in conditions which occurs since the creation of such trust or which may be reasonably foreseen, the objects of the trust might be defeated in whole or in part by the investment, or continuance of the investment, of all the funds of such trust in the kinds of investments to which the trustee is then limited by the statutes of this state or by the instrument or court order creating such trust and that the objects of the trust and the interests of all the beneficiaries thereof, whether vested or contingent, would be promoted by the investment of all, or some part, of the trust funds otherwise, the court shall by its order or judgment. . .authorize or direct the trustee of such trusts to invest the whole, or such part thereof as it shall designate, in any class of investments, including common or preferred stocks of corporations of this state or of any other state or country, which in its judgment will promote the objects of the trust and the interests of all the beneficiaries thereof."

For the purpose of showing the application and proper interpretation of 1937 R.S. 3:16-17 and 18, plaintiffs put in evidence exemplified copies of the complaints and final decrees in four cases, *Askew v. Fidelity Union Trust Co., Blair Academy v. Trustees of Presbytery, Morris Community Chest v. Wilentz,* and *Smith v. Hardin.* Beneficiaries of the trusts in each of those cases applied to the chancellor for an order authorizing the trustee to invest in "nonlegal invest-

ments." The final decree in each case authorized the trustee to invest in designated stocks. The decrees were based on findings that unforeseen changes endangering the trusts had taken place since the trusts were created. The *Askew, Blair Academy,* and *Smith* cases have not been published. *Morris Community Chest v. Wilentz* is reported 124 N.J. Eq. 580, 3 A 2d 808.

In addition to the decrees put in evidence, our attention is called to *Bliss v. Bliss,* 126 N.J. Eq. 308, 8 A 2d 705, affirmed 127 N.J. Eq. 20, 11 A 2d 13, and *Reiner v. Fidelity Union Trust Co.,* 126 N.J. Eq. 78, 8 A 2d 175, reversed 127 N.J. Eq. 377, 13 A 2d 291, 128 A.L.R. 964.

The *Bliss* and *Reiner* cases were the only two to reach the Court of Errors and Appeals, then New Jersey's court of final authority. Needless to say, the law as declared by that court is the law which must be applied here.

The vice chancellor said in *Morris Community Chest v. Wilentz, supra:* "The Legislature by enactment of the cited statute, to my mind, made it clear that it recognized that the court had jurisdiction to act, and that presently conditions were such, in the opinion of the Legislature, that the court, in proper cases, should act, and it therefore expressly authorized the court in certain instances to act and provided the method of procedure. Among the classes of investments which the Legislature thought might be authorized, were common and preferred stocks, and it recognized by the provisions of the act that conditions presently existed which might make it necessary to invest in common stocks in order to maintain the integrity of a trust fund, and while the inherent power of the court was unlimited, it intended by the statute to limit the power of the court in this respect, and therefore inserted the provision in R.S. 3:16-18 'provided, that the court shall not authorize or direct the purchase of any class of common or preferred stock of any corporation unless such corporation shall have been organized and engaged in the conduct of its business for five calendar years immediately preceding the purchase of the stock of such corporation.' "

In *Reiner v. Fidelity Union Trust Co.,* 126 N.J. Eq. 78, 8 A 2d 175, the trustee challenged the constitutionality of the 1937 statute when applied to trusts created prior to the enactment of the statute. The vice chancellor held the statute constitutional. He cited the *Morris Community Chest* case, *supra,* in support of his conclusion that the statute did not purport to change substantive rights—merely matters of administration over which courts of equity had jurisdiction without necessity for a statute. The vice chancellor reached the conclusion that the evidence established such change of conditions

jeopardizing the trust as warranted the exercise of the power declared by the statute. The trustee appealed. The Court of Errors and Appeals, 13 A 2d 291, approved the vice chancellor's conclusions as to his authority and the validity of the statute, but reversed the decree authorizing the trustee to deviate from the provisions of the trust relating to investments.

Donges, J., speaking for a unanimous court, said: "Here the donor provided that the funds should be invested in legals. The income was to be distributed and, in certain eventualities, the principal was to be distributed, but it does not appear that the purposes of the trust will be defeated because there has been some shrinkage in income. It appears that the sole purpose to be accomplished is to increase income by investing in stocks that will produce more but will not be legals.

"In view of the determination of this court in the case of *Bliss v. Bliss,* 126 N.J. Eq. 308, 8 A 2d 705, affirmed 127 N.J. Eq. 20, 11 A 2d 13, in which there was an affirmance of the decree advised by V. C. Kays dismissing the bill of complaint where there was an effort to increase the income for the benefit of the cestuis que trust, this decree must be reversed. In this case the whole situation was put upon the basis of economics, not the necessity of the beneficiaries. . .In the *Bliss* case there was testimony of a substantial shrinkage of both the value of the corpus and of the income, with resultant inconvience to the cestuis que trust and to the remaindermen on final distribution. But in that case, as in this case, there was no evidence that the purposes of the trust were likely to be defeated. Therefore, the warranty given by the statute for intervention by the Court of Chancery is lacking, and failing this the decree must be reversed."

The vice chancellor filed his decree in the *Bliss* case referred to by the Court of Errors and Appeals on 23 August 1939, 8 A 2d 705. There the testator had authorized his trustee to continue to hold securities received from his estate or to reinvest as permitted by the laws of New York in a restricted group of railway bonds. The beneficiaries contended the authority of the trustee should be amplified so as to permit investment in specifically designated common and preferred stock because such deviation and diversification would result in greater security of principal and would constitute a hedge against inflation. The vice chancellor, notwithstanding a substantial depreciation in the value of the securities held by the trust, declined to authorize the proposed investments. His conclusion was approved by the Court of Errors and Appeals in a per curiam opinion. 11 A 2d 13.

Here the trustees for practical purposes seek to set aside in toto the restrictions in the trust instrument with respect to investments.

They correctly say the additional authority given them by the court's decree does not in fact modify the provisions of the trust with respect to investments in Duke Power Co. Literally that is true. They already have full authority to sell any part or all of the stock they hold in Duke Power Co. But if they sell it, they must invest the proceeds in governmental obligations. That they do not wish to do.

The testimony on which they rely for the authority sought comes from experts in the field of investments. Their opinion that the requested authority should be granted is based on two propositions: First, there is an undue concentration of stock ownership in industries and companies.

Mr. Dickey testified: "I would say that the exercise of prudence, all other things being equal, would dictate definitely that the funds would be safer with a greater degree of diversification. . .I am clearly of the opinion that there is such a high degree of concentration of the over-all holdings of the Endowment in Duke Power that it would definitely not be desirable to increase these." Mr. McCloy said: "I have formed an opinion as to the desirability or undesirability of foundation trustees being subject to restrictive provisions, particularly in respect of investments. In the fast changing world, it is my opinion that the trustees of charitable foundations should be prepared to adjust and have the power to adjust to a variety of possible changes and circumstances which affect the trust. . .Ideally, foundation trustees should have all the latitude necessary to carry out the basic circumstances and the basic purposes of their trust in the face of changes." Mr. Heartt, chairman of the Endowment, chairman of its investment committee, director of Duke Power Co., and chairman of its finance committee, testified: "As to what the Trustees proposed to do if the relief requested in this petition should be granted, we have no plans at all. Our great desire is to be free of the restrictions, to be brought up to date, so to speak, in the investment area so that we will be prepared to exercise judgment and take proper steps when occasions seem to call for it. . . .Duke Power, in growing from a very small water power company to one of the ten largest and one of the most prosperous utilities companies in the country, has counterbalanced any other erosion we might have had. But Duke Power Co. has reached maturity, and I don't think it is possible to hope for a similar experience with it that we have had in the last 20 or 30 years."

The Supreme Court of New Jersey has generously made available to us the record in the case of *Reiner v. Fidelity Trust Co., supra.* We have studied the record, including the evidence on which the vice chancellor based his opinion. Complainants there did not allege a

hazard because of concentration in the securities of two or three companies. They asserted the hazard would arise by investing in fixed dollar obligations when reasonable expectations were that the purchasing power of the dollar would continually diminish. We think it clear from the decision in that case and subsequent interpretations thereof that the New Jersey law requires those seeking permission from a court of equity to ignore the express mandate of the author of the instrument under which they act to do more than show change of economic conditions. *Lambertville Nat. Bank v. Bumster, supra; First National Bank of Jersey City v. Stevens,* 9 N.J. Super. 324, 74 A 2d 368.

The law of New Jersey, as we interpret controlling decisions of the courts of that state, accords with the law announced and applied by courts of other states. *Stanon v. Wells Fargo Bank & Union Trust Co.,* 310 P 2d 1010 (Cal.); *In re Ryan's Estate,* 169 N.Y.S. 2d 804; *Hanover Bank v. Lamm,* 142 A 2d 528 (Conn.); *In re McDonough Trust,* 109 N.W. 2d 29 (Iowa).

In effect, the testimony on which plaintiffs relied served only to remind the court of the adage that a prudent person does not carry all his eggs in one basket. Can it be said that Mr. Duke's failure to heed this admonition warrants the court in making a contract which he was not willing to make? History records that Mr. Duke was a successful businessman. His genius brought into existence the American Tobacco Co., a financial giant ordered dissolved under the antitrust laws. *United States of America v. American Tobacco Co.,* 221 U.S. 106, 55 L. ed. 663. Mr. Cocke, one of the plaintiffs and one of the original trustees, testified that he participated in the preparation of the trust indenture. "It was under consideration and preparation for quite a considerable time, with long and careful consultation with Mr. Duke and direction by him."

John Wilber Jenkins, author of *James B. Duke: Master Builder,* published in 1927, opens his biography with this sentence: " 'America has many merchant princes and captains of industry, but only three industrial kings: John D. Rockefeller in Oil, Andrew Carnegie in Steel, and James B. Duke in Tobacco,' a financial writer recorded in *Leslie's Weekly* more than twenty years ago. That was the judgment of others, in and out of Wall Street." Mr. Jenkins quotes Mr. Duke as saying: "This is a harder job (preparation of the trust indenture) than I thought it would be. I'm beginning to think it is almost as difficult for a man to give away his money rightly as it is to make it." In view of the testimony and history of which we take judicial notice, can it be said that Mr. Duke was not aware of the hazard

inherent in the investment of all, or a major portion of, the trust assets in a single company or even in a single kind of business? The answer must, we think, be no. It must not be forgotten that Mr. Duke had as much right to name the securities in which the funds should be invested as he had to name the beneficiaries.

It may be that Duke Power Co. was a mere adolescent when Mr. Duke was preparing the trust instrument and that it has now reached maturity, but there is nothing in the record tending to indicate that it is approaching decadence. To the contrary, the evidence shows it is now engaged in expending some $60,000,000 to $70,000,000 for a hydroelectric plant which will have, when completed, a capacity of 350,000 kw. The capacity of all plants generating electricity in North Carolina at the end of 1924 was 303,389 kw. (P. 85,, Electric Power Statistics 1920-1940, issued by Federal Power Commission) Another public utility operating in this state recently dedicated a hydroelectric plant on the Roanoke River costing approximately $45,000,000.

Mr. Duke recommended Duke Power Co. and its subsidiaries to the trustees "as the prime investment for the funds of this trust" and requested the trustees "to see to it that at all times these companies be managed and operated by the men best qualified for such a service." Seven of the sixteen directors of Duke Power Co. are trustees of the Duke Endowment. How well the trustees have complied with Mr. Duke's request is best illustrated by comparing the value assigned to and the income derived from the Duke Power Co. stock when placed in the Endowment with the value and income derived from the same stock now. The result demonstrates Mr. Duke's wisdom both as to a source for income and the human agencies selected for its efficient operation.

The second reason assigned to justify the order is that governmental obligations are payable in dollars, the purchasing power of which may reasonably be expected to depreciate. Hence, long-term governmentals are not suitable. Short-term governmentals bear such a low rate of interest that they are not suitable.

We have given careful consideration to the evidence and the arguments made in support of the request that the trustees now be given carte blanche authority with respect to the investment of Endowment funds. Past adherence to the provisions of the trust agreement has, as Mr. Duke wished, promoted the economic as well as the social welfare of this and our sister state. The evidence fails to establish facts necessary for an order authorizing the trustees to disregard the express provisions of the trust indenture. The court should have allowed the

motion for nonsuit.
Reversed.

HIGGINS, J., concurring:

By the indenture now before us, Mr. Duke manifested a clear intent that the beneficiaries of the Endowment and the business enterprises which he helped to create should complement and support each other. By the third division of the indenture the trustees were required to lend surplus funds to the Duke Power Company or to invest them in its securities, or in those of its subsidiaries. The amount of the surplus emphasizes the importance of this right.

Manifestly the court cannot take away from Duke Power Company, or from its subsidiaries, this preference without their presence before the court. Their presence must be in their corporate capacities. The court should have required that these corporations be made parties to the proceeding and be given an opportunity to be heard before impairing their rights under the indenture.

The majority opinion, in which I fully concur, reverses the judgment of the Superior Court, hence the indenture remains as executed. My only purpose is to call attention to what I consider a defect of parties.

WACHOVIA BANK & TRUST COMPANY, EXECUTOR OF HATTIE L. PEPPER v. NANNIE E. DODSON, EXECUTRIX OF LIZZIE PEPPER (MRS. J. C.) DODSON, WACHOVIA BANK & TRUST COMPANY, EXECUTOR OF J. C. DODSON, NANNIE E. DODSON, AGNES V. DODSON, JAMES R. DODSON, JOHN C. DODSON, DELLA DODSON (MRS. CLYDE O.) CROWELL, WACHOVIA BANK & TRUST COMPANY, ADMINISTRATOR C.T.A. OF MARJORIE DODSON HAMNER, ELIZABETH HAMNER (MRS. W. DEANE) TAYLOR, NANNIE E. DODSON AND AGNES V. DODSON, EXECUTRIXES OF NELLIE DODSON BOYD, L. L. LEVINSON, ADMINISTRATOR OF MRS. N. A. MARTIN, LOUISE PEPPER McCLUNG, EXECUTRIX OF T. R. PEPPER, LOUISE PEPPER McCLUNG, FRANCIS D. PEPPER, HIERO L. TAYLOR, BETTY T. WEBB, MALLIE D. PEPPER, EXECUTRIX OF THOMAS OTTO PEPPER, LELIA JOYCE PEPPER (MRS. W. W.) MALONEY, THOMAS I. PEPPER, PHILIP E. LUCAS, ANCILLARY ADMINISTRATOR OF JOHN BOLT PEPPER AND ALTON DONNIE DOUGLAS, ANCILLARY EXECUTOR OF ANNA PEPPER (MRS. A. P.) DOUGLAS.

(Filed 19 July 1963.)

1. Wills § 27—

A will speaks as of the death of testator.

2. Wills § 28—

A codicil is a supplement to a will and is to be construed with the will as constituting but a single instrument.

3. Wills § 27—

A will and codicil thereto must be construed together to ascertain the intent of the testator as expressed in the language of the instrument interpreted, in case of ambiguity, in the light of the conditions existing at the time the will was made and at the time the codicil was made.

4. Wills § 57—

A specific legacy is a bequest of a particular chattel, or money in a particular place, or a particular corporate stock or particular bond or other obligation for the payment of money, so that the thing bequeathed is, by the terms of the will, distinguishable from all others of the same kind; a demonstrative legacy is a bequest of fungible goods payable out of or charged upon a particular fund, and not so described as to be distinguishable from others of the same kind.

5. Same—

From a consideration of the will and the codicil thereto, construed together as a whole, it *is held* that the bequests to designated legatees of a specified number of shares of stock in a tobacco company were specific and not demonstrative bequests and the specific legatees are entitled to all stock dividends and stock splits accruing after the death of testatrix.

6. Wills § 34—

A bequest of the income from stock for life to designated beneficiaries with provision that upon the death or marriage of both of the said life beneficiaries the stock, in a designated number of shares, should go to named beneficiaries, transfers to the ultimate beneficiaries a present fixed right of future enjoyment.

7. Wills § 42—

A bequest of a specified number of shares of stock to each of the children of testatrix' sister is subject to be opened up to make room for any children thereafter born to testatrix' sister.

8. Wills §§ 38, 57— *Bequest of whole of income not exceeding specified amount held not to vest income in excess of specified amount in legatee.*

Testatrix bequeathed all of the income from the remainder of the estate to two designated beneficiaries with provision that, upon the death or marriage of either, the survivor should be entitled to the whole of the income not exceeding a stipulated amount per year. Stock constituting a part of the remainder of the estate was thereafter bequeathed by specific bequest to named beneficiaries. *Held:* The entire income was given the designated beneficiaries during the term of their joint lives or nonmarriage and the specific legatees were entitled to no part thereof, but upon the death of one of the life beneficiaries the income in excess of

$1200 per year did not vest in the other and the estate of the survivor is not entitled thereto, but the specific beneficiaries are entitled to that part of the excess over $1200 per year that was derived from the stock specifically bequeathed to them.

9. Wills § 70—

In an action to construe a will it will be presumed, unless it appears to the contrary from the record, that the order of the court that all costs of the action including reasonable counsel fees and costs of administration be paid from the accumulated income of the estate, if sufficient, was entered in the exercise of the court's discretion, and the order will not be disturbed in the absence of a showing of abuse.

APPEAL by Alton Donnie Douglas, Ancillary Executor of the estate of Anna Pepper (Mrs. A. P.) Douglas, deceased, from *Martin, S.J.,* 16 April 1962 Civil Term of FORSYTH.

Proceeding under Declaratory Judgment Act, G.S. 1-253 *et seq.*, for construction of the will and codicil thereto of Hattie L. Pepper, deceased.

Hattie L. Pepper, a spinister and registered nurse, residing in Forsyth County, died testate 12 August 1928, leaving a will dated 7 April 1927, and a codicil thereto dated 12 June 1928, both of which were duly admitted to probate.

She had two brothers, T. R. and J. G. Pepper, and four sisters, Lizzie Pepper (Mrs. J. C. Dodson), Nannie Pepper, Anna Pepper (Mrs. A. P. Douglas), and Mrs. N. A. Martin.

This is a summary of her will, except when quoted verbatim:

Item First provides for the payment of her funeral expenses and debts.

Item Second. In this item she devises her one-eighth interest in a farm in Stokes County to her two sisters, Mrs. J. C. Dodson and Nannie Pepper, share and share alike, with the exception that she reserves the minerals on this farm, and devises them to her three sisters, Mrs. J. C. Dodson, Nannie Pepper and Mrs. A. P. Douglas, share and share alike.

> "THIRD: I give and bequeath to my sisters, Mrs. A. P. Douglas and Miss Nannie Pepper during their life time or until marriage, all the income derived from the remainder of my estate, of whatsoever nature and wheresoever situate, and I direct my Executor hereinafter named to divide this fund equally between them quarterly. Upon the death or marriage of either, the survivor shall be entitled to the whole of said income, but not exceeding $1,200.00 per year.

"FOURTH: Upon the death or marriage of both of my said sisters, Mrs. A. P. Douglas and Miss Nannie Pepper, I give and bequeath to my sister, Mrs. J. C. Dodson, seventy-five shares of my Common B Stock of the R. J. Reynolds Tobacco Company and I give and bequeath to the children of Mrs. J. C. Dodson (there being seven living at this time), seven shares each of my Common B stock of The R. J. Reynolds Tobacco Company.

"FIFTH: All of the rest and residue of my estate, not hereinbefore devised and bequeathed, of whatsoever nature and wheresoever situate, I give, devise and bequeath to my Brothers and Sisters, Mrs. N. A. Martin, Mrs. J. C. Dodson, T. R. Pepper, Miss Nannie Pepper, J. G. Pepper and Mrs. A. P. Douglas, in equal amounts, share and share alike; provided, however, if anyone or more of my said Brothers and Sisters should have predeceased me leaving issue, such issue shall receive the share which its, or their, parent would have received if living; and this provision applies equally in case any of the Dodson children, above mentioned, should predecease me."

Item Sixth appoints Wachovia Bank and Trust Company as executor of her will.

This is her codicil to her will:

"FIRST: I hereby alter section 'Fourth' of said will by adding in said section my brother-in-law, J. C. Dodson, to whom I give and bequeath twenty-five shares of my Common B Stock of the R. J. Reynolds Tobacco Company. This out of love and affection for him, and in appreciation of his kindness to me.

"SECOND: I hereby alter section 'Fifth' of said will as follows: Two-thirds of all the rest and residue of my said estate I give, devise, and bequeath to my sister, Mrs. J. C. Dodson. The remaining one-third I give, devise and bequeath to my brothers and sisters, Mrs. N. A. Martin, T. R. Pepper, Miss Nannie Pepper, J. G. Pepper and Mrs. A. P. Douglas, in equal shares as set forth in Section 'Fifth' of said will.

"THIRD: I hereby alter section 'Sixth' of my said will as follows: I declare it to be my earnest desire that my Executor shall not dispose of any of my estate, consisting principally of R. J. Reynolds Tobacco Company's stock and other securities, during the lifetime of my sisters, Nannie L. Pepper and Mrs. A. P. Douglas, unless the dividends of said stocks or securities should become impaired so that they cease to be a sound invest-

ment. In which event I hereby empower my said Executor to sell said stocks or securities, and reinvest the proceeds in other stocks or bonds as they may determine to be for the best interest of my estate.

"FOURTH: I have pledged as collateral security to the account of Nannie Pepper forty shares of my Common B stock of the R. J. Reynolds Tobacco Company, and Six Thousand Dollars ($6000) in cash, which shall remain as collateral to said account for a period of six (6) months from this date, or unless said account shall be terminated sooner. This stock and money is being attended to by my agent, J. C. Dodson, and I direct that it shall so remain in his sole charge until said account is closed. When said account is closed up, the said forty (40) shares of stock and Six Thousand Dollars ($6000) shall be returned to my estate, and the profits from said transaction, if any, shall be paid by my said agent to the said Nannie L. Pepper.

"FIFTH: Subject to these changes I hereby expressly reinstate my last Will and Testament made on the 7th day of April 1927."

The Wachovia Bank and Trust Company, executor of Hattie L. Pepper, hereafter called Wachovia, from the date it qualified as her executor to the date of the death of Nannie Pepper, unmarried, on 30 January 1945, in accord with the provisions of her will, paid all net income derived from her estate to Nannie Pepper and Mrs. A. P. Douglas in equal shares; that from the death of Nannie Pepper until the death of Mrs. A. P. Douglas on 20 March 1961, in accord with the terms of her will, it paid from the net income of her estate the sum of $1,200.00 a year to Mrs. A. P. Douglas.

Hattie L. Pepper, at the time of her death, owned 575 shares of Common B stock of R. J. Reynolds Tobacco Company; the executor in December 1928 sold 220 shares of this stock leaving 355 shares in her estate. In March 1929, this stock was split at 2½ for each share and the estate then held 887½ shares; the executor bought ½ share making a total of 888 shares. In 1930 it sold 30 shares leaving a total of 858 shares of this stock. In 1959 this stock ceased to be known as Common B stock and became common stock. In 1959 this common stock was split two shares for one, making a total of 1716 shares held by the estate of Hattie L. Pepper at the time of the death of Mrs. A. P. Douglas. This stock was again recently split at two shares for one, making a total of 3432 shares of stock of R. J. Reynolds Tobacco Company held by her estate. Hattie L. Pepper at the time of her

death owned 100 shares of common stock of the Baltimore and Ohio Railway Company, which the executor sold and invested the proceeds therefrom in common stock of the Union Carbide Corporation and of the General Electric Company. At the time of Mrs. A. P. Douglas's death, the estate held 45 shares of common stock of Union Carbide Corporation and 90 shares of common stock of General Electric Company. At the time of the death of Mrs. A. P. Douglas, the estate of Hattie L. Pepper held invested income in the amount of $24,381.23, and cash in the amount of $829.34.

In this proceeding Wachovia prays that the court construe the will and codicil thereto of Hattie L. Pepper, and determine the following questions arising in the administration of her estate:

> "1. Under the terms of Paragraph Third of the Will did all of the income from the residuary estate, or only the maximum sum of $1,200 per year, vest in the survivor of Mrs. A. P. Douglas and Miss Nannie Pepper upon the death of the other?
>
> "2. Under the terms of Paragraph Fourth of the Will and Paragraph First of the Codicil did the named legatees upon the death of the testatrix become vested of said stock, i.e., Mrs. J. C. Dodson — 75 shares of common stock of R. J. Reynolds Tobacco Company, J. C. Dodson — 25 shares of Common stock of R. J. Reynolds Tobacco Company, the children of Mrs. J. C. Dodson — 7 shares each of common stock of R. J. Reynolds Tobacco Company, with enjoyment of said stock postponed until the death of the last to die of Mrs. A. P. Douglas and Miss Nannie Pepper?
>
> or
>
> "Under the terms of Paragraph Fourth of the Will and Paragraph First of the Codicil did the named legatees upon the death of the last to die of Mrs. A. P. Douglas and Miss Nannie Pepper become vested of said stock, i.e., Mrs. J. C. Dodson — 75 shares of common stock of R. J. Reynolds Tobacco Company; J. C. Dodson — 25 shares of common stock of R. J. Reynolds Tobacco Company; the children of Mrs. J. C. Dodson — 7 shares each of common stock of R. J. Reynolds Tobacco Company?
>
> "3. If the answer to the first alternative of question 2 above is YES then do the specific bequests of paragraph Fourth of said Will and paragraph First of said Codicil carry with them as accretions all of the said shares resulting from stock splits since the testatrix' death,
>
> and
>
> "Do the specific bequests of paragraph Fourth of said Will and paragraph First of said Codicil carry with them all or any part

of the accretions in the form of cash dividends after the date of death of the testatrix, since the testatrix expressly provided in Item Third of the Will that all income from the remainder of the estate (including all such stock) should go to the sisters, Mrs. A. P. Douglas and Miss Nannie Pepper expressly subject, however, to the direction that the survivor of them should not be entitled to more than $1,200 per year?"

A separate answer was filed to Wachovia's complaint by the following: L. L. Levinson, Administrator of Mrs. N. A. Martin, deceased; Nannie E. Dodson, executrix of Lizzie Pepper (Mrs. J. C.) Dodson, deceased, and Nannie E. Dodson; Philip E. Lucas, ancillary administrator of John Bolt Pepper, deceased; Louise Pepper McClung, executrix of T. R. Pepper, Louise Pepper McClung, Francis D. Pepper, Mallie D. Pepper, executrix of Thomas Otto Pepper, Hiero L. Taylor, and Betty T. Webb; Thomas I. Pepper; Alton Donnie Douglas, ancillary executor of Anna Pepper (Mrs. A. P.) Douglas.

The parties stipulated as follows: All persons having an interest in the subject matter of this proceeding are parties defendant, individually or by their proper legal representative; all defendants are *sui juris* and have been duly served with process; almost all of the defendants have filed answer and were represented by counsel at the hearing; and time for the filing of answers has expired. All answering defendants have agreed that the facts alleged in paragraph 1 through paragraph 18, both inclusive, of the complaint are true. All parties have waived trial by jury, and have agreed that the court should hear the entire matter and render judgment without the intervention of a jury.

At the hearing below Alton Donnie Douglas, ancillary executor of Anna Pepper (Mrs. A. P.) Douglas, offered evidence to the following effect:

Mrs. A. P. Douglas, after a divorce from her husband in 1920, returned with her two sons, one 16 and the other 18½ years of age, from West Virginia to Winston-Salem. At that time Hattie L. Pepper was living with her sister, Mrs. J. C. Dodson, on Summit Street. One of her sisters arranged an apartment for her and her sons on West End Boulevard, a long city block away. Mrs. A. P. Douglas, after her divorce, worked as a clerk in a store in Winston-Salem. After about a year and a half they moved back to West Virginia. Later Mrs. A. P. Douglas moved to a farm at Bethania, North Carolina, that Mrs. J. C. Dodson bought for Nannie Pepper. For a few years Mrs. A. P. Douglas addressed envelopes for a corporation. Her oldest son worked his way through school. Mrs. A. P. Douglas, after her divorce, received a little help from Mrs. J. C. Dodson and Hattie L. Pepper, principally

Hattie L. Pepper, but it was not much. Her divorced husband gave her no support, and only a few dollars pocket money to his youngest son. She never remarried.

At the time of Hattie L. Pepper's death, she owed $38,034, of which $33,000 was owed to her broker Fenner & Beane, by whom she had been buying on margin. The sole income of the estate has been dividends from the stock set forth above. Wachovia has never segregated the Reynolds Tobacco Company stock into specific lots; it "has been carried as a sum total," "all in one pot." From 1928 through 1938 Wachovia, according to the provisions of Item Third of the Will, paid to Nannie Pepper and Mrs. A. P. Douglas each $1,200 or $1,300 annually. Beginning in 1939 the payments dropped to $800, $900, $700, and got down to $639.

The parties stipulated "the stock certificates were not in the name of Hattie L. Pepper, personally, but were in the name of her stockbroker." The record also shows that after Hattie L. Pepper's death, 170 shares of Reynolds Tobacco Company stock were in her safety deposit box.

The other parties offered no evidence.

Upon separate petitions by counsel for the parties, the court entered separate orders allowing counsel fees in the amount of $17,120, of which $11,000 was allowed to McKeithen & Graves, attorneys for Wachovia. No exception was filed by any of the parties to these orders.

The court after making findings of fact based upon the stipulations set forth above, and after considering the pleadings, the evidence both oral and documentary, and the briefs and arguments of counsel, adjudged and decreed as follows:

> "1. That under the terms of Paragraph Third of the Will, Mrs. A. P. Douglas and Miss Nannie Pepper, upon the death of the testatrix, became vested of the income from the remainder of the estate while both of them were living and unmarried, but only the maximum sum of $1,200 per year vested in the survivor of them upon the death of the other.
>
> "2. The bequests of Paragraph Fourth of the Will and Paragraph First of the Codicil are specific bequests, and carry with them as accretions all of the stock resulting from stock splits since the testatrix' death.
>
> "3. Under the terms of paragraph Fourth of the Will and paragraph First of the Codicil, the named legatees upon the death of the testatrix became vested of certain stock, to-wit: Mrs. J. C. Dodson — 75 shares of common stock of R. J. Reynolds Tobacco Company, J. C. Dodson — 25 shares of common stock of R. J.

Reynolds Tobacco Company, the children of Mrs. J. C. Dodson — 7 shares each of common stock of R. J. Reynolds Tobacco Company, but with the enjoyment of said stock postponed until the death of the last to die of Mrs. A. P. Douglas and Miss Nannie Pepper.

"4. The bequests of Paragraph Fourth of the Will and Paragraph First of the Codicil carry with them all accretions in the form of cash dividends (directly attributable to the stock designated in said specific bequests) between the time of the death of the testatrix and the time of the death of Mrs. A. P. Douglas.

"5. That Paragraph Second of the Codicil did not supplant Paragraph Fifth of the Will in its entirety, but only amended or modified it by devising two-thirds of the residue of the estate to Mrs. J. C. Dodson and the remaining one-third to Mrs. N. A. Martin, T. R. Pepper, Miss Nannie Pepper, J. G. Pepper, and Mrs. A. P. Douglas, and left the proviso of Paragraph Fifth of the Will standing and unaltered.

"It is FURTHER ORDERED, ADJUDGED, AND DECREED:

"(a) That Wachovia Bank & Trust Company, Executor, pay over and deliver to the following persons the following amounts of common stock of R. J. Reynolds Tobacco Company (which includes stock splits since the death of the testatrix) pursuant to and in fulfillment of the specific bequests of paragraph Fourth of the Will and Paragraph First of the Codicil: Nannie E. Dodson, Executrix of Lizzie Pepper (Mrs. J. C.) Dodson or her assigns — 750 shares, Nannie E. Dodson — 70 shares, Agnes V. Dodson — 70 shares, James R. Dodson — 70 shares, John C. Dodson — 70 shares, Della Dodson Crowell — 70 shares, Nannie E. Dodson and Agnes V. Dodson, Executrixes of Nellie Dodson Boyd — 70 shares, Wachovia Bank & Trust Company, Administrator c.t.a. of Marjorie Dodson Hamner — 70 shares, Wachovia Bank & Trust Company, Executor of J. C. Dodson — 250 shares; and a receipt of Nannie E. Dodson, Executrix, or of her attorneys of record, shall constitute a full acquittance and release of Wachovia Bank & Trust Company, Executor.

"(b) That Wachovia Bank & Trust Company, Executor of Hattie L. Pepper, in the due administration of said estate pay over and deliver to the Ancillary Executor of Anna Pepper Douglas the sum of $100.00 covering the last month of her life or from February 20, 1961, to March 20, 1961, in full settlement of her interest

as the surviving income beneficiary under Paragraph Third of the Will.

"(c) That the 45 shares of common stock of Union Carbide Corporation and the 90 shares of common stock of General Electric Company as referred to in Paragraph 18 of the complaint, and the cash dividends and accumulated income directly attributable to said stock are part of the residue of said estate.

"(d) That all costs in this action, including reasonable compensation for services of counsel allowed by separate orders, and all costs, fees and commissions incident to the complete administration of the estate be paid by the Executor from the accumulated income in said estate if the same be sufficient; and that all such costs, fees and commissions shall be allowed to the Executor in its accounting.

"(e) If the accumulated income in said estate is not sufficient to carry out the purposes directed in (d) above said Executor is expressly authorized to resort to the residuary of said estate and make sale of any stocks therein and apply such of the proceeds derived from such sales as may be necessary to supply the deficiency in order to carry out the provisions in (d) above.

"(f) That all accumulated income over and above the amount which may be required to carry out the provisions and directions of (d) above be allocated and distributed by the executor as between the beneficiaries of the specific legacies (designated in (a) above) and the residuary legatees hereinafter named, in accordance with and pursuant to a formula prepared by the Executor and presented to and approved by all counsel present at the hearing; under which formula the beneficiaries of the specific legacies are entitled to 67.366% of the total thereof and the beneficiaries of the residuary estate are entitled to 32.634% thereof. The foregoing distribution as to each specific legatee shall be in the ratio as provided in 3 above, and as to each residuary legatee or beneficiary in the ratio hereafter provided for the distribution of stock to them.

"It is FURTHER ORDERED, ADJUDGED AND DECREED that the remaining common stock of R. J. Reynolds Tobacco Company in said estate (being 1942 shares) is a portion of the residuary estate and shall be distributed by the Executor — as provided in Paragraph Fifth of the Will as modified by Paragraph Second of the Codicil — as follows: Two-thirds or 50/75ths thereof to Nannie E. Dodson, Executrix of Lizzie Pepper (Mrs.

J. C.) Dodson or her assigns; 6/75th to L. L. Levinson, Administrator of Mrs. N. A. Martin; 6/75ths to Louise Pepper McClung, Executrix of T. R. Pepper; 6/75th to Alton Donnie Douglas, Ancillary Executor of Anna Pepper (Mrs. A. P.) Douglas; 2/75ths to Lelia Joyce Pepper (Mrs. W. W.) Maloney; 2/75ths to Thomas I. Pepper; 2/75ths to Philip E. Lucas, Ancillary Administrator of John Bolt Pepper, and 1/75th to Nannie E. Dodson, Executrix of Lizzie Pepper (Mrs. J. C.) Dodson or to her assigns.

"It is FURTHER ORDERED, ADJUDGED AND DECREED that the Executor may make the foregoing distribution of stock in said residuary estate in kind, or in money, or partly in kind and partly in money."

From the judgment, only Alton Donnie Douglas, ancillary executor of the estate of Anna Pepper (Mrs. A. P.) Douglas, deceased, appealed.

William Joslin for defendant appellant, Alton Donnie Douglas, Ancillary Executor of the Estate of Mrs. A. P. Douglas.

Deal, Hutchins and Minor by Edwin T. Pullen for defendant appellees, Louise Pepper McClung, Executrix of T. R. Pepper, Louise Pepper McClung, Francis D. Pepper, Hiero L. Taylor, Betty T. Webb, and Mallie D. Pepper, Executrix of Thomas Otto Pepper.

Hudson, Ferrell, Petree, Stockton, Stockton & Robinson by Robert G. Stockton and R. C. Vaughn, Jr., for defendant appellees, Nannie E. Dodson, Executrix of Lizzie Pepper (Mrs. J. C.) Dodson and Nannie E. Dodson.

PARKER, J. Defendant appellant assigns as error that the court erred in adjudging that the legacies bequeathed by Item Fourth of the Will and by Item First of the codicil thereto are specific legacies, and carried with them all accretions resulting from stock splits after the death of the testatrix, and that the legatees named in these instruments became vested of the stock bequeathed them upon the death of the testatrix but with the enjoyment of said stock postponed until the death of the last to die of Mrs. A. P. Douglas or Nannie Pepper, and that these legacies carried with them all accretions in the form of cash dividends (directly attributable to the stock designated in said specific bequests) between the time of the death of the testatrix and the time of the death of Mrs. A. P. Douglas.

Defendant appellant contends that the bequests of Reynolds Tobacco Company stock in Item Fourth of the will and in Item First of the codicil thereto are demonstrative legacies, and thus do not carry with

them all accretions by way of stock dividends or stock splits and cash dividends that have accrued after the death of the testatrix.

A will speaks only from the death of the testator. *Yount v. Yount,* 258 N.C. 236, 128 S.E. 2d 613; *Coffield v. Peele,* 246 N.C. 661, 100 S.E. 2d 45. "A codicil is a supplement to a will, annexed for the purpose of expressing the testator's after-thought or amended intention. *Green v. Lane,* 45 N.C. 113. It is to be construed with the will itself, and the two are to be considered as constituting a single instrument. *Darden v. Matthews,* 173 N.C. 186, 91 S.E. 835." *Smith v. Mears,* 218 N.C. 193, 10 S.E. 2d 659.

It is hornbook law that the primary duty of the court is to discover the testatrix's intent as expressed in her will and her codicil thereto, and if it is not in contravention of some established rule of law or public policy, such intention must be given effect. *Entwistle v. Covington,* 250 N.C. 315, 108 S.E. 2d 603; *Smith v. Mears, supra.* That must be discovered from the language she used in the will and her codicil thereto, which in cases of ambiguity may be interpreted in the light of conditions existing at the time the will was made and at the time the codicil thereto was made. Strong's N. C. Index, Vol. 4, Wills, secs. 27 and 28.

Item Fourth of the will reads:

> "Upon the death or marriage of both of my said sisters, Mrs. A. P. Douglas and Miss Nannie Pepper, I give and bequeath to my sister, Mrs. J. C. Dodson, seventy-five shares of my Common B Stock of the R. J. Reynolds Tobacco Company and I give and bequeath to the children of Mrs. J. C. Dodson (there being seven living at this time), seven shares each of my Common B stock of The R. J. Reynolds Tobacco Company."

Item First of the codicil thereto reads:

> "I hereby alter section 'Fourth' of said will by adding in said section my brother-in-law, J. C. Dodson, to whom I give and bequeath twenty-five shares of my Common B Stock of the R. J. Reynolds Tobacco Company. This out of love and affection for him, and in appreciation of his kindness to me."

Stacy, C.J., speaking for a unanimous Court, said in *Heyer v. Bulluck,* 210 N.C. 321, 186 S.E. 356:

> "A specific legacy is a bequest of a specific article, distinguished from all others of the same kind, pointed out and labeled by the testator, as it were, for delivery to the legatee, such as a par-

ticular horse, a piece of silver, or money in a certain purse or chest, or a particular corporate stock, or a particular bond or other obligation for the payment of money. *Shepard v. Bryan, supra* [195 N.C. 822, 143 S.E. 835]. 'If the thing bequeathed is, by the terms of the will, individuated so that it is distinguishable from all others of the same kind, it is a specific legacy'—Leaming, V. C., in *Kearns v. Kearns,* 77 N.J. Eq. 453, 76 Atl. 1042, 140 Am. St. Rep. 575.

" A demonstrative legacy is a bequest of money or other fungible goods, payable out of or charged upon a particular fund in such a way as not to amount to a gift of the *corpus* of the fund, or to evince an intent to relieve the general estate from liability in case the fund fail, and so described as to be indistinguishable from other things of the same kind. *Shepard v. Bryan, supra;* 28 R.C.L. 292."

At the time of testatrix's death, she owned 575 shares of Common B stock of R. J. Reynolds Tobacco Company and 100 shares of the common capital stock of the Baltimore and Ohio Railway Company. In Item Fourth of her will and in Item First of her codicil thereto, she gives to the legatees therein named specified numbers of shares "of my Common B stock of the R. J. Reynolds Tobacco Company," thereby naming the particular corporate stock she bequeathed these legatees. From a consideration of the whole will and the whole codicil thereto, and the attendant circumstances at the time these instruments were made, we are satisfied that these legacies are specific, and that it was the clear intent of the testatrix to make these legacies specific.

Our opinion that these are specific legacies finds support in our case of *Smith v. Smith,* 192 N.C. 687, 135 S.E. 855, in which the facts are quite similar. M. F. Nesbit in Item 4th of his will bequeathed and devised to his wife all the residue of his estate to hold during her natural life, the income to be hers absolutely. In Item Fifth he directed that all his property shall remain as it now is under the direction of his wife, so long as she shall live, and after her death, his property shall be distributed as provided in the items following. In Item 10th he bequeathed unto Nannie Lee Kerr Nesbit 20 shares of the capital stock of the Mooresville Cotton Mills, Mooresville, N. C.; in Item 11th ten shares of the same stock to Alice Lee Nesbit Neikirk; in Item 12th ten shares of the same stock to Fred Nesbit Porter; in Item 13th ten shares of the same stock to Barron P. Smith; and in Item 14th

ten shares of the same stock to Lee Parker. It appears from the judgment of the trial judge that the ten shares of stock bequeathed to Lee Parker were revoked and the said ten shares of stock by a codicil to the will were bequeathed to F. E. Nesbit. In Item 19th he provides that the residue of his estate, after the death of his wife, shall be equally divided among persons specified. At the time of his death in 1907, the testator owned 60 shares of the capital stock of the Mooresville Cotton Mills. In January 1917, and subsequently thereto, Mooresville Cotton Mills declared stock dividends, which were delivered to the executor, until the executor held 360 shares of common stock of the mill and 20 shares of its preferred stock. Upon the death of the widow in 1925, the legatees to whom the stock was bequeathed by the testator in items 10th, 11th, 12th, and 13th of the will, and F. E. Nesbit who by codicil to the will received the ten shares of stock bequeathed to Lee Parker in Item 14th of the will, claimed the stock together with the stock dividends. The residuary legatees claimed the stock dividends upon the theory that the legacies were general and not specific. The Court in closing its opinion said: "Our conclusion is, upon the whole record, that the legacies of stock in the Mooresville Cotton Mills were specific, and that the stock dividends accruing upon said shares belong to the legatees named."

Our opinion that these are specific legacies also finds support in our case of *Bost v. Morris*, 202 N.C. 34, 161 S.E. 710. In this case Item 2 of testator's will reads: "I give and bequeath to my sister, Minnie E. Morris, if she survives me, ten thousand dollars in stocks in an incorporated company or companies to be selected by her, at its then par value." In Item 6 of his will the testator gave and devised all the rest and residue of his estate in fee simple to certain named beneficiaries. The executor qualified and on 14 December 1927 delivered to Minnie E. Morris, the legatee in Item 2, a list of the stocks found in the lock box of the deceased. On the stock selected by Minnie E. Morris, the dividends amounted to $431. The Court held that upon the exercise of the power of selection of the stock by the legatee, Minnie E. Morris, the bequest was rendered specific and the legatee was entitled to all dividends declared thereon from the date of the testator's death.

Our conclusion also finds support in the case of *Butler v. Dobbins*, 142 Me. 383, 53 A. 2d 270, 172 A.L.R. 361. In this case, provisions of a will of a testatrix who owned sixty-five shares of stock of a bank bequeathing to each of two daughters of her late husband "twenty-one shares of the capital stock held by me" in the bank, with a residuary clause in favor of her brother, show an intention to make specific

bequests to the daughters, and to divide the stock as nearly equally as feasible between them and her brother.

This is said in Annotation 116 A.L.R. 1130:

> "* * *specific legacies or devises are severed from the general estate of the testator immediately upon his death, and, in the absence of any provision to the contrary in the will, they become payable at the death of the testator. Consequently, according to the rule almost universally recognized by the courts, in the absence of a contrary intention in the will, such legacies or devises carry with them to the specific legatee or devisee any interest, dividends, rents, profits, or accretions, not otherwise disposed of by the will, that may have accrued on them from the death of the testator until the actual satisfaction of the legacy or devise; and such interest, dividends, etc., do not become a part of the general or the residuary estate of the testator. This general principle is either recognized or applied in the following cases:* * *."

Cases from 22 States, from the District of Columbia, from Federal Courts, and from England are cited in support of the text. The following are cited from North Carolina: *Nelson v. Nelson*, 41 N.C. 409; *Redding v. Allen*, 56 N.C. 358; *Harrell v. Davenport*, 58 N.C. 4; *Rogers v. McKenzie*, 65 N.C. 218; *Holly v. Holly*, 94 N.C. 670; *Smith v. Smith, supra; Bost v. Morris, supra*, which support the text. To the same effect: 57 Am. Jur., Wills, sec. 1615; 6 Bowe-Parker: Page on Wills, p. 423, which cites cases from many jurisdictions, including our cases of *Smith v. Smith, supra*, and *Bost v. Morris, supra*; 96 C.J.S., Wills, sec. 1101, pp. 824-827.

It is apparent that by Item Fourth of her will and Item First of her codicil thereto, and by the residuary clauses in her will and her codicil thereto, testatrix intended to dispose of her entire interest in the R. J. Reynolds Tobacco Company. The declaration of a stock split by a corporation is nothing more than the division of one share into two or more parts. Obviously, considering the will and codicil thereto as constituting one instrument, the things which testatrix intended to give the legatees named in Item Fourth of her will and Item First of her codicil thereto were not the mere paper certificates for the number of shares of stock therein specified, but the interests which those shares of stock represented in the R. J. Reynolds Tobacco Company, so far as stock splits are concerned arising or accruing since testatrix's death. Action taken by the R. J. Reynolds Tobacco Company in voting stock splits of its Common B stock should not result in the legatees of

these specific bequests getting merely the number of shares specified in Item Fourth of the will and in the First Item of the codicil thereto, and consequently receiving a less interest than the shares of stock bequeathed represented in the R. J. Reynolds Tobacco Company, thereby defeating the purpose and intent of the testatrix. It is manifest that there is no contrary intention in the will and the codicil thereto, considered as constituting a single instrument, to prevent the operation of the rule almost universally recognized by the courts that the specific legacies here carry with them to the specific legatees all stock dividends and stock splits that have accrued on them after the death of the testatrix and before the actual satisfaction of the specific legacies, with the result that such accretions of stock do not become a part of testatrix's general or residuary estate.

These specific legacies vested in the legatees upon the death of testatrix because there was a present fixed right of future enjoyment, which was upon the death of the last to die of Nannie Pepper or Mrs. A. P. Douglas. The specific legacies vested in the children of Mrs. J. C. Dodson were subject to open so as to make room for any children thereafter born to Mrs. J. C. Dodson. It appears from the record no other children were born. *Trust Co. v. Taylor,* 255 N.C. 122, 120 S.E. 2d 588; *Trust Co. v. McEwen,* 241 N.C. 166, 84 S.E. 2d 642; *Morrell v. Building Management,* 241 N.C. 264, 84 S.E. 2d 910; *Patrick v. Beatty,* 202 N.C. 454, 163 S.E. 572.

Testatrix in Item First of her will provides for the payment of her funeral expenses and debts from the proceeds of an insurance policy and from the first money received by her executor from her estate. In Item Second of her will she devises her one-eighth interest in a farm. In the first sentence of Item Third of her will she bequeaths to her sisters Nannie Pepper and Mrs. A. P. Douglas "during their lifetime or until marriage, *all the income derived from the remainder of my estate, of whatsoever nature and wheresoever situate,* and I direct my executor hereinafter named to divide this fund equally between them quarterly." (Emphasis supplied.) In Item Fourth of her will and in Item First of her codicil thereto she bequeaths the specific legacies above mentioned. It is patent that testatrix in Item Third of her will expressed a clear intention that all the cash dividends paid on these specific legacies and all other income from her estate should be paid to Nannie Pepper and Mrs. A. P. Douglas by her executor "during their lifetime or until marriage," and consequently during such specified time these specific legacies set forth in Item Fourth of the will and Item First of the codicil thereto do not carry with them these cash dividends. It seems clear that this was the construction placed upon the

will and the codicil thereto by Wachovia, and probably by all beneficiaries under the will and codicil thereto, because Wachovia from 25 August 1928, the date on which it qualified as executor, to the date of Nannie Pepper's death on 30 January 1945 paid all net income from testatrix's estate to Nannie Pepper and Mrs. A. P. Douglas in equal shares, and there is nothing in the record to indicate that any beneficiary under the will and codicil thereto objected. The judge below was in error in adjudicating that the specific bequests set forth in Item Fourth of the will and in Item First of the codicil thereto carried with them all accretions in the form of cash dividends, directly attributable to the stock designated in these specific bequests, from testatrix's death to the time of the death of Nannie Pepper.

The last sentence of Item Third of the will reads: "Upon the death or marriage of either, the survivor shall be entitled *to the whole of said income, but not exceeding $1,200.00 per year.*" (Emphasis supplied.)

From the time of Nannie Pepper's death on 30 January 1945, Wachovia, the executor, paid to Mrs. A. P. Douglas until the month before her death on 20 March 1961 from the net income of the estate the sum of $1,200 per year in monthly installments of $100. The net income of the estate after Nannie Pepper's death considerably exceeded the sum of $1,200 per year in most, if not all, years, because at the time of Mrs. A. P. Douglas's death on 20 March 1961 the estate had accumulated and invested income in the amount of $24,381.23 and cash in the sum of $829.34, due to the large growth in profits of the R. J. Reynolds Tobacco Company.

Defendant appellant assigns as error that the court below adjudged that under the terms of Item Third of the will only the maximum sum of $1,200 per year vested in Mrs. A. P. Douglas after the death of Nannie Pepper. Defendant appellant contends "the will and codicil read in light of testatrix's circumstances show her intention of giving all of the income to her two sisters for their joint lives, and to the survivor," and that the accumulated and invested income in testatrix's estate of $24,381.23 should be paid to the estate of Mrs. A. P. Douglas. The question whether it was testatrix's intent to give to the survivor of Nannie Pepper or Mrs. A. P. Douglas during the survivor's lifetime all income of the estate must be decided before we reach the question whether the specific legacies bequeathed by Item Fourth of the will and by Item First of the codicil carried with them to the specific legatees all accretions in the form of cash divi-

dends, directly attributable to the stock designated in the specific legacies, between the time of the death of Nannie Pepper and the time of the death of Mrs. A. P. Douglas.

Defendant appellant's contention that testatrix took more than just a normal interest in the maintenance and welfare of her sisters Nannie Pepper and Mrs. A. P. Douglas because one was unmarried and the other divorced finds no support in the provisions of the will, the codicil thereto, and in the evidence introduced by him. His evidence is to the effect that when Mrs. A. P. Douglas returned to Winston-Salem with her two sons age 16 and 18½ years from West Virginia after her divorce the testatrix was living with her sister Mrs. J. C. Dodson. That she received a little help from Mrs. J. C. Dodson and testatrix, principally testatrix, but it was not much. The will and codicil thereto show generous provisions for testatrix's brothers and sisters, but that the most generous provisions were made for Mrs. J. C. Dodson, her husband, and children.

According to evidence offered by defendant appellant, Wachovia for the first accounting year of the estate, 25 August 1928 to 25 August 1929, paid from the net income of the estate $1,340.11 to Nannie Pepper and $1,349.09 to Mrs. A. P. Douglas. From 1928 through 1938 Wachovia paid to Nannie Pepper and Mrs. A. P. Douglas from the net income of the estate $1,200 to $1,300 a year each. The sole income of the estate has been from dividends from stock of the R. J. Reynolds Tobacco Company and from stock bought with the proceeds of the sale of the stock of the Baltimore and Ohio Railway Company. It is legitimate to infer that when testatrix made her will on 7 April 1927 and her codicil thereto on 12 June 1928, she knew with reasonable certainty the income of her estate, that it was in excess of $2,400 per year, and anticipated that after the death of Nannie Pepper or Mrs. A. P. Douglas the income from her estate would exceed the sum of $1,200 per annum.

While it is possible to argue that Mrs. A. P. Douglas, after Nannie Pepper's death, is entitled to "the whole of said income," this phrase cannot possibly be reconciled with the words immediately following, "but not exceeding $1,200.00 per year." This same item in the preceeding sentence provides that Mrs. A. P. Douglas and Nannie Pepper "during their lifetime or until marriage" should receive "all of the income derived from the remainder of my estate," and in addition it appears that the predominant purpose or general scheme of the will and codicil thereto is that, after the more generous provisions made for Mrs. J. C. Dodson, her husband, and children, her other brothers and sisters should receive approximately equal parts, with the ex-

ception of the bequest to Nannie Pepper and Mrs. A. P. Douglas in Item Third of the will. Defendant appellant's contention can only be sustained by taking one small phrase out of context and disregarding the attendant circumstances when the instruments were executed and the general scheme or predominant purpose of these instruments, and thereby placing Mrs. A. P. Douglas, or her estate, in a position more favorable than expressed in the words of the will and codicil thereto. Doubtless, testatrix could have expressed herself in a clearer manner than she did in the last sentence of Item Third of her will. Her intent, however, is manifest, and the last sentence of Item Third of her will, considered in connection with all the provisions of the will and the codicil thereto, considered as constituting one instrument, and the attendant circumstances when these instruments were executed, can only mean one thing, and that is that Mrs. A. P. Douglas, after the death of Nannie Pepper, is to be paid during her remaining lifetime from the income of the estate an amount "not exceeding $1,200.00 per year," and no more. Defendant appellant's contention that under the provisions of Item Third of the will all of the income of the estate vested in Mrs. A. P. Douglas after the death of Nannie Pepper is not tenable.

This Court said in *Gatling v. Gatling,* 239 N.C. 215, 79 S.E. 2d 466:

> "The epigram of Sir William Jones over 250 years ago 'no will has a brother' has been often quoted by the courts. *Ball v. Phelan,* 94 Miss. 293, 49 So. 956, 23 L.R.A. (N.S.) 895; *Meeker v. Draffen,* 201 N.Y. 205, 94 N.E. 626, 33 L.R.A. (N.S.) 816. Two wills rarely use exactly the same language. Every will is so much a thing of itself, and generally so unlike other wills, that it must be construed by itself as containing its own law, and upon considerations pertaining to its own peculiar terms. Probing the minds of persons long dead as to what they meant by words used when they walked this earth in the flesh is, at best, perilous labor. As said by Smith, C.J., in *Brawley v. Collins,* 88 N.C. 605, 'it is seldom that we can derive aid from an examination of adjudicated cases.' "

We have found no adjudicated case construing wills using exactly the same language as the will and codicil here. However, our conclusion finds support in the principles of law stated and in the reasoning used by Courts in the following cases construing wills using language somewhat similar to the instruments here: *Manufacturers Trust Company v. Earle,* 32 N.J. Super. 262, 108 A. 2d 115; *Willis v. Hendry,* 127 Conn. 653, 20 A. 2d 375; *In re Berthet's Estate,* 196 N.Y.S. 2d 354;

In re Charters' Estate, 46 Cal. 2d 227, 293 P. 2d 778; *Saucier v. Saucier*, 256 Mass. 107 (same case reported as *Saucier v. Fontaine*, 152 N.E. 95).

Absent a contrary provision in the will and the codicil thereto, considered as constituting a single instrument, these specific legacies carry with them to the specific legatees after Nannie Pepper's death all cash dividends directly attributable to the stock designated in these specific legacies after Nannie Pepper's death, except such cash dividends, or part of them, for each year, if any, that were required to make up the payment of $1,200 per year to Mrs. A. P. Douglas during her lifetime after Nannie Pepper's death. It seems no part of such cash dividends was required for the purpose, because the record shows that at the time of Mrs. A. P. Douglas's death on 20 March 1961 the estate of testatrix owned and held invested income in the amount of $24,381.23 and cash in the amount of $829.34, which apparently was accumulated after Nannie Pepper's death on 30 January 1945. It would seem from the record that these cash dividends form a part of the invested income of $24,381.23, and possibly a part of the cash in the amount of $829.34 owned and held by the estate of testatrix at the time of the death of Mrs. A. P. Douglas.

There is no merit to defendant appellant's contention that the accumulated and invested surplus income belonging to and in the estate in excess of the $1,200 per year paid to Mrs. A. P. Douglas during her lifetime after Nannie Pepper's death should be paid to the estate of Mrs. A. P. Douglas. There is nothing in the will and codicil thereto, considered as constituting one instrument, to indicate that surplus income of the estate, in excess of that the specific legacies carry with them to the specific legatees after Nannie Pepper's death, should do other than accumulate. In Annotation 157 A.L.R. 674, it is said: "On the other hand, there is considerable authority that surplus income should be accumulated if there is nothing to indicate that it was intended to be disposed of otherwise." Among the cases cited to support this statement is our case of *Commerce Union Trust Co. v. Thorner*, 198 N.C. 241, 151 S.E. 263, which involved a will setting up a trust during the natural life of the testator's wife and for a period of not less than ten years after the date of the testator's death, and providing that three-fourths of the income should be paid to the wife as long as she should live, and one-fourth to the testator's daughter, and that on the termination of the trust the trustee should distribute the *corpus* to the testator's four children, if living, share and share alike, but that if any of such children should have died leaving lawful issue, then his or her share should be held in trust for the benefit of such issue, but mak-

ing no provision for the distribution of the income going to the wife in case she should die before the expiration of the period of ten years, and in which it was held that such income should be kept and reinvested by the trustees as an accumulation of the *corpus* of the trust estate until the termination of the trust, and then divided in accordance with the distribution specified in the will.

Defendant appellant assigns as error the adjudication of the court that all costs incident to the complete administration of testatrix's estate, including reasonable counsel fees and costs of administration, shall be paid by the executor from the accumulated income in the estate if the same is sufficient.

G.S. 6-21, and subsection 2 thereof, provide that in any action or proceeding which may require the construction of any will or trust agreement, or fix the rights and duties of parties thereunder, costs shall be taxed against either party, or apportioned among the parties, in the discretion of the court. In the last sentence of G.S. 6-21 it is stated: "The word 'costs' as the same appears and is used in this section shall be construed to include reasonable attorneys' fees in such amounts as the court shall in its discretion determine and allow." *Little v. Trust Co.*, 252 N.C. 229, 113 S.E. 2d 689. Defendant appellant does not contend in his brief that the fees allowed counsel were unreasonable. Nothing to the contrary appearing in the record, it will be taken that the court taxed the costs and attorneys' fees in the exercise of its discretion. *Hoskins v. Hoskins,* 259 N.C. 704, 131 S.E. 2d 326. The court allowed counsel fees in the amount of $17,120. It would seem that the costs and counsel fees will take all, or nearly all, of the invested income and cash in the estate, and exhaust all, or a part of, the cash dividends directly attributable to the stock designated in the specific legacies after Nannie Pepper's death. Whether this is correct or not, such a ruling is beneficial to defendant appellant, or at least not injurious to him. The brief filed by counsel for defendant appellees, Nannie E. Dodson, Executrix of Lizzie Pepper (Mrs. J. C.) Dodson, and Nannie E. Dodson closes with these words: "For the foregoing reasons, these appellees respectfully request that this Court affirm the trial court in all respects." There is nothing in the record to indicate the judge abused his discretion in decreeing that the attorneys' fees and costs shall be paid from the accumulated and invested surplus, if the same is sufficient, and his judgment in this respect will not be disturbed, particularly as none of the beneficiaries of the specific legacies except to the judgment below.

To summarize, the results are:

All defendant appellant's assignments of error have been considered, and the judgment below is affirmed with these modifications:

One. Paragraph 4 of the judgment shall be altered to read: The specific bequest in Item Fourth of the will and Item First of the codicil thereto do not carry with them to the specific legatees the cash dividends directly attributable to the stock designated in said specific bequests between the date of testatrix's death and the time of the death of Nannie Pepper, but they do carry with them to the specific legatees such cash dividends from the time of the death of Nannie Pepper to the time of the death of Mrs. A. P. Douglas, except such cash dividends, or part of them, for each year, if any, that were required to make up the payment of $1,200 per year to Mrs. A. P. Douglas during her lifetime after Nannie Pepper's death.

Two. It may be, and probably will be, due to large expenses and counsel fees, that the payment of costs and counsel fees will exhaust the accumulated and invested surplus and cash in the estate. From the state of the record we cannot determine. But in the event there is a surplus, paragraph (f) of the judgment will be amended so that the beneficiaries of the specific legacies will receive as specific legatees no part of the cash dividends on their specific legacies which such specific legacies do not carry with them to the specific legatees, but such cash dividends, if any, which the specific legacies do not carry to the specific legatees, will be divided as part of the residuary estate.

Modified and affirmed.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION, AND THE GREYHOUND CORPORATION v. CAROLINA COACH COMPANY AND QUEEN CITY COACH COMPANY.

AND

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION, AND THE GREYHOUND CORPORATION v. CAROLINA COACH COMPANY.

AND

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION, AND CAROLINA COACH COMPANY, v. THE GREYHOUND CORPORATION.

(Filed 19 July 1963.)

1. Carriers § 2; Utilities Commission § 3—

Agreements between carriers respecting service to the public are valid when approved by the Utilities Commission since the law favors such

agreements provided the paramount interests of the public are protected. G.S. 62-121.64(a), G.S. 62-121.48.

2. Same—

An order of the Utilities Commission approving a contract between carriers respecting their service to the public is *prima facie* just and reasonable, G.S. 62-26.10, and the Commission may not arbitrarily or capriciously rescind such order of approval, but may rescind such order only after notice to the carriers affected and an opportunity to them to be heard for change of circumstances requiring such rescission in the public interest. G.S. 62-26.5.

3. Same; Utilities Commission § 7—

The improvement and construction of highways between two municipalities making feasible a new and quicker bus route between them is sufficient change of condition to empower the Utilities Commission to modify or rescind a prior order entered by it approving an agreement between two carriers in regard to their respective services to the public between the two municipalities along the older routes.

4. Utilities Commission § 1; Monopolies § 1—

A contract between carriers with regard to their respective services to the public which is approved by the Utilities Commission is not void under the anti-monopoly statute, G.S. 75-1, since the Utilities Commission has the power to grant monopilistic authority to safeguard the public interest against excessive competition, and if it could have entered such order in a contested proceeding it can approve an agreement of the utilities to the same import.

5. Utilities Commission §§ 1, 3—

An application for a new authority to carry passengers between two municipalities of the State along a new route made feasible by the improvement or construction of highways may be treated by the Utilities Commission as a motion in a prior cause in which the Commission approved an agreement of the carriers in regard to their respective services between the cities, provided the carriers affected are given notice and an opportunity to be heard, and thus obviate the question whether the prior order of approval may be collaterally attacked.

6. Carriers § 2; Utilities Commission § 3—

The order of the Utilities Commission granting authority to applicant to provide bus service between two municipalities of the State along a new route made feasible by the improvement and construction of highways, is approved in this case, the findings of the Commission being supported by material and competent evidence and its conclusions, including its holding that the granting of the authority will not unreasonably impair the financial stability and efficient public service of applicant's competitors, being permissible upon the facts found.

7. Carriers § 2; Utilities Commission §§ 1, 9—

The determination of public convenience and necessity involves numerous imponderables to be resolved upon the facts of each particular case,

and is primarily an administrative question addressed to the Utilities Commission, and it is not for the courts to find the facts or to regulate utilities. Therefore, a determination by the Utilities Commission within the authority conferred upon it and warranted by the facts found upon supporting evidence will not be disturbed even though the courts might have reached a different result upon the same facts.

8. Carriers § 2; Utilities Commission § 3—

G.S. 62-121.52(7) does not preclude the Utilities Commission from granting authority to two or more carriers to traverse the same segment of highway so long as they do not render duplicate service.

9. Utilities Commission § 1— Utilities Commission is not confined to immediate scope of pleadings but may enlarge the inquiry upon notice.

The Utilities Commission is not confined to the immediate scope of the pleadings filed, and may enlarge the scope of the inquiry and grant an application, subject to such reasonable terms, conditions, and limitations as public convenience and necessity may require, G.S. 26-120.53, and therefore it may grant a "closed door" authority even though the application is for authority to duplicate service; likewise when a carrier seeks an alternate route authority the Commission may treat it as an application for a new authority when the application does not come within the Commission's rules defining alternate routes, the parties to be affected being before the court, participating in the proceedings, and having full opportunity to be heard.

10. Carriers § 2; Utilities Commission § 3—

Where the principal business of a carrier is the transportation of passengers between two cities of the State along a route serving a number of other cities, and the improvement and construction of highways makes feasible a new and more direct route between the termini, the Utilities Commission, upon appropriate findings of fact, may grant such carrier "closed door" authority along the new route, notwithstanding that other carriers, respectively, serve segments of the route in "open door" operations.

11. Utilities Commission § 9—

Order of the Utilities Commission revoking its prior order approving an agreement between carriers in regard to their respective services along the route in question and substituting in lieu thereof an order of the Commission having the same effect as the agreement, is reversed, there being no evidence to support the Commission's conclusion that the new order will promote harmony among the carriers, G.S. 66-121.44, G.S. 62-121.48(3), and there being no showing of a change of condition requiring a revision of the prior order in the public interest.

APPEALS by Carolina Coach Company, Greyhound Corporation and Queen City Coach Company from *Copeland, S.J.,* November 1962 Term of WAKE.

These proceedings originated before the Utilities Commission upon applications of Greyhound Corporation (Greyhound) and Carolina Coach Company (Carolina) for passenger bus franchise authority over certain highway routes within the State. The three proceedings were docketed in Supreme Court as separate appeals. We have consolidated them for convenience in delivering this opinion — they are interrelated in many aspects.

Case No. 465. Queen City Coach Company (Queen City) and Carolina appeal.

Case No. 466. Carolina appeals.

Case No. 467. Greyhound appeals.

Newsom, Graham, Strayhorn & Hedrick for The Greyhound Corporation.

Allen and Steed for Carolina Coach Company.

Joyner & Howison for Queen City Coach Company.

MOORE, J. Carolina, Greyhound and Queen City are common carriers of passengers, their baggage, mail, and light express, in the same vehicle with passengers, by motor vehicle operating over interstate and intrastate franchise routes within the State of North Carolina.

Prior to the institution of the instant proceedings these carriers had, among others, the following franchise routes, respectively:

(a). Carolina — (1) Between Raleigh and Charlotte by way of Durham, Burlington, Greensboro, Lexington, Salisbury and Concord, over U. S. Highways 70 and 29; (2) Between Raleigh and Charlotte via Sanford, Biscoe and Albemarle, over U. S. Highways 1 and 15 and N. C. Highway 27.

(b). Greyhound — (1) Between Raleigh and Winston-Salem via Pittsboro, Asheboro and Lexington, over U. S. Highways 64 and 52; (2) Between Winston-Salem and Charlotte via Mocksville, Statesville and Mooresville, over U. S. Highways 158, 64 and 21.

(c). Queen City — (1) Between Asheboro and Mount Pleasant over N. C. Highway 49. Mount Pleasant is 45 miles southwest of Asheboro and 26 miles northeast of Charlotte. After the instant proceedings were filed, but before orders were entered, the Commission granted Queen City franchise authority between Mount Pleasant and Charlotte over Highways 49 and 29. Queen City had previously operated between Mount Pleasant and Charlotte under an agreement with Carolina.

The franchise routes referred to are not described with absolute accuracy. Technical correctness of location is not important in the determination of these appeals.

In the early 1940s the Atlantic Greyhound Corporation (which has since merged with the Greyhound Corporation) had acquired *interstate* authority between Charlotte and Winston-Salem via Lexington over Highways 29 and 52, but did not have *intrastate* authority between Charlotte and Lexington over Highway 29. Carolina had the intrastate authority for this segment. Greyhound had both intrastate and interstate service north of Winston-Salem, the interstate extending to New York and other metropolitan areas; it also had interstate and intrastate service south and west of Charlotte, the interstate service extending to Miami, New Orleans and other southern metropolitan areas. The route between Winston-Salem and Charlotte via Lexington, over Highways 52 and 29, is shorter and requires less travel time than the route by way of Statesville over Highways 158, 64 and 21. To enable Greyhound to transport certain intrastate passengers over the Lexington route and at the same time to protect Carolina with respect to certain of its routes and passengers, a lease agreement was voluntarily entered into between Carolina and Greyhound, dated 1 August 1947. Carolina leased to Greyhound the privilege of transporting over the Lexington route intrastate passengers originating at or moving through Charlotte destined for Winston-Salem and points beyond, and intrastate passengers originating at or moving through Winston-Salem and destined for Charlotte or points beyond. On its part Greyhound agreed: (1) to operate with closed doors between the corporate limits of Lexington and the corporate limits of Charlotte and not to pick up or discharge any intrastate passengers at any intermediate points along said route; (2) not to pick up intrastate passengers at Lexington or at intermediate points between Lexington and Charlotte, destined to Charlotte or to any intermediate points between Charlotte and Lexington or to any intrastate points beyond Charlotte; (3) not to pick up any intrastate passengers at Charlotte, moving over this route, or at intermediate points between Charlotte and Lexington destined for Lexington or intermediate points between Charlotte and Lexington or to points between Lexington and Winston-Salem; (4) not to operate through service without change of buses between Raleigh and Charlotte by way of Lexington over Highways 64 and 29, "or compete with Carolina for intrastate traffic moving between Raleigh . . . and Charlotte . . ., irrespective of points of origin or destination"; (5) not to exchange between its schedules, operated over its present franchise route through Lexington and over the leased route,

intrastate passengers at Lexington irrespective of the point of origin or destination of such passengers, and to deliver to Carolina at Lexington all intrastate passengers moving by Greyhound into Lexington, irrespective of point of origin, destined to points between Lexington and Charlotte, and to deliver to Carolina at Charlotte all intrastate passengers moving by Greyhound into Charlotte, irrespective of the point of origin, destined to points between Charlotte and Lexington; (6) not to seek any intrastate franchise or permission to operate over the route leased during the term of this agreement, or any renewal thereof, except under the terms of this agreement. The term of the lease agreement was three years with an automatic extension of three years upon renewal of Carolina's franchise by the Utilities Commission. The effectiveness of the lease agreement was conditioned upon its prior approval by the Utilities Commission. Upon the joint petition of Carolina and Greyhound the Commission entered an order of approval. When the Carolina franchise became permanent by virtue of the Bus Act of 1949, the parties to the lease agreement contracted in writing that it would terminate only upon cancellation of Carolina's franchise by the Utilities Commission. This extension agreement was approved by the Commission.

Greyhound and Carolina operated under the terms of the lease agreement without any question as to its validity until 1960. In the meantime the State Highway Commission had begun to greatly improve N. C. Highway 49 from Charlotte to Asheboro, and by 1960 the improvements were nearing completion. As improved, Highway 49 was in excellent condition for bus travel, and the route by way of Asheboro over Highways 64 and 49 constituted the shortest and fastest route between Raleigh and Charlotte. It is much shorter than any other established through route. By reason of the improvement of Highway 49, a Raleigh-Charlotte franchise via Asheboro became very desirable. But before the improvements were made Highway 49 was ill adapted to bus service, both because of the condition of the highway and the sparseness of the population along the route. Queen City had the franchise between Mount Pleasant and Asheboro and operated over Highway 49 one round trip daily.

On 13 September 1960 Greyhound advised Carolina by letter that it considered the lease agreement of doubtful validity and requested that it be cancelled by mutual consent. By letter of 30 September Carolina declined to cancel. Greyhound then advised the Utilities Commission that it considered the lease agreement void, did not desire

to continue service under its provisions, and requested instructions. The Commission directed Greyhound to render service as before, until such time as the Commission should authorize it to discontinue.

Both Carolina and Greyhound applied to the Utilities Commission for franchise authority to operate "no change" service between Raleigh and Charlotte via Asheboro over Highways 64 and 49.

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Case No. 465. On 5 October 1960 Greyhound applied for intrastate franchise authority over the route between Asheboro and Charlotte on Highway 49 (Queen City's route), to combine such operation with the operation being conducted by Greyhound between Asheboro and Raleigh on Highway 64, so as to provide through service from Raleigh to Charlotte and vice versa, but restricted between Asheboro and Charlotte against passengers whose entire ride is between these two points.

Carolina and Queen City filed protests and were allowed to intervene.

After hearing, the Utilities Commission granted Greyhound's application, but with greater restrictions. The certificate authorizes Greyhound to operate through service between Raleigh and Charlotte via Asheboro over Highways 64 and 49, but "restricted from Asheboro to Charlotte to operations with closed doors and without authority to serve any intermediate points."

Carolina grounds its protests and appeal on its contentions that (1) Greyhound's application is barred by the lease agreement, and (2) public convenience and necessity does not require the granting of this authority to Greyhound.

Prior to the order in this case the through bus transportation between Raleigh and Charlotte had been over Carolina's northern route via Greensboro and Lexington, and Carolina's southern route via Sanford. Greyhound and Queen City's services were not in any real sense competitive. Greyhound's shortest route, controlled solely by it, was via Lexington, Winston-Salem and Statesville. Queen City had no service between Raleigh and Charlotte except in combination with Carolina or Greyhound. Carolina was anxious to retain the Raleigh-Charlotte traffic, and in the lease agreement Greyhound had promised not to compete with Carolina for intrastate traffic moving between Raleigh and Charlotte irrespective of the points of origin or destination.

It is Carolina's position that the lease agreement, solemnly executed by Greyhound and approved by the Commission, bars Greyhound from applying for the Raleigh-Charlotte authority. On the other hand Greyhound contends that it is void.

At the time of its execution in 1947, the lease agreement was approved by the Commission at the joint request of Carolina and Greyhound. The law encourages cooperation and agreements between common carriers respecting their service to the public. G.S. 62-121.64 (a). But the interest of the public is paramount and the Commission has the authority to supervise and regulate common carriers for the protection of the public interest. G.S. 62-121.48. Contracts between carriers affecting service to the public are subject to the Commission's regulatory authority. *Utilities Commission v. Motor Lines*, 240 N.C. 166, 81 S.E. 2d 404. A contract between public utilities, when formally approved by the Commission, is in effect an order of the Commission binding on each of the parties. *Power Co. v. Membership Corporation*, 253 N.C. 596, 603, 117 S.E. 2d 812. An order of the Commission is *prima facie* just and reasonable. G.S. 62-26.10. This applies to orders approving contracts of public utilities. *Utilities Commission v. Casey*, 245 N.C. 297, 96 S.E. 2d 8. And the Commission may at any time, upon notice to the public utility affected and after opportunity is afforded the affected utility to be heard, alter or amend any order made by it. G.S. 62-26.5. ". . . (I)n the absence of statutory authority, and in the absence of any additional evidence or a change in conditions, the Commission has no power to reopen a proceeding and modify or set aside an order theretofore made by it . . . where the order was made in pursuance of an agreement entered into by the parties to the proceeding." 73 C.J.S., Public Utilities, s. 56(d), p. 1135. The Commission may not arbitrarily or capriciously rescind its order approving a contract. It must appear that such rescission is made because of a change of circumstances requiring it in the public interest. *Chicago Housing Authority v. Illinois Com. Com'n.*, 169 N.E. 2d 268 (Ill. 1960); *Central Northwest B. Men's Ass'n. v. Illinois C. Com'n.*, 168 N.E. 890 (Ill. 1929).

The Commission correctly concluded that the lease agreement is not a bar to the institution and maintenance of this proceeding. The terms and conditions of the lease agreement are relevant matters to be considered upon the question of public convenience and necessity. And Greyhound has the burden of showing that public convenience and necessity require modification and rescission of the order approving the lease agreement, and the granting of the application for franchise authority.

Greyhound argues at great length that the lease agreement is in restraint of trade, violates G.S. 75-1, and is therefore void. The reason for strict regulation of public utilities is that they are either monopolies by nature or given the security of monopolistic authority for better service to the public. The public is best served in many circumstances where destructive competition has been removed and the utility is a regulated monopoly. "Whether there shall be competition in any given field and to what extent is largely a matter of policy committed to the sound judgment and discretion of the Commission. The Commission must maintain a reasonable balance to see that the public is adequately served and at the same time to see that the public and the public utilities involved are not prejudiced by the efforts which flow from excessive competition brought about by excessive services." 73 C.J.S., Public Utilities, s. 42, p. 1099; *Sonafelt v. Pennsylvania Public Utility Commission*, 103 A. 2d 442 (Pa. 1954). It could not be successfully maintained that the Commission, upon proper application therefor and after hearing, could not have entered a valid order, in a contested proceeding, to the same effect as the lease agreement. A contract between public utilities, approved by the Commission, is not violative of the anti-monopoly statute, G.S. 75-1, if the Commission could have lawfully made an order to the same effect upon application and after hearing in an adverse proceeding.

Carolina insists that Greyhound's application should have been dismissed because it is a collateral attack on the Commission's order approving the lease agreement. It is generally recognized that a valid determination made by an administrative agency in its judicial or quasi-judicial capacity is not subject to collaterial attack. 2 Am. Jur. 2d. Admnistrative Law, s. 493, p. 299. But whether Greyhound's application is technically a collateral attack on the Commission's order is of no material importance here. By statute, G.S. 62-26.5, the Commission is empowered to rescind, alter or amend any order made by it, upon notice to the public utility affected and after opportunity to be heard. There is no suggestion that Carolina did not have notice and full opportunity for hearing in the instant case, or that it did not understand and appreciate the full purport of the hearing. The effect of Greyhound's application is to allege that circumstances have changed and public convenience and necessity now requires the lease agreement to be modified and the franchise authority to be awarded to Greyhound. It was within the authority of the Commission to treat the application as a motion in the prior cause, and to modify the order ap-

proving the lease agreement. *Toomes v. Toomes,* 254 N.C. 624, 119 S.E. 2d 442. This the Commission apparently did. Carolina does not complain that it was taken by surprise.

We now come to the more difficult questions whether the Commission's findings of fact are supported by competent, material and substantial evidence and, if so, whether the findings are sufficient to show that public convenience and necessity requires the granting of the franchise authority to Greyhound.

". . . (W)hat constitutes 'public convenience and necessity' is primarily an administrative question with a number of imponderables to be taken into consideration, e.g., whether there is a substantial public need for the service; whether the existing carriers can reasonably meet this need, and whether it would endanger or impair the operations of existing carriers contrary to the public interest. Precisely for this reason its determination by the Utilities Commission is made not simply *prima facie* evidence of its validity, but '*prima facie* just and reasonable.' " *Utilities Commission v. Trucking Co.,* 223 N.C. 687, 690, 28 S.E. 2d 201; *Utilities Commission v. Ray,* 236 N.C. 692, 73 S.E. 2d 870. The doctrine of convenience and necessity is a relative or elastic theory. The facts in each case must be separately considered and from those facts it must be determined whether public convenience and necessity requires a given service to be performed or dispensed with. The convenience and necessity required are those of the public and not of an individual or individuals. *Utilities Commission v. Casey, supra.* "Necessity" means reasonably necessary and not absolutely imperative. *Utilities Commission v. R.R.,* 254 N.C. 73, 79, 118 S.E. 2d 21. "Any service or improvement which is desirable for the public welfare and highly important to the public convenience may be properly regarded as necessary." And if a new service is necessary, and if there are carriers already in the field, there is always the vital question (in determining convenience and necessity) whether the new service should be rendered by the existing carriers or by the new applicant. *Mulcahy v. Public Service Commission,* 117 P. 2d 298 (Utah 1941); 73 C.J.S., Public Utilities, s. 42, pp. 1099, 1100.

The Commission sets out in the findings of fact the various routes open to the public by bus between Raleigh and Charlotte, and the distances, schedules and travel time on each; also the routes available to the public at points on U. S. Highway 64 for travel to Charlotte and return, including distance, schedules and travel time. It is found that Greyhound proposes to operate five round trip schedules between Raleigh and Charlotte over the route in question "operating with closed doors between Asheboro and Charlotte." There are also the

following additional findings of fact (numbering ours): (1) "The services proposed by Greyhound will not materially impair or affect the services by Carolina or Queen"; (2) "Existing carriers cannot reasonably meet this public need" (for the services proposed by Greyhound); (3) granting of requested authority will not endanger or impair the operations of existing carriers contrary to the public interest; Carolina is hauling less that four passengers per trip for the entire trip between Charlotte and Raleigh, and 50 percent or more of these are interstate passengers; Queen City operates only one round-trip schedule per day over N. C. Highway 49 between Mount Pleasant and Asheboro; Greyhound requests authority over this route with closed doors; (4) Bus service over the route in question is inadequate and insufficient to meet the public need, and inadequate bus service over this route has resulted in the non-use of what bus service has been available and caused a public demand for improvement in the service; (5) Additional, faster, more adequate, more efficient and through bus service over the route in question is needed to meet the public convenience in addition to presently authorized and existing service; (6) Greyhound is fit, able and willing to render this service.

Without detailing here the voluminous evidence set out in the record, we conclude from our review thereof that there is competent, material and substantial evidence to support the Commission's findings. No one questions the fact that the route via Asheboro over U. S. Highway 64 and N. C. Highway 49 has been improved, the bus time between the two cities can be substantially decreased, and that adequate bus service over this route is necessary for public convenience. It is conceded that Carolina, Greyhound, and Queen City are each financially capable, and otherwise fit, able and willing to render the service. The difficult questions are: (1) Will the granting of the authority to Greyhound unreasonably impair the financial stability and efficient public service of Carolina and Queen City (*Utilities Com. v. Coach Co.*, 233 N.C. 119, 63 S.E. 2d 113) and (2) is it in the public interest that the service be rendered by Greyhound? Carolina has heretofore had no competition for through bus transportation between Raleigh and Charlotte, and its best revenue route has been the Raleigh-Charlotte route via Greensboro. Unquestionably the authority applied for by Greyhound will furnish competition. But the Commission finds in effect that the intrastate travel between these points and beyond is not of sufficient consequence to impair Carolina's financial position or its service. Furthermore, as we shall presently see, Carolina was also given authority over the same route, which will tend to minimize the competitive effect of Greyhound's franchise. It was concluded that

Queen City's service, one round-trip per day, is a small operation, and Greyhound's service over Queen City's route with closed doors will interfere very little with business Queen City has enjoyed. Perhaps the fact that led the Commission to grant the franchise to Greyhound rather than exclusively to Carolina or to Queen City is the showing of need for service between Charlotte and points on U. S. Highway 64. Greyhound already has the franchise along this highway, and through service from these points to Charlotte and return could not be rendered by Carolina or Queen City without a duplication of service along 64 from Asheboro to Raleigh. *Utilities Commission v. Coach Co., supra.*

Upon the same facts we might have reached a different result. But it is not for this Court to find the facts or to regulate utilities. *Utilities Commission v. Ray, supra.* "The decisions of the Utilities Commission must be within the authority conferred by the Act, yet the weighing of the evidence and the exercise of judgment thereon as to transportation problems within the scope of its powers are matters for the Commission." *Utilities Commission v. Motor Express,* 232 N.C. 180, 59 S.E. 2d 582.

Queen City contends that Greyhound's application should have been dismissed without a hearing for the reason that it proposed to duplicate Queen City's service over Highway 49. Queen City also contends that the Commission erred in granting Greyhound "closed door" authority over Queen City's route, because Greyhound did not apply for such authority at any time in the course of the proceeding.

It is true that Greyhound's application as filed sought to duplicate service on Queen City's route over Highway 49. It is also true that "no certificate shall be granted to an applicant proposing to serve a route already served by a previously authorized carrier unless and until the Commission shall find from the evidence that the service rendered by such previously authorized carrier is inadequate, and the certificate holder has been given reasonable time to remedy the inadequacy." G.S. 62-121.52(7).

The Commission did not grant the duplication of service requested by Greyhound. Instead, it granted only "closed door" authority over Queen City's route. G.S. 62-121.52(7) does not forbid authority to two or more carriers to traverse the same segment of a highway so long as they do not render duplicate service. The mere fact that the two carriers will use the same highway for a distance does not require a denial of the application. *Utilities Com. v. Coach Co., supra.*

The Commission need not approve or reject an application as submitted. It may attach to the certificate granted such reasonable terms,

conditions and limitations as the public convenience and necessity may require. G.S. 62-121.53. "Ordinarily, the procedure before such commission is more or less informal, and is not as strict as in civil cases, nor is it confined by technical rules; substance and not form is controlling." 73 C.J.S., Public Utilities, s. 49, p. 1115. In the proceeding before it the Commission is not confined to the immediate scope of the pleadings on file. It may enlarge the scope of the inquiry, and where the parties to be affected are before it, participate in the inquiry and make defense, they cannot complain of a departure from the pleadings. *Baltimore & O. R. Co. v. Public Service Commission*, 110 S.E. 475 (W. Va. 1922); *C. H. & D. Ry. Co. v. I.C.C.*, 206 U.S. 142. The authority granted Greyhound was less competitive to Queen City than that applied for. If Queen City was taken by surprise, the record does not disclose it.

As indicated above, the Commission granted Greyhound the certificate, with restrictions. The Commission declared: "To the extent that the contract (lease agreement between Carolina and Greyhound), its terms and conditions, are contrary and adverse to and in conflict with the provisions of this order they are vacated, voided, cancelled and declared null and of no effect." Carolina and Queen City appealed, and the Superior Court affirmed the Commission's order. In this, we find no error.

-II-

Case No. 467. On 27 September 1960 Carolina applied to the Commission for franchise authority from the junction of U. S. Highways 1 and 64, approximately two miles north of Apex, over U. S. Highway 64 to Asheboro, thence over N. C. Highway 49 to its junction with U. S. Highway 29, approximately six miles north of Charlotte, and return over the same route — "as an alternate route for operating convenience only, serving no intermediate points." Thus, Carolina applied for authority to operate with closed doors between Raleigh and Charlotte via Asheboro, seeking only point to point service over this route from Raleigh to Charlotte and return. It had previously had no franchise over the route described. Its purpose is to take advantage of the short route made available by the improvements on Highway 49, and to protect its Raleigh-Charlotte operations which it had previously enjoyed without serious competition.

Greyhound filed protest and intervened. After hearing, the Commission granted the application.

Greyhound contends that the application should have been dismissed for the reason that Carolina applied for an "alternate route for operating convenience only" and the route applied for does not qualify as an alternate route under the rules promulgated by the Commission.

According to the Commission's rule, an alternate route is "a designated highway or series of highways lying wholly within the State . . . over which a regular route motor carrier may operate in the interest of economy or convenience or to avoid congested areas . . . or other hazards on an authorized regular service route, deviating from a point on such authorized regular service route and returning at some other point on the same regular service route." [s. (b)(5) of Appendix of General Order B-4, promulgated 26 November 1958 pursuant to G.S. 62-121.60]. The route described in Carolina's application apparently does not comply with the foregoing rule for its termini connect with different service routes of Carolina.

Carolina agrees that the route described in its application is not the type of route referred to as an "alternate route" in the Commission's rule. But Carolina insists that, while the route will serve as an alternate route for its point to point service from Raleigh to Charlotte and return, its application is for a new service route for the operation of daily schedules between Charlotte and Raleigh in addition to the regular daily schedules in operation over its northern and southern routes. The application is filed on Commission's form M-1, pursuant to G.S. 62-121.52(b); applicant assumes the burden of showing public convenience and necessity; and proceedings are in conformity with G.S. 62-121.52. Regardless of the name given the proceeding, it is clear that the application is for franchise authority and not for alternate route authority, and the Commission so understood and dealt with the proceeding. Even if Carolina had sought alternate route authority under the Commission's rules, the power of the Commission is not restricted to the proceedings as commenced, but it may enlarge the scope of the inquiry beyond the issue raised by the pleadings where the parties to be affected are before the Commission, participate in the proceedings, have full opportunity to be heard, and are not misled as to the purpose of the hearing. 73 C.J.S. Public Utilities, s. 47, p. 1114. We do not understand that Greyhound contends it was taken by surprise.

It will be observed that franchise authority was also granted to Greyhound over this route, with closed door service only between Asheboro and Charlotte. The authority to Carolina is for closed door service for practically the entire route. "A traversing of the same high-

ways for certain distances by competing carriers may readily become necessary in the public interest and, in such an instance, more than one certificate may be granted, subject to such restrictions as will protect the authorized carrier in respect of that part of the highway to be traversed by both." *Utilities Com. v. Coach Co., supra.*

Among other things, the Commission found as a fact that "public convenience and necessity require the proposed service in addition to existing authorized transportation service and that applicant is fit, willing and able to properly perform the proposed service, and is solvent and financially able to furnish adequate service on a continuing basis." There is competent, material and substantial evidence to support this finding. The Charlotte-Raleigh service has historically been by Carolina's buses and routes, and Carolina has provided continuously the only intrastate motor bus service between these cities. This service has been the backbone of Carolina's operations in this State. The Charlotte-Raleigh operation has been the best in North Carolina as far as Carolina's passenger revenue is concerned. It has furnished revenues to support other operations. The shorter route via Asheboro will effect economies, reduce travel time, and increase bus travel. Granting of Carolina's application is necessary to protect the traffic now moving by Carolina between Charlotte and Raleigh, and to preserve to Carolina in the circumstances of new competition the passenger revenues essential to the maintenance of Charlotte-Raleigh service and service to other points. All these things the evidence tends to show.

It would seem that Greyhound is in poor position to oppose Carolina's application. The Commission granted similar authority to Greyhound on evidence which would have justified a denial. This gave Greyhound, for the first time, through service authority between Raleigh and Charlotte, over the shortest and most desirable route, and in direct competition with Carolina in a field that Carolina had occupied alone. It changed the competitive situation sharply in favor of Greyhound. The only possible protection for Carolina's position was the granting of its application.

From the order of the Commission allowing Carolina's application, Greyhound appealed. The Superior Court affirmed the Commission's order. In our opinion this result is proper.

-III-

Case No. 466. On 5 October 1960 Greyhound applied to the Commission for intrastate franchise authority on the route from Lexing-

ton over U. S. Highway 29 to Charlotte, combining this authority with the operation conducted by Greyhound between Winston-Salem and Lexington, and restricting the operation from Lexington to Charlotte against passengers whose entire ride is between Lexington and Charlotte or intermediate points.

The application was amended and finally Greyhound stipulated that "if any certificate is granted it will grant only authority to haul passengers from Winston-Salem or points beyond to Charlotte or points beyond and *vice versa,* without picking up or discharging any passengers, regardless of where originated, at any point between Winston-Salem or (and) Charlotte."

In final analysis Greyhound is asking for franchise authority for a service it has been rendering and may continue to render by virtue of the lease agreement between it and Carolina. It seeks only to set aside the lease agreement and to have the Commission grant it by certificate the same rights it has enjoyed by virtue of its contract.

The Commission found *inter alia* the following facts: (1) "Public convenience and necessity exists for and requires that the intrastate passenger service now being rendered by Greyhound between Lexington and Charlotte be continued; (2) The agreement or lease arrangement between Carolina and Greyhound . . . is not of such purport and substance as to be calculated to encourage and promote harmony among motor carriers of passengers; . . . (6) Greyhound should be granted authority to render this service under a franchise right of its own rather than under the existing lease arrangement or agreement."

It is conceded by all parties that public convenience and necessity requires the service that Greyhound has been rendering under the lease agreement, that it should be continued, and that Greyhound has the absolute right to continue the service under the terms of the lease agreement which were approved by the Commission.

However, the findings of fact do not support the conclusion that the lease agreement should be set aside and franchise authority be granted in lieu thereof. The only ground upon which the Commission undertakes to justify a revocation of its order approving the lease agreement is that the lease agreement "is not of such purport or substance as to be calculated to encourage or promote harmony among motor carriers of passengers," whatever that means. It is the policy of the law "to encourage and promote harmony among motor carriers of passengers," to be sure. G.S. 62-121.44; G.S. 62-121.48(3). However, there is no evidence tending to show, or explanation disclosing, how a certificate of the Commission of the same "purport and substance" as the lease agreement will better encourage and promote harmony be-

tween Greyhound and Carolina. Ordinarily a contract voluntarily made is more conducive to harmony that a judgment entered in an adverse proceeding. We can think of nothing which will effectively promote harmony between carriers when one is seeking to abrogate its solemn contract and take over business formerly enjoyed by the other. Moreover, the evidence does not show, and the Commission does not find, a change of conditions requiring, in the public interest, a rescission of the Commission's order approving the lease agreement. *Chicago Housing Authority v. Illinois Com. Com'n., supra.*

The Commission granted Greyhound's application and Carolina appealed. The Superior Court affirmed the Commission's order. We are of the opinion that the judgment should be reversed.

Case No. 465 — Affirmed.

Case No. 466 — Reversed.

Case No. 467 — Affirmed.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION v. HAYWOOD ELECTRIC MEMBERSHIP CORPORATION, BLUE RIDGE ELECTRIC ASSOCIATION, INCORPORATED, THE TOWN OF BRYSON CITY, THE FIVE-COUNTY COMMITTEE FOR T.V.A. POWER, THE COUNTY OF SWAIN, THE TOWN OF WEBSTER, THE COUNTY OF CHEROKEE, THE EASTERN BAND OF CHEROKEE INDIANS, THE WEST MACON GRANGE, THE SOUTH MACON GRANGE, IOTLA GRANGE, THE TOWN OF ANDREWS, ROBBINSVILLE GRANGE #1161, STECOAH GRANGE #1202, AND THE TOWN OF ROBBINSVILLE.

(Filed 19 July 1963.)

1. Utilities Commission § 9—

An order of the Utilities Commission must be predicated upon a finding of all the facts essential to a determination of the question in issue in order to permit a proper judicial review of its order. G.S. 62-26.3, G.S. 62-26.10.

2. Same; Electricity § 2— Commission held to have failed to find facts essential to support order approving sale of power facilities.

An order of the Utilities Commission granting a power company authority to sell its generating and transmission facilities to another power company and to abandon its obligations to the public under its certificate of public convenience and necessity upon the completion of the transfer, upon findings to the effect that the selling company was small and that it was not economically feasible for it to provide the increase in quantity of energy which its customers would need in the immediate future and

that the purchasing company could provide all energy needed in the foreseeable future and render more efficient service at less cost to the public than the selling corporation, must be set aside when there are no findings of fact supporting the conclusion that the cost of acquiring or constructing additional facilities by the selling corporation would be greater than economically feasible, and no findings in the record upon the evidence tending to show that the selling corporation could easily acquire additional energy for future expansion by purchase, exchange, and interchange of energy with other power companies, one of which was connected with TVA, etc.

3. Electricity § 2; Utilities Commission § 1—

A public service corporation operating under a certificate of public convenience and necessity may not be allowed to abandon its obligations to provide the authorized service to the public unless it establishes that the public no longer needs the service it was created to render, or that there is no reasonable probability of its being able to realize sufficient revenue to meet its expenses in the rendition of such service. G.S. 62-96.

4. Appeal and Error § 49—

A failure to find facts essential to the determination of the rights of the parties necessitates a remand of the cause to the fact finding agency.

APPEAL by protestants from *McKinnon, J.,* February 11, 1963 Civil Term of ALAMANCE.

In 1961 Duke Power Company (Duke) and Nantahala Power & Light Company (Nantahala) filed a joint application with the North Carolina Utilities Commission (Commission) seeking: (1) approval of a contract by Nantahala to sell at its depreciated cost ($4,000,000 when the petition was filed) to Duke with authority to Duke to operate: (a) all of Nantahala's distribution facilities in the six counties in which Nantahala operates, (b) all of Nantahala's transmission lines in those counties "except its 161-kv line extending from its interconnection with Tapoco, Inc. to its Thorpe hydroelectric generating plant; and its 66-kv line extending from its Thorpe Plant to its Tennessee Creek hydroelectric generating plant." (c) Nantahala's Bryson, Dillsboro, and Franklin hydroelectric generating plants having a total capacity of 2,245 kw, (d) "all of its substations, line terminals, circuit breakers, relays and other related facilities, except those necessary for the operation of the generating plants and transmission lines being retained by Nantahala Power and Light Company," (e) miscellaneous real and personal property; and (2) authorization to Nantahala "to abandon the operation of its electric distribution system in the area it now serves and the transmission and generating facilities herein described, upon the commencement of operations by Duke Power Company."

The authorization requested is predicated upon allegations that: Duke, a large utility company is qualified to provide adequate, efficient, and dependable electric service in the area presently served by Nantahala; Nantahala, a relatively small public utility, operates hydroelectric plants which have a peak capacity of approximately 42,200 kw, not sufficient to take care of the demand expected by 1965; Nantahala is without funds to provide the additional generating capacity needed by 1965; if permission is granted to Duke to purchase, it will assume operation of the distribution system serving all of the customers of Nantahala except Aluminum Company of America (Alcoa) and will continue in effect Nantahala's current rate schedule for a period of three years from the date of acquisition.

Haywood Electric Membership Corporation, created pursuant to G.S. 117-6 *et seq.*, Blue Ridge Electric Association, a Georgia corporation doing business in this state, Bryson City, Webster, Andrews, and Robbinsville, municipal corporations, Swain and Cherokee Counties, Eastern Band of Cherokee Indians, Five-County Committee for TVA Power, West Macon Grange, South Macon Grange, Iotla Grange, Robbinsville Grange #1161 and Stecoah Grange #1202, unincorporated associations (all collectively designated as protestants), as customers of Nantahala, sought permission and were permitted to intervene in opposition to the authorization sought. Their answers question the desirability of permitting Duke to serve the territory now served by Nantahala. Additionally they allege the permission sought by Nantahala to divert the energy developed by its hydroelectric plants from public to private use would constitute a distinct disservice to the public.

Hearings were held. The Commission, by majority vote, made "findings of fact" and on these findings it reached "conclusions." Based on the findings and conclusions, it granted Nantahala authority to sell, Duke authority to purchase and operate in the described territory upon condition that Nantahala's rates in effect when the application was filed should continue in effect for a period of three years after the acquisition, unless changed by order of the Commission, and gave Nantahala permission "to abandon its obligation to serve the public in the area involved under its Certificate of Public Convenience and Necessity upon the completion of the transfer of the properties and the beginning by Duke Power Company of the service hereinabove authorized."

Commissioner Eller filed a lengthy dissent, taking issue with the findings and conclusions made. He set out in detail additional facts he thought established by the evidence and necessary for a decision.

Protestants appealed to the Superior Court.

The Superior Court overruled each of protestants' exceptions and affirmed the order of the Commission.

E. B. Whitaker, Lacy H. Thornburg, Vaughan S. Winborne, and William T. Crisp for potestant appellants.

Carl Horn, Jr., General Counsel Duke Power Company and Joyner and Howison by R. C. Howison, Jr., for Nantahala Power and Light Company.

RODMAN, J. Art. 2, c. 62 of the General Statutes prescribes the procedure in matters before the Commission. As a part of that article, G.S. 62-26.3 requires: "All final orders and decisions of the Commission shall be sufficient in detail to enable the court on appeal to determine the controverted questions presented in the proceedings and shall include (1) findings and conclusions and the reasons or basis therefor upon all the material issues of fact, law, or discretion presented in the record, and (2) the appropriate rule, order, sanction, relief, or statement of denial thereof."

The Commission's findings, summarized or quoted, follow: (1) Notice of the time fixed for the hearing was published; (2) and (3) Nantahala and Duke are public utilities engaged in generating, transmitting, distributing, and selling electric current and energy; (4) a description of the properties as set out in the application; (5) the price to be paid; (6) the date when the sale will become effective; (7) the area in which Nantahala now operates, which Duke will serve if the sale is approved; (8) the dates when the four hydroelectric plants which Nantahala proposed selling were built and the dates when the seven plants which it proposed retaining were built; (9) "That from the combined capacities of the aforesaid plants Nantahala has a dependable capacity of 41 megawatts; that the plants are, of course, under favorable conditions capable of producing more electricity than 41 megawatts; that they have at one time produced a peak capacity of 42 megawatts; that Nantahala has approximately 16,600 customers; that for the calendar year of 1960 these customers used approximately 460 millions kwh of electricity; that it is necessary, in order to serve its public utility customers, that Nantahala have sufficient primary dependable power to meet these requirements; that Nantahala's public utility customers' use of electric energy has been increasing over the past years; that, by projecting this increase at a reasonably anticipated rate of increase into the future, Nantahala estimates that its present dependable power capacity will carry it through

the year 1965; that after the year 1965 it will not have sufficient generating facilities to enable it to produce dependable power in sufficient capacity to supply the needs and requirements of its public utility customers; that Nantahala has made studies and estimates looking toward the acquiring of additional land for and the construction of additional hydroelectric generating facilities so as to enable it to meet its anticipated requirements; that, from these studies and estimates, it appears that the cost of acquiring and constructing the additional facilities necessary will be greater than economically feasible"; (10) Duke presently serves an area of approximately 20,000 square miles with a population of 2,900,000; its lines extend into Transylvania County where it serves the towns of Brevard and Rosman; it has 12,700 acres of land in the southwest part of Transylvania County which can be used in the future for a hydroelectric generating plan; Duke is interconnected with Carolina Power & Light, Virginia Electric & Power, and South Carolina Electric & Gas; these connections lend strength to each of the utilities; Duke proposes to construct a transmission line into the Nantahala area if the sale is approved and "can put electric current and energy into the area economically and at reasonable rates;" (11) Duke is qualified and financially able to fulfill all its obligations; (12) neither Duke nor any other public utility company has offered to purchase the remaining hydroelectric generating plants of Nantahala; (13) it is Duke's policy to advertise the services it can render; (14) "That it will be in the public interest for Duke to acquire from Nantahala its distribution lines, generating facilities and properties, as hereinbefore set out, and operate them, serving the public in the area now served by Nantahala."

After stating protestants' contention that Nantahala, a public service corporation, authorized to exercise the power of eminent domain, could not turn its back on the public and deliver all the power it generates to its sole stockholder, Alcoa, the Commission said: "The nature of hydroelectric generating plants being what it is, it would seem logical to assume that Nantahala owns in fee simple the lands on which these plants and their storage lakes and ponds are situate. Except for the inference implied by the statutory authority conferred upon all public utilities, the record is void of any competent evidence which would support a finding of fact that any particular tract of land was acquired for these purposes by the use, or threat of use, of the power of eminent domain. . .The law applicable to abandonment of easements acquired by eminent domain is different from that which applies to lands acquired in fee."

The Commission concluded "the sale and transfer will be in the public interest," the sale should be approved, and when consummated Nantahala "should be relieved of its obligation to serve and should be permitted to abandon its Certificate of Public Convenience and Necessity."

The exceptions and assignments of error raise these questions: (1) Has the Commission found facts as required by G.S. 62-26.3? (2) Is the Commission's order based on a misinterpretation of the law applicable to the facts of the case?

The Commission is required by G.S. 62-26.3 to find all facts essential to a determination of the question at issue. Having found the facts, it may then make factual conclusions. *Utilities Com. v. State and Utilities Com. v. Telegraph Co.*, 239 N.C. 333, 80 S.E. 2d 133, 43 Am. Jur. 718. The reason for compelling adequate factual findings is to permit proper judicial review. G.S. 62-26.10.

The duty imposed by G.S. 62-26.3 is similar to the duty imposed on a judge of the Superior Court by G.S. 1-185 when a jury trial is waived, and on the Industrial Commission by G.S. 97-84 before it can award or deny compensation.

Bobbitt, J., speaking with reference to the duty imposed by G.S. 97-84, said in *Guest v. Iron & Metal Co.*, 241 N.C. 448, 85 S.E. 2d 596: "Specific findings of fact by the Industrial Commission are required. These must cover the crucial questions of fact upon which plaintiff's right to compensation depends. (Citing authorities). Otherwise, this Court cannot determine whether an adequate basis exists, either in fact or in law, for the ultimate finding as to whether plaintiff was injured by accident arising out of and in the course of his employment."

The reasons assigned to secure approval of the sale and release of Nantahala from its obligation to the public are twofold: (1) Nantahala, a small company, does not have and cannot economically provide the energy which the public in its service area will in the near future demand. (2) Duke, an electrical giant, has an abundance of power. It can provide all electricity which is now or may be needed in the foreseeable future. Not only does it have adequate power but it can render more efficient service at less cost to the public than Nantahala can.

As said by the Commission, protestants do not challenge Duke's ability to meet public demand. What protestants say is Nantahala can meet the demand and do so at less cost to the public than the service would cost if rendered by Duke.

To support their contention protestants point to the evidence of applicants to establish these facts:

(1) COST OF SERVICE: Duke, while possessing large water power, depends primarily on steam to generate electricity, using its hydroelectric power during short periods of peak demands. As a result it cost Duke 12.138 mills per kw for electricity generated in 1960. Nantahala, relying exclusively on water power, generated electricity at a cost of 7.8 mills per kw. Thus the commodity each had for sale cost Duke nearly half a cent more than it cost Nantahala. Nantahala now has the facilities necessary to transmit the current it generates to its distribution system. Duke, on the other hand, will have to build a transmission line connecting its generating plants with the distribution system which Nantahala wishes to sell. This new transmission line will cost Duke $2,226,000.

(2) NANTAHALA'S ABILITY TO SERVE: Mr. Archer, Nantahala's vice president, testified: "Hydroelectric plants produce both primary energy, which is completely dependable, and secondary energy, which is not dependable. This is due to the fact that streamflows vary from year to year and the amount of electricity which can be generated is dependent entirely upon the amount of water flowing into the reservoirs. In order for the energy to be primary, it must be that energy which can be produced in times of lowest stream-flow. Only primary energy is used by our customers other than Alcoa. All of the secondary generation, and that part of the primary generation which is left after all our other customers are served, is taken and paid for by Alcoa whether it can use this generation or not."

Nantahala's witness Phillips testified that he made studies of stream flows affecting Nantahala's plant for the period from 1924 to 1960, both inclusive. He testified: "We concluded that stream flows experienced during the 18-month period from June 1930 through November 1931 represented the most adverse period of record or the 'critical period' as it is usually termed. This 18-month period is the period in which the sum of the energy from stream-flow and the energy from storage produces the minimum monthly energy supply available from Nantahala's plants. In all other months of the thirty-six year period, the available energy would be equal to or greater than the monthly generation available during the critical period." He concluded that during this 18-month period Nantahala had a total generating capacity of 540,000,000 kwh or an average of 30,000,000 kwh per month. "Since the generation of a group of hydroelectric plants

during the critical period represents its assured supply of energy—usually referred to as its supply of primary energy—the primary energy of the Nantahala system is 360 million kilowatt-hours per year." He further testified: "I have spent my lifetime on water problems and I think the probability of a lower water period is always present as you have a cycle of about 150 years between minimum water."

Protestants inquire: Is it proper to find that Nantahala's dependable capacity is limited to 41 megawatts because once in a thirty-six-year period the stream flow would have produced only that quantity, particularly in view of the fact that these adverse conditions occur in cycles approximating 150 years apart?

Nantahala's kwh sales to the public and to its parent during the period 1941-1960 are shown in the following tabulation:

	KWH SALES	
YEAR	PUBLIC	ALCOA
1941	25,984,275	28,525,000
1942	15,624,515	224,605,383
1943	16,493,930	320,776,268
1944	18,816,597	205,616,125
1945	28,155,912	205,500,700
1946	23,092,921	296,697,964
1947	26,542,909	277,882,600
1948	31,924.079	259,283,160
1949	37,436,526	376,799,145
1950	54,869,704	378,183,840
1951	63,423,669	274,107,200
1952	77,204,105	322,902,800
1953	88,653,730	199,706,760
1954	90,742,310	265,448,248
1955	115,735,461	257,318,132
1956	122,938,976	183,203,452
1957	125,253,483	355,560,020
1958	137,948,583	328,132,000
1959	158,937,298	203,507,964
1960	172,451,768	256,808,780

Mr. Philips further testified: "In an average year the energy generated will amount to 439 million kilowatt-hours per year." This is 50

megawatts, 22% greater than the "dependable capacity" found by the Commission.

Nantahala does not propose shedding its duty to the public because the service it undertook to render is no longer needed. It seeks to do so upon the hypothesis that there is no reasonable probability of its being able to realize sufficient revenue from the services rendered to meet its expenses, contending the Commission's finding "that Nantahala has made studies and estimates looking toward the acquiring of additional land for and the construction of additional hydroelectric generating facilities so as to enable it to meet its anticipated requirements; that from these studies and estimates, it appears that the cost of acquiring and constructing the additional facilities necessary will be greater than economically feasible" is sufficient to meet the statutory condition for abandonment. G.S. 62-96.

We are not certain whether the Commission meant Nantahala had concluded the cost of acquiring and constructing the additional necessary facilities "would be greater than economically feasible," or whether that was the conclusion reached by the Commission from the evidence. In either event it is a mere conclusion. There are no facts found by the Commission on which to base the conclusion.

The evidence to which the Commission refers with respect to the cost of additional hydroelectric power comes from Nantahala's officials. They refer to two sites available to Nantahala for further development, one known as Wesser, the other as Needmore. The latter is the larger of the two, and cost of energy generated there will be less than at Wesser.

Needmore would have a capacity of 118,000,000 kwh of "primary energy." The estimated cost of generating electricity at that site is 13.3 mills per kw as compared with Nantahala's present cost of 7.8 mills per kw and Duke's cost of 12.138 mills per kw. While it would cost more to generate electricity at Needmore that it costs Duke, seemingly the cost of electricity generated by the present plants and Needmore would average less than 10 mills per kw—2 mills less than Duke's cost. The Commission has not interpreted nor made findings based on this testimony.

The mere fact, as the Commission seems to have assumed, that additional hydroelectric power would be unduly expensive (if such is the case) would not suffice to relieve Nantahala of the responsibility of seeking other sources so as to assure necessary supplementary power during periods of abnormally low stream flow.

The evidence is that Alcoa, sole stockholder of Nantahala and Tapoco, Inc., an owner of hydroelectric plants in this state, entered

into a contract with TVA in 1941 which has since been amended and supplemented. The subsidiaries of Alcoa, by virtue of this agreement (called the Fontana Agreement), sell (in the language of the contract, "exchange") all the electricity they produce. The electricity "exchanged" is paid for by "interchange electricity."

The public has the first claim on all power generated by Nantahala. *Utilities Com. v. Mead Corp.*, 238 N.C. 451, 78 S.E. 2d 290. Would not TVA, in recognition of this sound legal principle, consent to rearrange the "exchange" and "interchange" of power so as to assure Nantahala's getting such additional power as it might need in periods of emergency created by abnormally low stream flow? It is stated in one of the exhibits offered by applicants: "TVA had a variety of contractual relations with fourteen privately owned utility companies and one generation and transmission cooperative. The contracts with these utilities provide for interconnection of facilities for interchange, sale and purchase of power, for emergency standby services, or various combinations of these." We find nothing to indicate this field has been explored.

Commissioner Eller in his dissenting opinion refers to Tapoco, Inc. as a public utility with a surplus of primary power. It is already connected with TVA and with Nantahala. If in fact Tapoco has power not used to serve the public, should that power not be made available to Nantahala and other utility companies in emergencies to meet the public demand?

Nantahala's officials also testified to negotiations with Duke Power Co. and Carolina Power & Light Co. with respect to supplementing Nantahala's "primary energy" when needed. Again the Commission made no findings with respect to this important phase of the case.

The Commission said: "The law applicable to abandonment of easements acquired by eminent domain is different from that which applies to lands acquired in fee." Assuming the foregoing statement of law to be correct, we are unable to relate it to the right of Nantahala to cease serving the public.

A corporation created by governmental authorization for the purpose of serving the public at a profit to itself should be given wide latitude in estimating the extent to which the public will call on it for service, and no order should be made which will thwart it in the performance of its duty to the public; but when a corporation which has accepted the state's grant of authority to acquire property for use in serving the public seeks to relieve itself of the responsibility imposed when it accepted its charter, a different and more stringent rule must be applied. The Legislature has so declared. It must es-

tablish that the public no longer needs the service which it was created to render or that there is no reasonable probability of its being able to realize sufficient revenue by the rendition of such service to meet its expenses. G.S. 62-96. As said by Barnhill J. (later C.J.), in *Sinclair v. R.R.*, 228 N.C. 389, 45 S.E. 2d 555: "While a public utility such as a railroad retains its franchise, it owes to the State and the public the duty of continuous operation." *Utilities Com. v. R.R.*, 254 N.C. 73, 118 S.E. 2d 21; 43 Am. Jur. 621.

A failure to find facts essential to a determination of the rights of the parties necessitates a remand to the person or agency charged with that responsibility. *Jamison v. Charlotte,* 239 N.C. 423, 79 S.E. 2d 797; *Woodard v. Mordecai,* 234 N.C. 463, 67 S.E. 2d 639; *Shore v. Bank,* 207 N.C. 798, 178 S.E. 572.

Because the Commission has failed to find essential facts and may have misinterpreted the law, the judgment of the Superior Court is reversed with directions to the Superior Court to remand to the Utilities Commission to make necessary findings and conclusions on which it may base its order.

Reversed and remanded.

GUILFORD REALTY AND INSURANCE COMPANY, PLAINTIFF v. BLYTHE BROTHERS COMPANY, A CORPORATION, AND HOWARD CONSTRUCTION COMPANY, A CORPORATION, INDIVIDUALLY AND JOINTLY, DOING BUSINESS AS BLYTHE-HOWARD COMPANIES, DEFENDANTS.

AND

J. CLARENCE COGGIN AND WIFE, BETTY A. COGGIN, PLAINTIFFS v. BLYTHE BROTHERS COMPANY, A CORPORATION, AND HOWARD CONSTRUCTION COMPANY, A CORPORATION, INDIVIDUALLY AND JOINTLY, DOING BUSINESS AS BLYTHE-HOWARD COMPANIES, DEFENDANTS.

(Filed 19 July 1963.)

1. Pleadings § 14—

G.S. 1-128 applies to all demurrers, written or oral, and a demurrer asserting in general terms that the complaint did not allege facts sufficient to constitute a cause of action, without specifically stating the grounds of objection, may be disregarded. G.S. 1-127(6).

2. Appeal and Error § 7—

Upon demurrer *ore tenus* in the Supreme Court for failure of the complaint to state a cause of action, the Court will consider only the ground upon which the complaint is challenged in the brief.

3. **Negligence § 4; Trespass § 1—**

Blasting operations are inherently dangerous, and persons using explosives may be held liable as for a trespass, irrespective of any question of negligence, for damage from concussion or vibration to nearby dwellings proximately caused by an explosion, even though the explosion throws no rocks or debris on the property, and the complaint in this action *is held* sufficient to state a cause of action on this ground.

4. **Pleadings § 14—**

A motion to strike all of the allegations of a further answer and defense is in effect a demurrer to the further answer and defense, and is governed by the rules applicable to demurrers generally.

5. **Pleadings § 12—**

The sufficiency of the allegations of the further answer to set up a defense may be tested by demurrer.

6. **Trespass § 1; Municipal Corporations § 10; Eminent Domain § 2—**

If plaintiff's dwelling is damaged as a result of concussion from the use of explosives in excavating for a sewer outfall line, the municipality is not immune from liability for such damage, even though the damage is caused in the performance of a governmental function, since it amounts to a "taking" of private property, and therefore, in an action against the city's contractor doing the excavation work, the contractor's demurrer on the ground that it was clothed with the governmental immunity of the city, is properly overruled.

7. **Municipal Corporations § 10; Master and Servant § 20—**

A city may not escape liability for damage to nearby dwellings caused by concussion from explosions in excavating for a governmental purpose by employing an independent contractor to do the work.

8. **Eminent Domain § 1—**

The constitutional prohibition against the taking of private property for a public use without just compensation is self-executing, and when no statute provides procedure to recover compensation under the circumstances of the taking, the owner may maintain an action to obtain just compensation therefor.

9. **Municipal Corporations § 11; Eminent Domain § 15—**

There being no allegation that defendant in the construction of a sewer line under contract with a municipality acted under the direction and supervision of the city in setting off the explosion causing damage to plaintiff's dwelling or that the work was done in strict conformity and as required by the plans and specifications of the contract with the city, the question whether the defendant may be held liable or whether only the city is liable therefor, is not presented.

APPEALS by defendants from *Crissman, J.*, February 18, 1963, Civil Session of GUILFORD, High Point Division.

Civil actions to recover for damage to real property in High Point, North Carolina.

The corporate plaintiff owns the property designated 1823 Eastchester Drive. The plaintiffs Coggin own the property designated 1829 Eastchester Drive. A dwelling house is located on each of said properties.

The complaints, answers, motions to strike, demurrers *ore tenus,* orders and appeal entries in the two actions are the same in all material respects except as to the identity of the plaintiff(s), the property involved, and the amount of damages. Hereafter, the word "plaintiff" will refer to the plaintiff(s) in each of the two actions.

Plaintiff alleged defendants, on the 9th, 10th, and 11th days of May, 1961, "undertook to excavate and construct a ditch some twenty feet deep across an easement running near and upon plaintiff's property, for the purpose of laying a sewer outfall line for The City of High Point"; that, in the course of such excavation, defendants "elected to use and did use certain explosive compounds for the purpose of dislodging portions of an extensive and deep stratum of rock which lay below the surface of the earth along the course through which said sewer outfall line was being run"; that, in excavating said ditch by the use of explosives, defendants "knowingly and unlawfully engaged in ultra-hazardous activities, in that they set off and discharged numerous explosions upon said stratum of rock in close proximity to plaintiff's said dwelling house"; that "(s)aid explosions produced violent concussions and vibrations of the earth in the vicinity thereof, and particularly in the earth around and beneath said stratum of rock, running along the course of said sewer outfall line and to and under the plaintiff's said dwelling house"; and that, as a direct and proximate result of defendants' "said unlawful conduct and actions," plaintiff's dwelling house and property were shaken and jarred by said concussions and vibrations of the earth and greatly damaged in the manner and to the extent specifically alleged.

Answering, defendants alleged, *inter alia,* that they, on or about January 17, 1961, entered into a contract with the City of High Point (city) for the construction of a sewer system in accordance with plans and specifications adopted by the city prior to its call for bids; that plaintiff voluntarily executed and delivered to the city a right of way deed; that defendants, during May, 1961, were engaged in the performance of said contract; that it was necessary for defendants to use explosives; that the explosives were used for the necessary purposes of the city as provided in said contract; that "the explosives were at all times used in accordance with the obligations imposed by law and

by the agreement between these defendants and the City of High Point and between the plaintiff and the City of High Point"; that the city, in entering into said contract with defendants, "provided responsible means for the performance of its governmental function"; and that "the defendants in the performance of the terms and provisions of the contract including the specific performance relating to the area over the right-of-way granted to the City of High Point by the plaintiff properly, carefully and legally performed the duties imposed upon them which constituted an exercise of the governmental function for and by the City of High Point."

Plaintiff moved to strike from the answer a portion of Article VII, a portion of Article VIII, and all of the further answer and defense. These portions of the answer contained the allegations summarized in the preceding paragraph. At the hearing on plaintiff's motion to strike, defendants demurred *ore tenus* to the complaint on the ground it did not state facts sufficient to constitute a cause of action.

The order entered by Judge Crissman "allowed in all respects" plaintiff's motion to strike and overruled defendants' demurrer *ore tenus*. Defendants excepted and appealed from the portion of the order allowing plaintiff's motion to strike. Defendants excepted to the portion of the order overruling their demurrer *ore tenus* and this Court granted *certiorari* for review of this ruling.

Haworth, Riggs, Kuhn & Haworth and Schoch & Schoch for plaintiff appellees.

Sapp & Sapp for defendant appellants.

BOBBITT, J. This appeal presents two questions: 1. Does the complaint state facts sufficient to constitute a cause of action? 2. *If so,* do the facts alleged in the challenged portions of the answer constitute a defense to plaintiff's alleged cause of action?

Defendants, in their demurrer *ore tenus*, asserted in general terms that the complaint did not allege facts sufficient to constitute a cause of action. G.S. 1-127(6). They did not, so far as the record shows, "distinctly specify the grounds of objection to the complaint" and their demurrer "might well have been disregarded" by the court below. *Griffin v. Bank,* 205 N.C. 253, 171 S.E. 71. G.S. 1-128 applies to all demurrers, written or oral. *Seawell v. Cole,* 194 N.C. 546, 140 S.E. 85; *Adams v. College,* 247 N.C. 648, 654, 101 S.E. 2d 809. The court below did not disregard but overruled defendants' demurrer *ore tenus*. This Court granted *certiorari* to review this ruling. Consideration of defendants' demurrer *ore tenus* in this Court is limited to the ground

on which the complaint is now challenged as insufficient by defendants' brief, namely, plaintiff's failure to allege that negligence on the part of defendants proximately caused plaintiff's damage.

In testing the sufficiency of the complaint, factual allegations deemed admitted by the demurrer *ore tenus* include the following: In order to dislodge portions of an extensive and deep stratum of rock, defendants elected to use certain explosive compounds and set off numerous explosions upon said stratum of rock *in close proximity* to plaintiff's dwelling house. These explosions produced violent concussions and vibrations of the earth around and beneath said stratum of rock. The said stratum of rock extended to and under plaintiff's dwelling house. The concussions and vibrations greatly damaged plaintiff's dwelling house and property.

The question is whether defendants, upon the facts alleged, would be liable for concussion and vibration damage to plaintiff's dwelling house and property proximately caused by their use of explosives in blasting.

It appears that in the prior decisions of this Court involving personal injuries or property damage caused by blasting (with the exception noted below) the plaintiff's action was based on negligence. This was true in *Wiggins v. R.R.*, 171 N.C. 773, 89 S.E. 18, where this Court, in a *per curiam* opinion, said: "We are of opinion that there is abundant proof of negligence (even if proof of negligence be necessary where such a trespass is committed upon the property and rights of another) to justify submission of the issues to the jury." In *Cobb v. R.R.*, 172 N.C. 58, 89 S.E. 807, the plaintiff's action was grounded on trespass rather than on negligence. This Court upheld an order continuing the restraining order to the final hearing. The decision was predicated upon the proposition that the invasion of the plaintiff's property by casting rocks and debris thereon by blasting constituted a trespass and the defendant was responsible for the damage caused thereby. Later, after trial, in *Cobb v. R.R.*, 175 N.C. 130, 95 S.E. 92, *the plaintiff* appealed from a judgment based on a verdict that he had been damaged "by the trespasses of the defendants, as alleged" but that such trespasses were not committed "wantonly and willfully." In *Asheville Const. Co. v. Southern Ry. Co.*, 4 Cir., 19 F. 2d 32, Circuit Judge Parker said: "There can be no doubt, we think, that where one, in the carrying on of blasting operations, throws rock or debris on the property of another, he is liable for the damage done, on the principle that he is guilty of trespass, and quite irrespective of the question of his negligence."

"Blasting is considered intrinsically dangerous; it is an ultra-hazardous activity, at least in populated surroundings, or in the vicinity of dwelling places or places of business, since it requires the use of high explosives and since it is impossible to predict with certainty the extent or severity of its consequences." 35 C.J.S., Explosives § 8(a).

"The decided weight of authority supports the view that where one explodes blasts on his own land and thereby throws rock, earth, or debris on the premises of his neighbor, he commits a trespass and is answerable for the damage caused, irrespective of whether the blasting is negligently done." 22 Am. Jur., Explosions and Explosives § 53.

In *Wallace v. A. H. Guion & Company* (S.C.), 117 S.E. 2d 359, the complaint alleged concussion and vibration damage to the plaintiff's residence caused by the use of explosives by the defendant while engaged in excavating a ditch for a sewer line. The Supreme Court of South Carolina held the complaint was not demurrable on account of the plaintiff's failure to allege negligence. We quote the following from the opinion of Chief Justice Stukes:

"2. Harper and James, Torts, 812 et seq., sec. 14.6, contains excellent review of the authorities. The authors advocate the general rule which we follow. We quote briefly from their conclusion: 'Blasting operations are dangerous and must pay their own way. . . .The principle of strict or absolute liability for extrahazardous activity thus is the only sound rationalization.'

"This majority rule of liability without allegation and proof of negligence has been adopted by the American Law Institute, Restatement of Torts, Vol. III, sec. 519, in which it is said in sec. 520, at page 44, 'Blasting is ultrahazardous because high explosives are used and it is impossible to predict with certainty the extent or severity of its consequences.' We think that is the better reasoned rule and, supported as it is by the majority of the courts, we follow it. This requires affirmance of the order under appeal."

"There is a conflict of authority as to whether one who, by blasting with powerful explosives, produces severe concussions or vibrations in surrounding earth and air and so materially damages buildings belonging to others is liable, irrespective of negligence on his part. According to one theory, since recovery is permitted for damage done by stones or dirt thrown upon one's premises by the force of an explosion upon adjoining premises, there is no valid reason why recovery should not be permitted for damage resulting to the same property from a concussion or vibration sent through the earth or the

air by the same explosion. There is really as much a physical invasion of the property in one case as there is in the other; and the fact that the explosion causes stones or other debris to be thrown upon the land in one case, and in the other only operates by vibrations or concussions through the earth and air, is held to be immaterial." 22 Am. Jur., Explosions and Explosives § 54. It is stated in 35 C.J.S., Explosives § 8(a) that this is the rule "more generally adopted." See Annotation: "Liability for property damage by concussion from blasting," 20 A.L.R. 2d 1372, 1375 *et seq.*

In *Exner v. Sherman Power Const. Co.*, 2 Cir., 54 F. 2d 510, 80 A.L.R. 686, in which the rule of absolute liability is held applicable to concussion and vibration damage as well as to damage caused by actual trespass, Circuit Judge Augustus N. Hand said: "It is true that some courts have distinguished between liability for a common-law trespass, occasioned by blasting, which projects rocks or debris upon the property or the person of the plaintiff, and liability for so-called consequential damages arising from concussion, and have denied liability for the latter where the blasting itself was conducted at a lawful time and place and with due care. (Citations) Yet in every practical sense there can be no difference between a blasting which projects rocks in such a way as to injure persons or property and a blasting which, by creating a sudden vacuum, shatters buildings or knocks down people. In each case, a force is applied by means of an element likely to do serious damage if it explodes. The distinction is based on historical differences between the actions of trespass and case and, in our opinion, is without logical basis." Judge Hand then cites numerous decisions in which the distinction was rejected. The distinction is also rejected in Prosser on Torts, 2nd Ed., § 59, p. 336.

For a valuable discussion, with citations in accord with the majority rule of absolute liability and others in accord with the minority rule, see Comment Note by John Bryan Whitley appearing in Volume 40, page 640, of the North Carolina Law Review. In addition to *Wallace v. A. H. Guion & Company, supra,* recent decisions adopting the majority rule include *Whitney v. Ralph Myers Contracting Corporation* (W. Va.), 118 S.E. 2d 622, and *Enos Coal Mining Company v. Schuchart* (Ind.), 188 N.E. 2d 406.

In accord with the majority rule, which we adopt, defendants, upon the facts alleged *in the complaint,* and nothing else appearing, would be liable for concussion and vibration damage to plaintiff's dwelling and property proximately caused by their use of explosives in blasting. It may be inferred from plaintiff's factual allegations that *the blasting* was within "an easement running near and upon plaintiff's

property." Plaintiff alleged that the explosions were upon an extensive and deep stratum of rock "in close proximity to plaintiff's said dwelling house." It is noted: While plaintiff alleged that defendants "were engaged in a joint venture for the construction of an outfall sewer line *for* The City of High Point," (Our italics) the complaint contains no allegation as to the contractual relationship subsisting between defendants and the City of High Point or with reference to whether defendants acted in compliance with such contract, if any, as may have subsisted between defendants and the City of High Point. Under these circumstances, we are constrained to hold that defendants' demurrer *ore tenus* was properly overruled.

The next question for consideration is whether the facts alleged in the challenged portions of the answer constitute a defense to the cause of action alleged by plaintiff.

Plaintiff's motion to strike is addressed to defendants' further answer and defense and, in substance, if not in form, is a demurrer. (The challenged allegations in Article VII and in Article VIII relate solely to matters pertaining to defendants' further answer and defense and will be considered as if a part thereof.) The court, in effect, sustained a demurrer to defendants' further answer and defense.

The rules applicable when the sufficiency of a pleading is challenged by a demurrer apply in determining the sufficiency of defendants' further answer and defense. *Jewell v. Price,* 259 N.C. 345, 348, 130 S.E. 2d 668, and cases cited; Strong, N. C. Index, Vol. 3, Pleadings § 12.

Defendants' factual allegations, deemed admitted by plaintiff's motion to strike, include the following: Defendants were engaged in construction of a sewerage system for the City of High Point in accordance with plans and specifications prescribed by the City of High Point and set forth in their contract with the City of High Point. It was necessary to use explosives and explosives were used for the necessary purposes of the city as provided in said contract.

Power "to acquire, provide, construct, establish, maintain and operate a system of sewerage for the city" is conferred upon municipal corporations by G.S. 160-239. Power to acquire by condemnation, as provided by G.S. 40-11 *et seq.*, "any land, right of way, water right, privilege, or easement," necessary to establish such sewerage system, G.S. 160-204, is conferred by G.S. 160-205.

Defendants contend the City of High Point was engaged in the performance of a governmental function and that "plaintiffs have not alleged that defendants have done more than High Point could do with immunity." Plaintiff contends (1) that the City of High Point is

not immune from liability for plaintiff's damage, and (2) that the immunity, if any, of the City of High Point affords no protection to defendants.

There is a conflict of authority in other jurisdictions as to whether a municipal corporation is performing a governmental function when engaged in the *construction* of a sewerage system. 63 C.J.S., Municipal Corporations § 1049; 38 Am. Jur., Municipal Corporations § 585; McQuillin on Municipal Corporations, 3rd Edition, Vol. 18, § 53.125, and cases cited. No decision of this Court determinative of the precise question has come to our attention. A determination of the question is not necessary to disposition of this appeal; and, in view of defendants' meager factual allegations, further discussion of the question is deemed inappropriate.

Is the City of High Point immune from liability on account of the damage to plaintiff's dwelling house and property?

While defendants alleged they contracted to construct the sewerage system for the City of High Point in accordance with plans and specifications prescribed by the City of High Point and set forth in the contract, they did not attach a copy of the contract to their pleading and did not, except as indicated herein, allege the terms of the contract. In short, defendants' pleading does not disclose whether, under the subsisting contractual relationship, defendants were agents or independent contractors. Be that as it may, the use of explosives in blasting under the circumstances alleged by plaintiff must be considered inherently or intrinsically dangerous; and the City of High Point, if liable for the damage if caused by its agents, could not evade liability by employing an independent contractor to do the work. 57 C.J.S., Master and Servant § 590; 35 C.J.S., Explosives § 8(e); 22 Am. Jur., Explosions and Explosives § 57; McQuillin on Municipal Corporations, 3rd Edition, Vol. 18, § 53.76(3); *Arthur v. Henry,* 157 N.C. 393, 73 S.E. 206; *Dunlap v. R.R.,* 167 N.C. 669, 670, 83 S.E. 703, and cases cited; *Embler v. Lumber Company,* 167 N.C. 457, 83 S.E. 740.

"It is well recognized with us that unless a right of action is given by statute, municipal corporations may not be held civilly liable to individuals for 'neglect to perform or negligence in performing duties which are governmental in their nature' and including generally all duties existent or imposed upon them by law solely for the public benefit." Hoke, J. (later C.J.), in *Harrington v. Greenville,* 159 N.C. 632, 75 S.E. 849. Prior decisions of this Court in which this legal principle has been applied are cited in *Rhyne v. Mount Holly,* 251 N.C. 521, 526, 112 S.E. 2d 40.

Plaintiff did not allege defendants were negligent in any respect. Indeed, they expressly disavow any intent to try the action on any theory of negligence. Defendants allege expressly that they exercised due care while performing their obligations under and in accordance with their contract with the City of High Point.

Conceding, without deciding, that the City of High Point would not be liable for personal injuries proximately caused by its agent or by an independent contractor when engaged in the performance of a governmental function, the factual situation now under consideration calls for the application of different legal principles.

It is settled law in this jurisdiction that municipalites, even though engaged in the performance of a governmental function, cannot establish and maintain a nuisance, causing appreciable damage to the property of a private owner, without incurring liability for such damage. "To the extent of the damage done to such property, it is regarded and dealt with as a taking or appropriation of the property, and it is well understood that such an interference with the rights of ownership may not be made or authorized except on compensation first made pursuant to the law of the land." *Hines v. Rocky Mount,* 162 N.C. 409, 78 S.E. 510; *Raleigh v. Edwards,* 235 N.C. 671, 71 S.E. 2d 396; *McKinney v. High Point,* 237 N.C. 66, 74 S.E. 2d 440; *McKinney v. High Point,* 239 N.C. 232, 79 S.E. 2d 730; *Young v. Asheville,* 241 N.C. 618, 86 S.E. 2d 408, and cases cited; *Spaugh v. Winston-Salem,* 249 N.C. 194, 105 S.E. 2d 610; *Rhyne v. Mount Holly, supra,* and cases cited.

It is fundamental law that when private property is taken for a public use or purpose, just compensation must be paid. *Eller v. Board of Education,* 242 N.C. 584, 89 S.E. 2d 144, and cases cited. "A constitutional prohibition against taking or damaging private property for public use without just compensation is self-executing, and neither requires any law for its enforcement, nor is susceptible of impairment by legislation." *Sale v. Highway Commission,* 242 N.C. 612, 617, 89 S.E. 2d 290. ". . . the owner, in the exercise of his constitutional rights, may maintain an action to obtain just compensation therefor." *Cannon v. Wilmington,* 242 N.C. 711, 89 S.E. 2d 595; *Eller v. Board of Education, supra; Sale v. Highway Commission, supra.* When private property is *taken* under circumstances such that no procedure provided by statute affords an applicable or adequate remedy, the owner, in the exercise of his constitutional rights, may maintain an action to obtain just compensation therefor. *Eller v. Board of Education, supra; Sale v. Highway Commission, supra.*

The test of liability is whether, notwithstanding its acts are governmental in nature and for a lawful public purpose, the municipality's acts amount to a partial taking of private property. If so, just compensation must be paid.

While the blasting causing the alleged damage occurred only on the 9th, 10th, and 11th days of May, 1961, the alleged damage to plaintiff's property was permanent in character and substantially impaired its value. In this factual situation, we perceive no sound reason why the alleged damage to and impairment in value of plaintiff's property should not be considered a partial taking or appropriation of plaintiff's property for which the City of High Point would be legally obligated to pay just compensation.

For present purposes, whether plaintiff's remedy against the City of High Point would be by a special proceeding in accordance with G.S. 40-11 *et seq.*, or by civil action is immaterial. The crucial point is that the City of High Point is not immune from liability for the damage to plaintiff's property.

Having reached the conclusion that, under the facts alleged, the City of High Point is *not* immune from liability for the damage to plaintiff's property, the question as to whether the immunity of the City of High Point, if it were immune, would extend to and protect defendants, does not arise. The appeal calls for consideration and application of different legal principles.

There is authority for the proposition that "(a) contractor or agent lawfully acting on behalf of a principal to whom the right of eminent domain has been accorded, in making a proposed public improvement, cannot be held personally liable for damages if such improvement is made without negligence on his part." *Tidewater Const. Corp. v. Manly* (Va.), 75 S.E. 2d 500; *Valley Forge Gardens v. James D. Morrissey, Inc.* (Pa.), 123 A. 2d 888, and cases cited.

While not necessary to decision of the precise question then presented, this Court in opinion by Ervin, J., in *Moore v. Clark*, 235 N.C. 364, 70 S.E. 2d 182, said: "A contractor who is employed by the State Highway and Public Works Commission to do work incidental to the construction or maintenance of a public highway and who performs such work with proper care and skill cannot be held liable to an owner for damages resulting to property from the performance of the work. The injury to the property in such a case constitutes a taking of the property for public use for highway purposes, and the only remedy available to the owner is a special proceeding against the State Highway and Public Works Commission under G.S. 136-19 to recover compensation for the property taken or damaged. (Citations) But if

the contractor employed by the State Highway and Public Works Commission performs his work in a negligent manner and thereby proximately injures the property of another, he is personally liable to the owner therefor. (Citations)" It is noted that *Moore v. Clark, supra,* was decided prior to our decisions in *Eller v. Board of Education, supra; Sale v. Highway Commission, supra*; and *Rhyne v. Mount Holly, supra.*

There is authority *contra*: *Berg v. Reaction Motors Div.* (N.J.), 181 A. 2d 487; *Whitney v. Ralph Myers Contracting Corporation, supra; Scranton v. L. G. De Felice & Son* (Conn.), 79 A. 2d 600.

This Court, upon the meager factual allegations in defendants' pleading, deems it inappropriate to state or approve a general rule with reference to the matters referred to in the preceding paragraphs.

Defendants alleged plaintiff granted (voluntarily) to the City of High Point a right of way but did not disclose the terms and provisions of the agreement. As indicated above, defendants did not allege verbatim or in substance the terms of the contract between defendants and the City of High Point. What were the plans and specifications? Did the contract contain provisions bearing upon the circumstances under which blasting was required or permitted? There are no allegations that the blasting by defendants was done under the supervision and direction of the City of High Point. It is noteworthy that in *Moore v. Clark, supra,* it was alleged that the road and drainage contractors "performed the work in strict conformity with the plans of the State Highway and Public Works Commission and *under the direction of its highway engineers.*" (Our italics)

We do not decide that defendants have no defense of the nature of that they attempt to allege, principally in terms of legal conclusions, in their pleading. Our decision is simply that *the facts* alleged by defendants are insufficient to constitute a defense to the cause of action alleged by plaintiff. On this ground, the judgment sustaining plaintiff's motion to strike is affirmed. Defendants may, if so advised, move for leave to amend.

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

Affirmed.

FARMERS COOPERATIVE EXCHANGE, INCORPORATED v. RAYMOND A. SCOTT, DORIS C. SCOTT AND SCOTT POULTRY COMPANY.

(Filed 19 July 1963.)

1. **Appeal and Error § 19; Reference § 4—**

When appellants have objected to an order of compulsory reference but have no exception to the order except in their assignments of error, their contention that it was error to order a compulsory reference prior to the determination of their plea in bar, is not properly presented, it being required that an assignment of error be supported by an exception duly noted in the record.

2. **Reference § 4—**

Where appellants have objected to an order of compulsory reference but do not enter an exception on the ground that the court could not order the reference prior to the determination of their plea in bar until the trial by jury in the Superior Court upon the referee's report, the exception is not to the order of compulsory reference when made and is ineffectual.

3. **Reference § 3—**

Where an action involves purchases on account over a period of years it cannot be said that the action does not require the examination of a long account within the meaning of the reference statute. G.S. 1-189.

4. **Appeal and Error § 41—**

Where the evidence excluded does not appear in the record, it cannot be determined on appeal that its exclusion was prejudicial.

5. **Appeal and Error § 1—**

Where, in an action on an account, there is no allegation or contention that the prices charged by plaintiff were excessive, the contention on appeal that certain evidence excluded was competent on the question of price cannot be sustained, since the appeal must follow the theory of the trial.

6. **Evidence § 35—**

The exclusion of a witness's estimate in regard to a matter, without any facts in evidence upon which the estimate could be based, is properly excluded.

7. **Evidence § 26—**

Parol evidence in regard to writings is properly excluded in the absence of a showing of any effort to procure the writings to offer them in evidence.

8. **Accord and Satisfaction § 1—**

The trial court's charge as to the meaning of "accord and satisfaction" *held* without error.

APPEAL by defendants from *Paul, J.*, August 1962 Term of WAYNE.

Civil action to recover for the sale and delivery of feed and supplies to Raymond A. Scott, doing business under the trade name of Scott Poultry Company, and his wife, Doris C. Scott, under the terms of a special secured feeder account. The action was instituted in Wake County on 21 January 1958, and on 1 June 1959 an order was entered transferring the action for trial to the superior court of Wayne County, the home county of defendants.

This is a summary of the complaint:

During a period commencing prior to August 1956 and ending 4 January 1958 plaintiff sold and delivered to defendants feed and supplies (the complaint is not clear as to whether chicks were included) under the provisions of three speical secured feeder contracts, securing the special secured feeder account. The first such contract was entered into in August 1956, and the payment for any purchases thereunder by defendants was secured by a bond and deed of trust on real and personal property, both dated 2 August 1956, and executed by Raymond A. Scott and wife, Doris C. Scott. On 5 October 1956 and in November 1957 additional such contracts were entered into by the parties, and the payment for any purchases thereunder by defendants was secured by bonds and deeds of trust executed by Raymond A. Scott and wife, Doris C. Scott. During this period of time defendants made many payments to plaintiff for the sale and delivery of feed and supplies to them under the provisions of these contracts, and the unpaid balance on the aforesaid account on 26 November 1957 was $23,491.14; and a written memorandum was signed certifying that on such date the indebtedness of defendants to plaintiff under these contracts was $23,491.14.

Subsequent to 26 November 1957 plaintiff sold and delivered to defendants feed and supplies under the provisions of these contracts in the sum of $5,829.38, a long itemized list of which showing the dates of delivery and the amount thereof is set forth in the complaint. On the purchases and deliveries since 26 November 1957, defendants have made payments in the amount of $3,504.80.

The unpaid balance due from defendants to plaintiff on these contracts is now $25,815.72. Plaintiff prays that it recover $25,815.72, with interest, from defendants, and that claim and delivery issue for the recovery of personal property described in the deeds of trust.

Defendant Doris C. Scott filed a separate answer asserting that she had no connection with or knowledge of the matters alleged in the complaint, except that she admitted that she, at the request of her husband, signed the three bonds and deeds of trust set forth in the com-

plaint, securing an indebtedness alleged in the complaint as owed by her husband to plaintiff. As a further answer and bar to recovery, she denies that she is indebted to plaintiff in any amount, and asserts that under no circumstances is she responsible to plaintiff for the amount of money alleged in the complaint to be owing in excess of that included in the bonds and deeds of trust.

Defendant Raymond A. Scott, doing business as Scott Poultry Company, filed a separate answer. In his answer he admits plaintiff sold to him a considerable amount of merchandise. That his purchases from plaintiff were made with the understanding that he would sell eggs produced by him to Southeastern Hatcheries, Inc., who would pay the purchase price thereof direct to plaintiff, and that plaintiff would give him credits on his account therefor, and regularly render to him statements of the account between them. That plaintiff has never furnished him a statement of the account between them, and he never agreed on 26 November 1957 that he was indebted to plaintiff in the amount of $23,491.14. That he has received a statement from Southeastern Hatcheries, Inc., showing it has paid plaintiff for his benefit more than $58,000, for which plaintiff has given him no credit. He admits he has purchased merchandise from plaintiff subsequent to 26 November 1957, and avers that his records do not show any such payments on these purchases since 26 November 1957 as set forth in the complaint, but do show payments since 26 November 1957 in a considerably larger amount. He admits the execution of the three bonds and three deeds of trust set forth in the complaint, that plaintiff has caused claim and delivery papers to issue, and avers that he has retained possession of the property seized by filing an undertaking in the amount of $40,000.

As a further answer and bar to recovery he alleges in substance: He denies that the correct balance due plaintiff is $23,491.14, and alleges proper credit has not been given him for payments made. His records as of 15 November 1958 show plaintiff has been paid in full, and he is informed and believes, and therefore alleges, that plaintiff's records show the same thing. On 29 October 1958 plaintiff submitted to him a statement showing he owed it $125.76 on these accounts; on 31 October 1958 a charge memorandum in the amount of $432.23 for an insurance premium on insurance covering property described in the deeds of trust was added to this account; and on 11 November 1958 plaintiff rendered to him a statement showing a balance due of $557.99, with an interest charge of $2.79, totaling $560.78. On 15 November 1958 he paid plaintiff the sum of $560.78 by cheque, bearing on its face "Scott Poultry Co. Special Feeder Account in Full,"

which constitutes full payment to plaintiff of all sums due by him, but if the account rendered was not correct, plaintiff knowingly accepted the same in full payment, and thereby entered into an accord and satisfaction agreement. That the cheque was paid when presented. Wherefore, defendant prays that plaintiff's complaint be dismissed or that plaintiff be required to present in court all instruments and papers in respect to all purchases by him and all payments received by it for his benefit, "and the true amount owed by this defendant to the plaintiff be ascertained."

At some term of court, apparently in the fall of 1959, though the term is not specified in the record, an order of reference was entered by Frizzelle, J., presiding, to which order plaintiff and defendants objected, and reserved their rights to a trial by jury. Neither plaintiff nor defendants excepted to the order of reference.

On 10 July 1961 the referee James N. Smith filed his report, in which he made specific detailed findings of fact and conclusions of law, and reported to the court that plaintiff is entitled, *inter alia,* to recover judgment from the defendants Doris C. Scott and Raymond A. Scott in the sum of $25,451.02, with interest from 1 January 1958, subject to a credit of $125.76 for interest paid by defendants on 15 November 1958, and its costs.

Defendants excepted to the referee's findings of fact, tendered issues, and demanded a jury trial.

At the August 1962 Term the case was tried by a jury. The following issues, without objection, were submitted to the jury, and answered as indicated:

> "1. Did the defendant, Raymond Scott, on November 26th, 1957, sign and deliver to plaintiff the account stated, the same being marked 'Plaintiff's Exhibit 10', as alleged in the complaint?
>
> "ANSWER: Yes.
>
> "2. At the time the defendants executed and acknowledged the Deed of Trust dated November 22nd, 1957, said instrument being marked 'Plaintiff's Exhibit 9', did said instrument contain the paragraph giving a lien on the equipment and other personal property including chickens with replacement thereof and additions thereto then located on the lands described in said instrument?
>
> "ANSWER: Yes.
>
> "3. In what amount did the defendant, Raymond Scott, make purchases of feed and supplies on his Special Feeder Account from plaintiff on and after November 26th, 1957?

"ANSWER: $5,517.38.

"4. In what amount did the defendant, Raymond Scott, make payments to plaintiff on his Special Feeder Account after November 26, 1957?

"ANSWER: $3,557.50.

"5. Did the plaintiff accept the check from Raymond A. Scott dated November 15th, 1958, in the amount of $560.78 in accord and satisfaction or as a compromise and settlement of the defendants' Special Feeder Account, as averred in the Answer?

"ANSWER: No.

"6. What was the fair market value of the chickens and other personal property seized by the Sheriff under Claim and Delivery and delivered to the defendants on January 27, 1958?

"ANSWER: $33,779.00."

Judgment was entered upon the verdict. The judgment, after setting forth the issues and the answers thereto, reads:

"And the parties having agreed that 'Plaintiff's Exhibit 10' as referred to in the first Issue, if signed by Raymond Scott, on November 26, 1957, stated an account of $23,491.14 due by him to the plaintiff.

"It further appears to the court that the plaintiff resorted to the remedy of Claim and Delivery and caused the Sheriff to take possession of certain articles of personal property described in the Deed of Trust referred to in the second Issue, and that the defendants replevied said personal property on their undertaking in the amount of $20,000.00, with one Ebern T. Watson as surety on said undertaking.

"It further appears to the court that the parties hereto have stipulated and agreed that all of the personal property seized by the Sheriff under the Claim and Delivery and returned to the defendants on their undertaking has been disposed of or is now of only nominal value.

"The plaintiff, in open court, admits that $125.76 of the amount paid by Raymond A. Scott by the check dated November 15, 1958, was an interest payment for one month on the Special Feeder Account, and that such interest as this judgment may draw should be credited with said amount of $125.76.

"The parties have stipulated that Raymond A. Scott and Doris C. Scott executed the $25,000 Bond payable to plaintiff dated

November 22, 1957, marked 'Plaintiff's Exihibit 8', the same being secured by the Deed of Trust marked 'Plaintiff's Exhibit 9', said Deed of Trust being recorded in the office of the Register of Deeds of Wayne County in Book 477 at page 239.

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED BY THE COURT THAT:

"1. The plaintiff have and recover of the defendants the sum of $25,451.02, with interest thereon from January 1, 1958, subject to a credit on said interest in the amount of $125.76.

"2. The plaintiff recover its costs of the defendants, including the cost of the hearings under order of reference in the amount of $150.00.

"3. The costs of this action be taxed against the defendants, including an allowance of $500.00 to James N. Smith, the Referee hereinbefore appointed in this cause. This is additional to the $250.00 already allowed.

"4. That the liability of the defendant, Doris C. Scott, under this judgment shall be discharged upon payment of the sum of $25,000.00, plus interest on said $25,000.00 from January 1, 1958, until paid, subject to a credit of $125.76, plus the costs of this action as herein taxed; that the liability of Ebern T. Watson, surety on defendants' replevin bond, shall be discharged upon payment of the sum of $20,000.00, plus interest from January 24, 1958, the date of the defendants' original replevin bond, said interest being subject to a credit of $125.76, plus the costs of this action as herein taxed.

"IT IS FURTHER ORDERED that in the event $25,000.00 with interest thereon from January 1, 1958, subject to said credit of $125.76, is not paid on or before September 30, 1962, William L. Powell, Jr., is hereby appointed commissioner and authorized to advertise and sell the lands described in the Deed of Trust in the Office of the Register of Deeds of Wayne County in Book 477 at Page 239, said advertisement and sale to be in a manner prescribed by statute."

From the judgment, Raymond A. Scott and Doris C. Scott appeal.

Braswell & Strickland by Roland C. Braswell for defendant appellants.

Dees, Dees, and Smith by William L. Powell, Jr., for plaintiff appellee.

PARKER, J. Defendants assign as error the order of compulsory reference. Defendants state in their brief:

> "It is the defendants' position in this matter that the compulsory reference could not be ordered by the court of its own motion until such time as the plea in bar of accord and satisfaction had been ruled upon. In this case, the defendants point out that there were two distinct controversies, one as to the right of the plaintiff to recover of the defendants under any circumstances as the result of the plea in bar of accord and satisfaction, and the other controversy as to the amount of recovery in the event of the right to recover at all as (sic) established."

Defendants objected to the order of compulsory reference at the time it was entered, but did not except to it, and proceeded with the trial before the referee. By objecting to the order of compulsory reference when entered, and by, after the referee's report was filed, filing in apt time exceptions to particular findings of fact made by the referee, tendering issues and demanding a jury trial on each issue tendered, defendants complied with procedural requirements to preserve their right to a jury trial. *Bartlett v. Hopkins,* 235 N.C. 165, 69 S.E. 2d 236. Defendants have had a jury trial.

Defendants' exception to the order of compulsory reference appears only in their assignments of error. Exceptions which appear nowhere in the record, except under the assignments of error, are ineffectual, since an assignment of error must be supported by exception duly noted. *Beasley v. McLamb*, 247 N.C. 179, 100 S.E. 2d 387; *Barnette v. Woody*, 242 N.C. 424, 88 S.E. 2d 223; *Suits v. Insurance Co.*, 241 N.C. 483, 85 S.E. 2d 602.

During the trial by jury Joseph R. Marks, a witness for plaintiff, testified, *inter alia,* on direct examination: "It is true that I was manager of the FCX Store in Goldsboro and I was manager at the time the sales ticket for $96.00 was made. This sale to Mr. Scott was made under my control and supervision." The record then shows: "Defendant objects. Objection overruled: Exception No. 1B." Defendants assign this as error. In respect to this exception defendants state in their brief: "The defendants further argued to the Court that the lower Court erred when, after having ruled that a compulsory reference was necessary and the matter was back before the Court with proper exceptions and objections having been made to the referee's report and the matter was then before the Court to be heard did not rule upon the defendants' plea in bar." There is nothing in the record to show that defendants' counsel made any such argument

at the trial before Judge Paul and a jury. Manifestly, this cannot be considered as an exception to the order of compulsory reference when made. The court submitted to the jury Issue 5, an issue as to defendant Raymond A. Scott's plea of accord and satisfaction, and the jury answered the issue, No. This assignment of error is overruled.

In *Lumber Co. v. Pemberton,* 188 N.C. 532, 535, 125 S.E. 119, 121, the Court said:

> "Defendant in apt time objected to the order of reference and is therefore not deprived of his right to trial by jury of the issue of facts which he has joined with the plaintiff.
>
> "Having duly excepted to the order, and upon appeal assigned same as error, defendant presents to this Court, for review, the decision of the court below as a matter of law, contending that it was error to order a compulsory reference, for that the answer contains a general denial and sets up a plea in bar of plaintiff's right to recover in this action. Defendant having objected to the reference, and excepted to the order signed by the judge, had the option to appeal at once, if he was so minded, or to await final judgment, having preserved his objection by exceptions noted in apt time."

To the same effect: McIntosh, N. C. Practice and Procedure, 2d Ed., Vol. I, sec. 1407, pp. 787-8.

It cannot be said as a matter of law that plaintiff's cause of action does not require the examination of a long account. G.S. 1-189. Defendants, by not excepting to the order of compulsory reference when made and by proceeding with the trial before the referee, have not preserved the right to challenge it upon the ground that it should not have been entered before the alleged plea of accord and satisfaction had been passed on, or any other plea in bar they may contend is asserted in Raymond A. Scott's answer. *Graves v. Pritchett,* 207 N.C. 518, 177 S.E. 641, relied on by defendants, is not in point. In that case an order of compulsory reference was ordered, to which both sides *excepted.*

In addition, a serious question is presented as to whether the answer of Raymond A. Scott, liberally construed, shows that the plea in bar of accord and satisfaction extends to the whole cause of plaintiff's action, or merely to the state of the account between plaintiff and defendants since 26 November 1957. However, it is not necessary to decide this, because defendants did not except to the order of reference when made.

Raymond A. Scott, doing business under the trade name of Scott Poultry Company and Scott's Farm, had three accounts with plain-

tiff: (1) a special secured feeder account, No. 107; (2) a broiler account, No. 108; and (3) an open account, No. 106. Prior to 26 November 1957 plaintiff sold and delivered to Raymond A. Scott over a period of more than two years a substantial amount of chicks, feed, and supplies, which, according to the nature of the sale, were charged to the account for which they were ordered. Plaintiff brought an action on the broiler account on 28 January 1958 against Raymond A. Scott, which ended in a consent judgment against Raymond A. Scott in the amount of $2,472.99, plus interest in the amount of $105.10, which judgment with the costs Scott paid. On 26 March 1958 plaintiff instituted an action against Raymond A. Scott on the open account claiming an unpaid balance due it in the sum of $6,536.98, which action is now pending. The instant case is an action brought on the special secured feeder account, No. 107. Plaintiff and the defendants offered evidence in support of the allegations in their pleadings.

Joseph R. Marks, manager of plaintiff's store in Goldsboro during the years 1956, 1957, and 1958 and a witness for plaintiff, testified on cross-examination that the feed sold to Raymond A. Scott by plaintiff under his contracts was sold as feed would be sold to the public in general. He was then asked by defendants' counsel: "During the period October 5, 1956 to November 26, 1957, do you know the price of feed that was sold by you to the public in general?" He replied: "No, sir." He was then asked: "Can you get it for me?" He replied: "Yes, sir." He was then asked: "And will you?" He replied: "Yes, sir." Plaintiff objected to this line of questioning. The court sustained the objection. Defendants except and assign this as error. They contend they were "attempting to establish the price of feed sold to the public in general so the jury could get some idea about the costs of the feed sold to Raymond Scott." Defendants have not put this excluded evidence in the record so that we can see whether or not its exclusion was prejudicial to them, consequently this exception is without merit, and is overruled. *Board of Education v. Mann*, 250 N.C. 493, 109 S.E. 2d 175. In addition, neither defendant has averred in his or her answer that plaintiff's charges for feed delivered to Raymond A. Scott were in excess of the price of feed sold by it to the public in general. Under the theory of the trial below such evidence would seem to be incompetent.

L. Clyde Rauch, a witness for defendants, testified on direct examination in substance that he was partially familiar with the flock of chickens raised on Mr. Scott's farm during the period indicated. He made various trips there and saw this flock of chickens, that it was an average flock, and it would have an average mortality rate of about

15 per cent. He was then asked by defendants' counsel: "Based upon what you saw at Raymond Scott's farm and as an expert in production of chickens, do you have an opinion satisfactory to yourself as to the average loss of chickens that Raymond Scott experienced?" The court sustained plaintiff's objection to the question, and defendants excepted, and assign this as error. The witness was permitted to answer: "Well I would say that he lost 15%. On one occasion I happened to be there those chickens were out of water out there, so from that experience I would say that it was an average operation because I have seen similar things happen too many times." There is no merit to this assignment of error, because the excluded evidence is a substantial repetition of what Rauch had immediately before testified to without objection.

Raymond A. Scott recalled as a witness testified on direct examination in substance: Of these twelve cheques which had been handed to him, one is payable to him and eleven to FCX, but all of these cheques were endorsed by FCX and turned over to him. They are the same cheques which were involved at the time he swapped a cheque with them. He looked for the cheques which he swapped with them during the lunch period, and he found two of them. His books are being audited, and things are tangled up. The cheque dated 22 August 1956 in the amount of $176 made payable to FCX is one of the cheques which he exchanged with FCX. Defendants' Exhibit AA dated 9 July 1957 is a cheque for $230 which was exchanged with Goldsboro FCX. "I would estimate that I gave approximately 50% of the total of the checks received from Southeastern Hatcheries back to FCX." He was then asked: "Can you get your bank stubs?" He replied: "We will do our best. There is a huge stack of that stuff and the girl that was working there is not there now." Defendants assign as error that the court upon plaintiff's motion struck out Scott's estimate of 50% given back to FCX. This assignment of error is overruled. It appears that Scott's estimate is a pure guess, and further, so far as the record shows, he made no effort to get his bank stubs so as to offer them in evidence, although this action had been pending since 21 January 1958 and the referee did not file his report until 10 July 1961.

Raymond A. Scott testified in substance without objection on direct examination: His Exhibit A, which he had introduced in evidence, is a letter dated 21 January 1958, written on stationary of plaintiff, Raleigh, N. C., purporting to be from B. W. Kenyon, Jr., manager of plaintiff's credit department, and received by him through the mails. This letter states he, according to its records, is indebted

to plaintiff in the sum of $3,457.31. This figure does not agree with his open account with them. Plaintiff has now sued him on all three of his accounts with it. The record then shows: "Q. Referring you to defendants' Exhibit A, Mr. Scott, what amount does this letter indicate that you are indebted to FCX? A. $3,457.31. Q. Does that exhibit indicate what account was involved? Motion answer be stricken from the records. Answer stricken." Defendants assign this as error. No prejudicial error is shown because this letter was in evidence for the jury, judge and counsel and all concerned to see.

Defendants state in their brief they have abandoned their assignments of error based on their exceptions Nos. 2, 4, 5, 6, 8, and 9.

Defendants' other assignments of error to the admission and exclusion of evidence have been carefully examined. Prejudicial error has not been shown, and they are overruled. Our task in considering the assignments of error to the admission and exclusion of evidence has been unusually laborious, for the reason that in the assignments of error the pages on which the exceptions appear in the record are set forth wrong in many instances, and the same is true of defendants' brief.

Defendants have assigned as error the court's charge as to what is meant by "accord and satisfaction." This assignment of error is overruled, for the very simple reason that what the judge charged as to the meaning of "accord and satisfaction" is taken almost verbatim from what this Court has said is the meaning of these words in *Dobias v. White*, 239 N.C. 409, 80 S.E. 2d 23, and in *Mercer v. Lumber Co.*, 173 N.C. 49, 91 S.E. 588.

The other assignments of error to the charge have been considered, and are all overruled, because, after a careful study of the charge in its entirety, prejudicial error is not shown by defendants.

It is significant that the able referee found in his report that plaintiff is entitled to recover from defendants the sum of $25,451.02, with interest, subject to a credit of $125.76 on account of interest paid by defendants on 15 November 1958, and that a jury in a trial presided over by one of our most learned and experienced trial judges, now deceased, found by its verdict that defendants were indebted to plaintiff in the sum of $25,451.02, and the plaintiff, according to the judgment, admitted in open court that defendants on this amount were entitled to a credit in the amount of $125.76 by reason of interest paid on 15 November 1958.

All defendants' assignments of error are overruled. Defendants have shown no error sufficiently prejudicial to justify disturbing the trial below.

No error.

LESTER B. SMITH v. ANDRE MARCEL CORSAT.

(Filed 19 July 1963.)

1. Trial § 22—

Where the evidence most favorable to complainant makes out a *prima facie* case, contradictions and inconsistencies in complainant's evidence do not justify nonsuit.

2. Automobiles § 41c—

Defendant's allegation and evidence on his cross action to the effect that plaintiff, approaching from the opposite direction, failed to yield one-half of the highway, failed to give timely warning of his movement to defendant's side of the highway, and failed to keep a reasonable lookout, *held* sufficient to overrule nonsuit.

3. Damages § 3—

The general rule relating to recovery of damages for personal injuries is that the injured party is entitled to recover the present worth of the damages sustained in consequence of the tort, embracing indemnity for loss of time, or loss from inability to perform ordinary labor, or incapacity to earn money, which are the immediate and necessary consequences of his injury.

4. Damages § 12—

In actions to recover for personal injuries, the age and occupation of the injured person, the nature and extent of his employment, the value of his services and the amount of his income at the time, whether from fixed wages or salary, are matters properly to be considered by the jury.

5. Same—

In personal injury actions, great latitude is allowed in the introduction of evidence to aid in determining the extent of the damages, and as a broad general rule any evidence which tends to establish the nature, character and extent of injuries which are the natural and proximate consequences of the tortfeasor's acts is admissible in such actions, if otherwise competent.

6. Same—

As a general rule evidence that after the injury the business in which the injured party was interested suffered a loss or diminution of profits is not competent to be considered for the purpose of establishing the pecuniary value of lost time or diminution of earning capacity of the injured party, but such evidence may be competent for such purpose where the business is small and the income which it produces is principally due to the personal services and attention of the injured owner.

7. Same— Evidence of loss of profits from personal business held competent as aid in determining damages for loss of earning capacity.

Upon evidence tending to show that claimant suffered personal injuries which impaired his capacity to engage in his occupation, that he

was self-employed and his earnings consisted of the net profits of the business enterprise owned and operated by him, and that the dominating factors in the production of his profit were his personal efforts and contacts, it *is held* evidence of the net income received from the business for the three years prior to the injury and the year following the injury is competent as an aid, to be considered with all the other evidence, in determining the pecuniary value of the loss of time or loss or impairment of earning capacity, even though the evidence would not be competent on the issue of special damages, if such had been submitted, because special damages were not properly pleaded and because the evidence of loss of profit does not reach that degree of certainty required as a foundation for special damages.

8. Evidence § 35—

Testimony of a witness as to the net profits from his business for the year in question from memory and estimates, instead of from records and accounts, *held* not to render the testimony too speculative, the opposing party having had full opportunity to cross-examine him with respect to all phases of the business.

9. Trial § 15—

Where evidence competent for a restricted purpose is admitted generally, an exception will not be sustained in the absence of a request that its admission be restricted.

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

Action to recover damages resulting from a collision of motor vehicles. Plaintiff seeks to recover for personal and property damages suffered by him. Defendant counterclaims for like damages. The jury answered the issues in favor of defendant and awarded him $22,000 for personal injuries and $500 for property damage. Judgment was entered accordingly.

Barber & Holmes; Jordan, Wright, Henson & Nichols; and Karl N. Hill, Jr., for plaintiff.

Ike F. Andrews and Simms & Simms for defendant.

MOORE, J. Plaintiff assigns as error the denial of his motion to nonsuit defendant's counterclaim.

The collision occurred shortly after midnight on 18 November 1961 on U. S. Highway 64 in Siler City. Plaintiff was driving his Mercury Comet station wagon eastwardly, and defendant was operating his Volkswagen panel truck westwardly. According to plaintiff's account of the accident, defendant made a left turn off the highway into the driveway of Ruth's Drive-in, which is on the south side of the high-

way, and then suddenly and without warning turned back into the highway in the path of plaintiff's vehicle which was so near that collision was inevitable. On the other hand, defendant testified that he was driving in a straight line at a fairly good rate of speed, 35 to 40 miles per hour, in the right-hand or north lane of the highway, "completely the right lane," he suddenly saw lights as though lights had been turned on in a moving vehicle, these lights came over into the defendant's lane and blinded him, and they were so near he "could do nothing" to avoid collision.

Plaintiff relies on contradictions and discrepancies in defendant's testimony and certain physical evidence as a basis for his motion to nonsuit the counterclaim. Contradictions and inconsistencies in testimony do not justify nonsuit where the evidence in the light most favorable to complainant makes out a *prima facie* case. *Redden v. Bynum,* 256 N.C. 351, 123 S.E. 2d 734. Defendant alleges that plaintiff's negligence proximately caused the collision and resulting damages in that he failed to yield one-half of the highway (G.S. 20-148), failed to give timely warning of his movement to the north side of the highway, and failed to keep a reasonable lookout. Defendant's evidence tends to support these allegations. The court properly overruled plaintiff's motion for nonsuit.

Defendant alleges that he is 47 years of age, "is the owner and general manager of A. M. Corsat Records & Appliances with stores in Jacksonville, Florida; Atlanta, Georgia; and Norfolk, Virginia; that this business requires that he travel a great deal through the Southeastern part of the United States in order that he may supervise and manage these stores; that because of the negligent acts of plaintiff in causing the . . . collision, the defendant has been unable to devote his time, talent and energy to the operation of his business and therefore has suffered great financial loss; that for the period of December 1, 1961, through March 31, 1962, there was a decrease in gross sales . . . in the amount of $28,229.12 from the same period of 1960-'61; that . . . it has been necessary to employ additional help . . .; that in spite of this additional help, the defendant's business is still suffering and will continue to suffer decreases in profit due to the loss of services of the defendant." Defendant prays for a recovery of $10,000 for "loss of business," in addition to other damages.

Over plaintiff's objection, defendant was permitted to introduce evidence that his net income for each of the years 1959, 1960 and 1961 was "about $10,000," and for 1962, nothing. Plaintiff contends that the court erred in admitting this and related evidence for the reason that the net profits from defendant's business resulted from a

combination of inconstant factors, such as capital, the labor of employees, other variables, and defendant's services, and that the sources of profit are too contingent and speculative for net profits to serve as an aid in the determination of defendant's damages.

The salient facts which determine the class or category of cases to which this belongs are: Claimant suffered personal injuries for which he seeks compensation. His injuries impair his capacity to engage in his occupation. He is self-employed and receives no salary or wages. His earnings consist of the net profits from the business enterprise owned and operated by him. He gives his full time to the business, and capital is employed and the labor of others used to some extent in the business.

No case has been cited and no decision has been found in our research where the exact question at bar has been considered in this jurisdiction. The nearest approach is *Wallace v. Railroad,* 104 N.C. 442, 10 S.E. 552. Wallace, a carpenter, received personal injuries while riding on a train. One of the assignments of error related to testimony of his earnings before the accident. The Court said:

> "An inquiry, . . . as to his earnings in his business is competent. It is not itself a rule of damages. There are many other elements of damages to be considered, and, 'upon all the circumstances, it is for the jury to say what is a reasonable and fair compensation which the defendant should pay the plaintiff, by way of compensation, for the injury he has sustained.' . . . .
>
> "In *Nash v. Sharp,* 19 Hun., 365, PRATT, J., says: 'Evidence of the nature and extent of the party's business, or how much he was *earning from his business or realizing from fixed wages,* is proper upon the question of damages.'
>
> " 'The age and occupation of the injured person, the value of his services, that is, *the wages which he has earned* in the past, whether he has been employed at a fixed salary or as a professional man are proper to be considered.' 2 Wood Railway 1240, and cases there cited."

In general terms, the law in this jurisdiction, relating to the recovery of damages for personal injury resulting from negligence, is that the injured party is entitled to recover the present worth of all damages sustained in consequence of the tort. These are understood to embrace indemnity for loss of time, or loss from inability to perform ordinary labor, or capacity to earn money, which are the immediate and necessary consequences of his injury. The age and occu-

pation of the injured person, the nature and extent of his employment, the value of his services and the amount of his income at the time, whether from fixed wages or salary, are matters properly to be considered by the jury. *Owens v. Kelly*, 240 N.C. 770, 84 S.E. 2d 163; *Mintz v. R.R.*, 233 N.C. 607, 65 S.E. 2d 120; *Dickson v. Coach Co.*, 233 N.C. 167, 63 S.E. 2d 297; *Fox v. Army Store*, 216 N.C. 468, 5 S.E. 2d 436; *Ledford v. Lumber Co.*, 183 N.C. 614, 112 S.E. 421. In personal injury actions great latitude is allowed in the introduction of evidence to aid in determining the extent of the damages, and as a broad general rule any evidence which tends to establish the nature, character and extent of injuries which are the natural and proximate consequences of the tortfeasor's acts is admissible in such actions, if otherwise competent. *Owens v. Kelly, supra.* In determining future earning capacity, prior earnings are admissible in evidence if there is a reasonable relation between past and probable future earnings. *Fox v. Army Store, supra;* Stansbury: North Carolina Evidence, s. 101, p. 193.

It is a generally accepted proposition that evidence of the profits of a business in which the injured party in a personal damage suit is interested, which depend for the most part upon the employment of capital, the labor of others, and similar variable factors, is inadmissible in such suit and cannot be considered for the purpose of establishing the pecuniary value of lost time or diminution of earning capacity, for the reasons that a loss of such profits is not the necessary consequence of the injury and such profits are uncertain and speculative. In such circumstances loss of profits cannot be considered either as an element or the measure of damages. In such case, the measure of damages is the loss in value of the injured person's services in the business. "Profits" and "earnings" are not synonymous. Loss of personal earnings is properly considered as an element or measure of damages. *Hendler v. Coffey*, 179 N.E. 801 (Mass. 1932); *Flintjer v. Kansas City*, 204 S.W. 951 (Mo. 1918); *Singer v. Martin*, 164 P. 1105 (Wash. 1917); *Mahoney v. Boston Elevated R. Co.* 108 N.E. 1033 (Mass. 1915); 25 C.J.S., Damages, s. 86, p. 618; 15 Am. Jur., Damages, s. 155, pp. 571-2. See also 12 A.L.R. 2d., Anno — Damages — Plaintiff's Business Profits, pp. 288, 294, 296. (In this Annotation the entire question is fully discussed and cases from many jurisdictions are cited and abstracted.)

However, where the business is small and the income which it produces is principally due to the personal services and attention of the owner, the earnings of the business may afford a reasonable criterion to the owner's earning power. *Bell v. Yellow Cab Co.*, 160 A. 2d 437

(Pa. 1960); 15 Am. Jur., Damages, s. 96, p. 506; 12 A.L.R. 2d 292. In cases where it is not established that the employment of capital, the use of labor of others, or similar variable factors were predominant in the injured person's business or determinative, for the most part, of the receipts realized, it is held that evidence of profits, in a restricted sense, or income (even if one or more of the factors mentioned were present and influential) may be used for the purpose of aiding in establishing a standard for the calculation of damages, if it conforms to the requirements of proximate cause and certainty. It has some bearing upon the question of damages, whether of loss of time or loss or diminution of earning capacity. Such evidence furnishes as safe a guide for the jury, under proper cautionary instructions, as may be found, in the assessment of damages, and becomes useful in helping to determine the pecuniary value of loss of time or impairment of earning capacity. *Amelsburg v. Lunning*, 14 N.W. 2d 680 (Iowa 1944); *Roy v. United Electric R. Co.*, 159 A. 637 (R.I. 1932); *Atlanta v. Jolly*, 146 S.E. 770 (Ga. 1929); *Osterode v. Almquist*, 200 P. 2d 169 (Cal. 1948); *Gombert v. New York C. & H. R.R. Co.*, 88 N.E. 382 (N.Y. 1909); 12 A.L.R. 2d 294, 297.

Dempsey v. Scranton, 107 A. 877 (Pa. 1919), is closely analagous to the case at bar. Dempsey suffered personal injuries by reason of the unsafe condition of the city streets. He owned a tea and coffee store and employed three clerks. Prior to his injury he drove a wagon and peddled tea and coffee. After the accident he employed another at $15 per week to drive the wagon. He had built his business by personal efforts over a period of fourteen years. There was no evidence of the amount of capital invested. While plaintiff could not give the business his personal attention profits decreased $100 to $125 per month. The Court said:

> ". . . (T)he income or profits an injured person derives from a business personally conducted with little or no capital and depending entirely or substantially upon his undivided labor and skill, whether physical or mental, may be considered as affording the true measure of his earning capacity; . . . . The services of a man who, like the plaintiff in this case, has, by his personal labor, skill, and business ability, built up and managed a business for a period of years, is manifestly worth more than the mere cost of hiring another temporarily to fill his place. The thorough knowledge of the business thus acquired, together with the personal acquaintance with the customers, has a value in the commercial world readily recognized by any business man. This

being so, no valid reason appears why one responsible for an injury should be heard to say that damages based upon such considerations are merely conjectural."

See also: *Chicago Union Traction Co. v. Brethauer*, 79 N.E. 287 (Ill. 1906); *Laycock v. United Rys. Co. of St. Louis*, 235 S.W. 91 (Mo. 1921).

"Probably, the true rule is that evidence of loss of profits is admissible where it would have a material bearing on the actual value of plaintiff's own services and work in the business and the pecuniary value of his lost time, but not as proof of a distinct element of damage in and of itself." *Seymour v. House*, 305 S.W. 2d 1, 4 (Mo. 1957).

At the time of the trial defendant-appellee was 48 years old. He was formerly a field engineer at the Naval Air Station in New Jersey. He moved to Jacksonville, Florida, and as a sideline went into the wholesale phonograph record business. At first his home was his place of business and base of operations. Through his connections in the Navy he was able to sell records to aircraft carriers and other Naval outlets. He gave up all other employment and devoted his entire time to the records business. He had to travel along the East Coast and keep in contact with ships and other outlets. He had to be at the right spot at the right time because competition was keen. He opened a little store in Jacksonville and one in Portsmouth, Virginia, as bases of operation — places to load and store records and equipment. He opened a place in Decatur, Georgia (in the metropolitan area of Atlanta). He employed some help, but did all of the buying and most of the selling and was in full control of the business. "You might say he was the sole operator, really." He served in all capacities, truckdriver, janitor, salesman and peddler. Because of the severity of his injuries from the collision, he could not use his legs, could not travel, could not attend to the business, and there was a net loss in 1962. He hired an assistant at a cost of $1800, but could not keep the business going on a paying basis. His injuries are permanent in nature and before trial he had incurred doctors', medical and hospital expenses in the amount of $6,756.83.

The preceeding paragraph is a summary of defendant's evidence with respect to the nature and extent of his business, his activities in connection therewith, and the effect of his injuries thereon. This evidence is lacking in some respects, especially as to details. It does not indicate how much capital was invested, how many persons were employed, or whether business conditions and opportunities were substantially the same after the accident as before. In testifying as to

the amount of net profits prior to the accident, it seems that defendant relied on his memory and estimates rather than business records and accounts. Yet it seems clear that predominating factors in the production of profits were the attention, efforts, skill, connections and personal attributes of defendant, and that the employment of capital and the labor of others played a very small part. Defendant had originated the business and built it on friendships, personality and trust. Defendant did all of the buying; the bulk of the selling was a "peddling" job which defendant alone handled. His stores were mainly places of storage and bases of operation, rather than trading posts. The business was predominantly a personal matter, depending for its life on the defendant's presence, services and personality. When he was injured and could not attend to the business profits ceased. In our opinion the evidence of profits was admissible as an aid (considered with other evidence) in determining the pecuniary value of defendant's loss of time or loss or impairment of earning capacity. The fact that defendant did not testify from business records and accounts does not render his testimony too speculative. Plaintiff had full and ample opportunity to cross-examine him with respect to all phases of the business. *Offensend v. Atlantic Refining Co.*, 185 A. 745 (Pa. 1936).

Defendant alleges "loss of business" on account of the injuries received by him and claims $10,000 as special damages therefor. The quotation (third paragraph next above) from the opinion in the *Seymour* case indicates that loss of profits from a business enterprise may not be the subject of special damages in a personal injury action. This proposition is not absolute. In personal injury suits loss of profits are recoverable as special damages if properly pleaded as such, if they arise naturally and proximately from the injury, and if they are reasonably definite and certain. In actions in which such recoveries are allowed there is usually some special contract or engagement from which the injured party would have realized a relatively definite profit but for the injury, or some seasonable or separable transaction (as opposed to a long, indefinite, continuous and complicated operation) from which claimant would have realized a profit, reasonably ascertainable and certain, but for the injury. Loss of profits from personal injury were recovered as special damages in the following cases: *Steitz v. Gifford*, 19 N.E. 2d 661, 122 A.L.R. 292 (N.Y. 1939) — truck farming; *Hetler v. Holtrop*, 281 N.W. 434 (Mich. 1938) — fruit stand; *Alengi v. Hartford Acci. & Indem. Co.*, 167 S. 130 (La. 1936) — truck farming; *Hollander v. Wilson Estate Co.*, 7 P. 2d 177 (Cal. 1932) — rugs, carpets, furniture broker; *Horrell v. Gulf*

& Valley Cotton Oil Co., 133 S. 394 (La. 1931) — Contracting business. Of course, future business profits may not be recovered as such, they are too remote and uncertain to sustain a judgment for their loss. 15 Am. Jur., Damages, s. 157, p. 573; *Mitchell v. Chicago, R. I. & P. R. Co.*, 114 N.W. 622 (Iowa 1908).

We have found no tort cases in which loss of business profits resulting from personal injury has been allowed as special damages in this jurisdiction. This is not to say that no such recovery would be allowed if essential elements were present. Recovery of lost business profits has been allowed in property damage cases. *Trucking Co. v. Payne*, 233 N.C. 637, 65 S.E. 2d 132; *Steffan v. Meiselman*, 223 N.C. 154, 25 S.E. 2d 626; *Binder v. Acceptance Corp.*, 222 N.C. 512, 23 S.E. 2d 894; *Lumber Co. v. Power Co.*, 206 N.C. 515, 174 S.E. 427; *Johnson v. Railroad Co.*, 140 N.C. 574, 53 S.E. 362.

In the instant case recovery for "loss of business" as special damages is not permissible, and evidence of lost profits is not admissible on such theory of special damages. Special damages are not properly pleaded. *Binder v. Acceptance Corp., supra.* Besides, the evidence of loss of profits does not reach that degree of certainty required as a foundation for special damages. *Johnson v. Railroad Co., supra.* Even so, plaintiff has not shown prejudicial error entitling him to a new trial. No issue of special damages for loss of profits was submitted to the jury. Considering the verdict in the light of the evidence of medical and hospital expenses, serious and permanent personal injury, and loss of time and earning power, it does not reasonably appear that the jury awarded special damages. The challenged evidence is competent and admissible as an aid in determining damages for loss of time or impairment of earning capacity. "Where evidence competent for a restricted purpose is admitted generally, an exception will not be sustained in the absence of a request that its admission be restricted." 4 Strong: N. C. Index, Trial, s. 15, p. 302.

All assignments of error have been carefully considered. None are sustained.

No error.

LOUIS N. PRENTZAS v. HELEN J. PRENTZAS, ADMINISTRATRIX OF JOHN N. PRENTZAS, DECEASED, HELEN J. PRENTZAS, NICHOLAS J. PATTERSON AND GUS J. PATTERSON.

(Filed 19 July 1963.)

1. Limitation of Actions § 8; Partnership § 9—

The right of action by one partner to compel an accounting by the other does not arise and the statute of limitations does not begin to run until the demanding partner has notice of the other partner's termination of the partnership and refusal to account, and evidence disclosing that demands for an accounting were met with requests for time in which to prepare an account and that the demanding partner had no notice that the other partner would not account until less than the crucial three year period had expired warrants a peremptory instruction to answer the issue of the bar of the statute in the negative.

2. Limitation of Actions § 9—

Where a claim is not barred at the time of the debtor's death, the death suspends the running of the statute until the qualification of an administrator, and the creditor has one year from the date of the appointment of the administrator within which to bring suit. G.S. 1-22.

3. Accord and Satisfaction § 1—

Ordinarily when an offer of money or property in full discharge of an obligation is accepted and retained, such acceptance and retention is a complete discharge of the claim, even though the sum or value of the property received is less than the amount owing. G.S. 1-540.

4. Same— Person entitled to hold title as trustee may accept title as trustee without binding himself to settlement in individual capacity.

Where a partnership in real estate held for rentals has title to land purchased with partnership funds put in the name of the wife of one of the partners and, after demand of the other partner for an accounting, one of the pieces of real estate is conveyed to him with verbal statement that it was in complete settlement, the retention of the deed and the collection of rentals would constitute a settlement regardless of the intent of the grantee partner if he accepted the deed as conveying the property to him in his individual capacity and collected the rentals on the basis of individual ownership, but would not constitute a settlement if he merely retained title for the partnership, offering to account for the rents and profits in the settlement of the partnership affairs.

APPEAL by defendants from *Armstrong, J.*, September 10, 1962 Civil Term of GUILFORD (Greensboro Division).

This is an action to declare a trust and for an accounting of partnership assets. The complaint alleges these facts: Plaintiff (Louis) and his brother, John N. Prentzas, (John), who died 12 October 1952, formed a partnership about 1938 for the purchase of real estate in Greensboro to be held as rental properties; pursuant to the partner-

ship agreement three tracts were purchased, one in 1938, the other two in 1939; the total purchase price of the three tracts was $25,000; Louis contributed $11,500, John, $5,000; the remaining $8,500 was paid from rents collected from the properties; John managed the partnership; he took title to the three parcels in the name of his wife, defendant Helen J. Prentzas (Helen); from time to time plaintiff called for an accounting of partnership assets and liabilities; he was assured that full and proper accounting would be made; on 30 March 1950 John and Helen executed, acknowledged, and had recorded in Guilford County a deed conveying to plaintiff one of the pieces purchased with partnership assets; after the recorded deed had been delivered to plaintiff, he was told by John the property described in the deed was settlement in full of Louis's claim to partnership assets; plaintiff refused to recognize the conveyance as a settlement, but did not reconvey; on 6 October 1950 John and Helen, for the purpose of defrauding plaintiff, conveyed one of the three pieces of the partnership property to Nicholas J. Patterson and Gus J. Patterson, sons of John and Helen; Helen qualified as administratrix of the estate of John in the Superior Court of Guilford County on 12 November 1952.

Defendants denied there had been a partnership between plaintiff and John. As additional defenses they allege (1) the cause of action was barred by the three-year statute of limitations, (2) the deed of 30 March 1950, followed by plaintiff's collection of rents from that property, constituted an accord and satisfaction, and (3) plaintiff had delayed so long in asserting his claim that a court of equity would not permit him to recover.

There was a motion for reference. Judge Armstrong held a pretrial conference. He concluded from his examination of the pleadings and statements then made that issues should be submitted to a jury with respect to the asserted bar of the statute of limitations and the plea of accord and satisfaction, but there was nothing to warrant the submission of an issue as to the plea of laches. Issues with respect to the statute of limitations and the plea of accord and satisfaction were submitted to a jury. It answered each issue in the negative. Judgment was entered that plaintiff's claim was not defeated by any of the three special pleas. The cause was referred for a determination of the other issues arising on the pleadings.

Andrew Joyner, Jr., and Adams, Kleemeier, Hagan and Hannah by Charles T. Hagan, Jr., for plaintiff appellee.

Smith, Moore, Smith Schell & Hunter by David M. Clark for defendant, appellants.

RODMAN, J. The court instructed the jury if it found the facts to be as all the evidence tended to show, it should answer the first issue (statute of limitations) in the negative. Defendants assign this peremptory instruction as error. The partnership existing between Louis and John created a fiduciary relationship imposing on John, the managing partner, the duty upon request of Louis, to render a full and accurate account of partnership affairs. *Casey v. Grantham,* 239 N.C. 121, 79 S.E. 2d 735. The three-year statute of limitations was applicable to plaintiff's claim against John or his estate, G.S. 1-52, but the statute did not begin to run until Louis had notice of John's termination of the partnership relationship and his refusal to account. *Solon Lodge v. Ionic Lodge,* 247 N.C. 310, 101 S.E. 2d 8; *Teachey v. Gurlay,* 214 N.C. 288, 199 S.E. 83; *Greenleaf v. Land Co.,* 146 N.C. 505; *Robertson v. Dunn,* 87 N.C. 191.

The evidence is that Louis made requests for an accounting and even threatened to bring suit to compel an accounting. These requests and threats were not rejected but were met with requests for time in which to prepare the account. Not until 30 March 1950 did Louis know that John would not perform his duty and render a statement showing the status of the partnership. John died within three years of the date Louis learned that John would not account. John's death suspended the running of the statute until the qualification of an administratrix and gave him one year from that date in which to bring his suit. G.S. 1-22. Helen qualified as administratrix 12 November 1952. This action was begun 10 November 1953. The cause of action, if the jury accepted the evidence as true, did not arise until 30 March 1950. If that is the date on which the cause of action accrued, it follows as a matter of law that the action is not barred. We find no error in the instruction given the jury on the first issue.

We find nothing in the record which would support an affirmative answer to defendants' plea of laches. It follows that the court properly refused to submit that question to the jury.

Defendants' plea of accord and satisfaction "is recognized as a method of discharging a contract, or settling a cause of action arising either from a contract or a tort, by substituting for such contract or cause of action an agreement for the satisfaction thereof, and an execution of such substitute agreement." *Walker v. Burt,* 182 N.C. 325, 109 S.E. 43; *Products Corp. v. Chestnutt,* 252 N.C. 269, 113 S.E. 2d 587; *Bizzell v. Bizzell,* 247 N.C. 590, 101 S.E. 2d 668; *Allgood v. Trust Co.,* 242 N.C. 506, 88 S.E. 2d 825, 1 Am. Jur. 2d 301.

The word "agreement" implies the parties are of one mind—all have a common understanding of the rights and obligations of the

others—there has been a meeting of the minds. *Richardson v. Storage Co.*, 223 N.C. 344, 26 S.E. 2d 897; *Sprinkle v. Ponder,* 233 N.C. 312, 64 S.E. 2d 171; *Allgood v. Trust Co., supra; McCraw v. Llewellyn,* 256 N.C. 213, 123 S.E. 2d 575. Agreements are reached by an offer by one party and an acceptance by the other. This is true even though the legal effect of the acceptance may not be understood. *Wright v. McMullan,* 249 N.C. 591, 107 S.E. 2d 98; *McGill v. Freight,* 245 N.C. 469, 96 S.E. 2d 438; *Greene v. Spivey,* 236 N.C. 435, 73 S.E. 2d 488.

Ordinarily when a creditor calls on his debtor or a beneficiary calls on his trustee for an accounting and settlement and the demand is met with an offer of money or property in full discharge of debtor's or trustee's obligation, an acceptance and retention of the thing tendered constitutes a complete discharge even though the sum or property received is less than the amount actually owing. G.S. 1-540; *Casualty Co. v. Teer Co.,* 250 N.C. 547, 109 S.E. 2d 171; *Moore v. Greene,* 237 N.C. 614, 75 S.E. 2d 649; *Durant v. Powell,* 215 N.C. 628, 2 S.E. 2d 884; *DeLoache v. DeLoache,* 189 N.C. 394, 127 S.E. 419; 1 C.J.S. 487.

Here plaintiff alleges the deed of 30 March 1950 to him from John and Helen was tendered "in full of plaintiff's share of all property then belonging to their partnership account." Plaintiff alleged both the conditional offer and his refusal to accept the offer as made.

Defendants' allegation that the offer was accepted presents the sole controverted phase of their plea of accord and satisfaction. To support their assertion of acceptance they contend: Plaintiff has retained the deed and has not offered to reconvey; shortly after receipt of the deed he notified the tenants he was the owner of the property and would collect the rents; he stipulated at the trial that he had collected the rents since March 1950 and had sold the property to Redevelopment Commission of Greensboro.

Plaintiff, in support of his denial of acceptance, contends: When the recorded deed was delivered to him and he was then told by John that it was in full of his claim to partnership assets he stated that he would not so accept it but would insist on an accounting of all partnership assets; as partners he and John were co-owners with equal rights, G.S. 59-55, but Helen was a mere trustee of a resulting trust since the purchase money was provided by the partnership; Helen provided none; he was under no obligation to revest legal title in a mere trustee with the risk incident to such conveyance; he did continue to insist on an accounting; he employed counsel, who on his behalf demanded a settlement; when this was not made he instituted an action in the Superior Court of Guilford in August 1950

against John and Helen "to compel defendants to account for partnership funds for a division of partnership assets"; the conveyance to Redevelopment Corporation was under threat of condemnation; the other two pieces of partnership property have likewise been taken by Redevelopment Corporation; he collected the rents for the partnership and is prepared to account for his handling of the property when the account is taken.

If plaintiff held title to the property and collected the rents therefrom as an incident of *his* ownership he would be bound by the condition verbally stated by John when he delivered the deed of 30 March 1950. (The deed is not copied in the record. We do not understand it contains any statement that it was made in settlement of plaintiff's claim.) On the other hand, if plaintiff received the deed and retained legal title for the partnership, he would not be bound by John's verbal statement.

Defendants assign as error this portion of the court's charge: "If you should find from the evidence in this case that the plaintiff, Louis Prentzas, accepted this deed and even collected the rent and profit therefrom thereafter and until the present time, but he did not intend to accept it in full settlement or in satisfaction and accord of his alleged partnership affairs, then, of course, you would answer the issue, 'No'."

The assignment is well taken. The question for decision was not whether plaintiff intended to accept the conveyance in settlement of his claim but whether he took and retained title to the property for his own benefit or for the benefit of the partnership. We think the jury might well have understood the court to say that the acceptance of title and collection of the rents as plaintiff's individual property would not bind him if he intended not to be bound.

There must be a

New trial.

NORTH CAROLINA NATIONAL BANK, GUARDIAN OF CLABRON ANN BARBEE, RONALD MILLS BARBEE AND CAROLYN LOUISE BARBEE, MINORS, v. ANNIE MILLS BARBEE, EXECUTRIX OF THE ESTATE OF C. J. BARBEE, DECEASED, AND ANNIE MILLS BARBEE, INDIVIDUALLY.

(Filed 19 July 1963.)

1. Wills § 63—

The mere fact of the qualification of the widow as executrix under the will does not constitute an election when the widow is not under the necessity of making an election.

2. Same—

Where testator devises property held by the entireties to his children under the mistaken belief that he was the sole owner of the property, and devises and bequeaths other property to his widow, his widow is not put to her election.

3. Appeal and Error § 60—

A provision of a judgment from which no appeal is taken becomes the law of the case.

APPEAL by plaintiff from *Clark (Heman R.), J.*, December 1962 Assigned Civil Term of WAKE.

Action by the guardian of minor children of a decedent to determine whether the defendant, his widow, has elected to take under the will of her husband. The parties waived a jury trial and the judge heard the case upon the following facts which were either admitted or stipulated:

C. J. Barbee died in Wake County on November 24, 1960 leaving a holographic will dated February 18, 1960 which has been duly probated. His heirs at law, the sole beneficiaries under the will, are his widow, the defendant Annie Mills Barbee who was named executrix of the will, and their three minor children, Clabron Ann, Ronald Mills, and Carolyn Louise. He appointed plaintiff as guardian of his minor children.

In articles 1, 2, and 3 of his will, C. J. Barbee devised to each of his three children certain real estate in Wake County. In addition, to Clabron Ann he devised a lot in Durham; to Ronald Mills, a lot in Raleigh; to Carolyn Louise, a lot in Wilmington. Article 4 of his will provides: "To Annie Mills Barbee, my beloved wife, the remainder of my real estate and all of my personal property so long as she may live, and then to the three above mentioned children if living, if not to the surviving ones in either instance the division is to be on an equal basis." It also directed his wife to discharge any unpaid mortgages on the lands devised to the children out of the proceeds of his insurance or some of his personal property.

Following the death of her husband the defendant offered his will for probate and qualified as executrix. She is now administering the estate. The Durham lot, devised to Clabron Ann, has a value of $34,365.00; the Raleigh lot, devised to Ronald Mills, $35,000.00; and the Wilmington lot, devised to Carolyn Louise, $30,000.00. These three lots were owned by C. J. Barbee and his wife as tenants by the entireties. The total value of the real estate owned by them as tenants by the entireties at the time of his death was $188,865.00. Individually, he owned real estate worth $139,300.00. The value of his personal property, including cash, notes, insurance payable to the estate, and all other items was $24,194.00. The indebtedness against the estate, as of the date of death, was $73,603.94.

The value of the widow's life estate in the realty, computed on the basis of her age at decedent's death, is $84,106.85; in the personalty, $14,637.38, making a total of $98,744.23.

On February 28, 1961, defendant filed a complete inventory of all property of the decedent in which she listed the property held by the entireties separately. She has maintained separate accounts for funds derived from that property. At the time of the trial below all of the cash assets of the estate and all income from the properties of the estate had been used to pay debts. She has used no estate assets whatever for her own purposes.

On November 24, 1961, defendant filed with the Clerk of the Superior Court a "Declaration of Intent" in which she recited that "being acutely aware that her husband, C. J. Barbee, attempted to devise property which he mistakingly supposed himself to have the right to dispose of, (she) sought legal counsel as to the proper course of procedure; and that she was advised by counsel that due to the value of the property passing to her on the death of her husband, G.S. 30-1, Section (b) prevented her from dissenting to the will."

The stated purpose of the declaration was to record her intention and desire to assert her title in fee to all real property she and C. J. Barbee owned by the entireties at the time of his death, and to assert her right to the proceeds of all life insurance paid to her as the designated beneficiary in the policies.

In May 1962 the plaintiff, as guardian of the minor children, instituted this action. Plaintiff alleged that by qualifying and acting as executrix under the will of Barbee, defendant had elected to take under the will; that consequently she owns a life estate in all the personal property of her deceased husband and a life estate in the real property owned by him individually. The prayer of the complaint is that the minors be declared the owners in fee of all property devised

to them by the will, including property owned by testator and defendant by the entireties. The defendant, relying upon her "Declaration of Intent," filed answer in which she denied that she had forfeited her rights in the property owned by the entireties. She prayed that she be declared the owner in fee of all real property which she and Barbee owned as tenants by the entireties at the time of his death as well as the owner of a life estate in his personal property and all the realty owned by him individually; and that she be declared to be the owner of the proceeds from the life insurance policies in which she was named sole beneficiary.

The trial judge found that defendant had asserted her ownership to all the lands which were owned by her and her husband by the entireties at the time of his death, three tracts of which, "in apparent ignorance of the fact that said lands were owned by the entireties, (he) attempted to devise to his children, the plaintiffs herein." The judge concluded as a matter of law that, although defendant had qualified and is acting as executrix of her husband's will, she had accepted no benefits under it and is not estopped from asserting her ownership of all the lands which she owned with testator as tenants by the entireties. He held, however, that having elected to take independently of the will and contrary to the same, the defendant cannot also take under the will as devisee. He decreed that she is entitled to take no property as a devisee or beneficiary under the will of C. J. Barbee. The defendant did not except to this judgment. The plaintiffs excepted to the signing of the judgment and appealed.

Robert L. McMillan, Jr., for plaintiff appellant.
Charles O'H. Grimes and M. Alice Hunt for defendant appellee.

SHARP, J. In the vast majority of jurisdictions the rule is that merely qualifying as executor or administrator c.t.a. is not sufficient standing alone, to constitute an election to take under the will but is a factor tending to establish such an election which must be considered in conjunction with all the other circumstances. 57 Am. Jur., Wills, §1539; Anno. — Wills — Election by Beneficiary, 166 A.L.R. 316, 320.

The early cases in North Carolina held that if a wife qualified as executrix or administratrix, c.t.a. of her husband's will, the act of qualifying and undertaking upon oath to carry out the provisions of the will was an irrevocable election to abide by it. *Mendenhall v. Mendenhall*, 53 N.C. 287; *Hoggard v. Jordan*, 140 N.C. 610, 53 S.E. 220. This same rule applied to any other beneficiary who qualified

as executor or administrator c.t.a. *Allen v. Allen,* 121 N.C. 328, 28 S.E. 513; *Treadaway v. Payne,* 127 N.C. 436, 37 S.E. 460. An error in the legal consequences of a widow's decision was immaterial where there had been no imposition upon her. *Syme v. Badger,* 92 N.C. 706. However, where she was misinformed by those interested in the estate and had taken nothing under the will, she was allowed to dissent within the time provided in spite of having qualified as executrix. *In Re Shuford's Will,* 164 N.C. 133, 80 S.E. 420. Even where she herself owned the realty, and was entitled under the law to the personal property, given her by the will of her husband, her qualification as administratrix c.t.a. was held to estop her executor from afterwards claiming the property. *Tripp v. Nobles,* 136 N.C. 99, 48 S.E. 675.

In recent years North Carolina has modified the strict rule of the earlier cases and mere qualification as executor will not now constitute an election *unless the executor was under the necessity of making an election.*

In *Elmore v. Byrd,* 180 N.C. 120, 104 S.E. 162, a husband devised to his wife all his personal property and "the lands of which he was seized" for life with remainder to his children and grandchildren. W was appointed executrix and qualified. H owned a one hundred and fifty acre tract of land. W owned a one hundred and twenty-five acre tract which she conveyed to H four months prior to his death by a deed void because her private examination was not taken. The defendants contended that by qualifying as executrix, she had forfeited her right to claim the one hundred and twenty-five acres. The Court rejected this contention. Assuming, it said, that her qualification as executrix would be sufficient as an election, no election was required. H had erroneously believed the title to the one hundred and twenty-five acres had passed to him; it had not. He was not seized of the land and therefore his intention to devise it did not appear from the will. The Court also said, quoting from Pomeroy on Equity, 3d Ed., Vol. 1, § 475 at p. 792:

> " 'The doctrine of election is not applicable to cases where the testator, erroneously thinking certain property is his own, gives it to a donee to whom in fact it belongs, and also gives him other property which is really the testator's own, for in such cases the testator intends that the devisee shall have both, though he is mistaken as to his own title to one.' " (*Byrd v. Patterson,* 229 N.C. 156, 48 S.E. 2d 45, is such a situation.)

In *Benton v. Alexander,* 224 N.C. 800, 32 S.E. 2d 584, 156 A.L.R. 814, a husband devised to his wife all his real and personal property

for life with remainder to A, and appointed W his executrix. H owned no interest in any lands, except as a tenant by the entireties with W. His personalty was insufficient to pay his debts and W spent substantial sums of her own discharging them. In a contest between W and A over the lands, A contended that W had elected to take under the will when she qualified as executrix and that A owned the fee. Speaking for the Court, Justice Seawell reviewed the previous cases on the question and said: "While decided differently in many jurisdictions, it is settled law in this State that, nothing else appearing, a beneficiary under a will, *who is under the necessity of making an election,* has exercised that privilege by offering the will as executor and procuring its probate."

The question presented in the instant case, as it was in *Benton v. Alexander, supra,* is whether the widow was put to her election under the terms of her husband's will.

The doctrine of election has been stated and restated many times by this Court and, in the restating, it has been tempered somewhat. *Melchor v. Burger,* 21 N.C. 634; *Isler v. Isler,* 88 N.C. 581; *Tripp v. Nobles, supra; Hoggard v. Jordan, supra.* The following statement of the doctrine in *Lovett v. Stone,* 239 N.C. 206, 79 S.E. 2d 479, has the full sanction of our decisions today:

> "Election is the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims in cases *where there is a clear intention of the person from whom he derives one that he should not enjoy both,* the principle being that one shall not take any beneficial interest under a will, and at the same time set up any right or claim of his own, even if legal and well founded, which would defeat or in any way prevent the full effect and operation of every part of the will." (Italics ours)

See also *Sandlin v. Weaver,* 240 N.C. 703, 83 S.E. 2d 806; *Taylor v. Taylor,* 243 N.C. 726, 92 S.E. 2d 136.

The cases have always held that there was a presumption that a testator meant only to dispose of what was his own and that all doubts would be resolved "so that the true owner, even though he should derive other benefits under the will, will not be driven to make an election." However, if the will discloses a manifest purpose to require an election, then it is immaterial whether he should recognize it as belonging to another, or whether he should believe that he had the title and right to dispose of it. *Isler v. Isler, supra; Horton v. Lee,* 99 N.C. 227, 5 S.E. 404; *Elmore v. Byrd, supra.* This is the law today. *Lovett v. Stone, supra; Trust Co. v. Burrus,* 230 N.C. 592, 55 S.E. 2d 183.

In *Benton v. Alexander, supra,* as here, the debts of the estate largely exceeded the personal property and at no time did W accept any personalty by reason of the bequest. In holding that W was not put to an election, the Court said:

> "To raise the legal necessity of election, the intent of the donor must clearly appear from the will under recognized rules of construction. . . .
>
> "In the case at bar there is no express declaration that the one gift should be taken in lieu of the other, as we often find in wills intended to put the wife to her election with regard to common law or statutory rights in the property of her husband. . . 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 mistakingly believes to be his own, and so describes it, whereas, in reality, it is the property of another."

This Court has consistently followed the rule laid down by Justice Seawell in *Benton v. Alexander, supra.* In *Lamb v. Lamb,* 226 N.C. 662, 40 S.E. 2d 29, the Court said: "(I)f, 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."

In *Honeycutt v. Bank,* 242 N.C. 734, 89 S.E. 2d 598, *Bobbitt, J.,* speaking for the Court said: "Ordinarily, where the testator attempts to devise *specific property,* not owned by him, to a person other than the true owner, and provides other benefits for the owner of such specific property, such beneficiary is put to his election. (Citations omitted) Even so, if it appears that the testator erroneously considered the specific property so devised to be his own, no election is required. *Byrd v. Patterson, supra; Benton v. Alexander,* 224 N.C. 800, 32 S.E. 2d 584; *Elmore v. Byrd,* 180 N.C. 120, 104 S.E. 162." See also *Walston v. College,* 258 N.C. 130, 128 S.E. 2d 134.

For a discussion of these North Carolina cases see Anno.: Will — Election — Intention, 60 A.L.R. 2d 736, 746.

In the instant case Mrs. Barbee has accepted no benefits under the will of her husband — only the burden of administration which, no doubt, she assumed to save costs and to keep in the family the commissions which will be considerable in the administration of an estate so largely indebted. The judge has found as a fact, to which no exception was taken, that her husband devised to others the specific property to which she was entitled as survivor "in apparent ignorance

of the fact that said lands were owned by the entireties." As the law required him to do, the judge gave her the benefit of the presumption of fact that a testator intends to devise only his own property. The facts found support the conclusion of law. *Rader v. Coach Co.*, 225 N.C. 537, 35 S.E. 2d 609.

Under the authority of *Benton v. Alexander* and the subsequent cases cited above, we hold that Mrs. Barbee's qualification as executrix, under the circumstances here disclosed, did not amount to an election. The trial judge has ruled that she is entitled to take no property as devisee or beneficiary under the will. She did not appeal from this ruling. It is, therefore, the law in this case.

The judgment of the court below is

Affirmed.

MITTLE S. CONGER v. THE TRAVELERS INSURANCE COMPANY AND COLONIAL STORES, INCORPORATED.

(Filed 19 July 1963.)

1. Pleadings §§ 3, 18; Parties § 3—

The provision of G.S. 1-69 permitting a plaintiff, uncertain as to which of two defendants is liable, to sue both of them in the alternative will not be construed to authorize the joinder of unrelated and distinct causes of action against separate defendants, G.S. 1-123, but when the allegations of the complaint tell a connected story and plaintiff does not assert any inconsistent positions therein, and the action affects both defendants in that if the one is liable the other is not, the statute applies and demurrer for misjoinder should be overruled.

2. Same; Insurance §§ 8, 16—

Plaintiff alleged that she was the beneficiary under a certificate of group insurance, that insured's portion of the premium was regularly deducted from his wages by defendant employer, and that insured died less than 31 days after the last deduction of the premium from his wages. Plaintiff sought to recover against insurer on the policy if the policy were in force, and against the employer if the policy were not in force, for breach of contract by the employer to keep the policy in force by the payment of premiums. *Held:* Demurrer of the respective defendants for misjoinder of parties and causes of action should have been overruled.

APPEAL by plaintiff from *Paul, J.*, September 1962 Term of WAYNE.

The plaintiff brought this action against The Travelers Insurance Company and the Colonial Stores, Inc. alleging two alternative causes of action.

The first cause is stated against Insurance Company as follows:

E. H. Conger, deceased, was employed by Stores. Insurance Company issued to Stores a group insurance policy on the lives of its employees. Certificate No. F-1054 was issued to Conger under the master policy on September 1, 1958. It insured his life in the sum of $8,000.00 and named plaintiff as his beneficiary. Conger died on May 22, 1961 while the policy was in full force and effect. Notice of death and claim was given to Insurance Company but payment was refused. Plaintiff is entitled to recover the sum of $8,000.00 from Insurance Company.

The second cause of action is stated against Stores in the alternative as follows:

If it be found on the trial that Insurance Company is not liable to the plaintiff under the policy then Stores is liable because, under the terms of the employment contract between Stores and Conger, Stores agreed to pay part of the premium on the aforesaid life insurance policy and Conger agreed to pay $1.90 per week as his share of the premium. Stores deducted this sum from his salary up to and including his final week of employment which ended April 24, 1961. He died within thirty-one days thereafter. Under the terms of the policy his beneficiary was entitled to the face amount of the certificate. If Stores did not remit the premium due Insurance Company, his part of which it deducted from Conger's salary each week, or if any other breach of contract by Stores relieved Insurance Company from liability to the plaintiff, then Stores is liable to the plaintiff for $8,000.00

Each defendant demurred to the complaint on the ground that (1) there is a misjoinder of both causes of action and parties and (2) plaintiff is not the real party in interest. The judge sustained the demurrer for misjoinder and dismissed the action.

J. W. H. Roberts by Willis A. Talton for plaintiff appellant.
Taylor, Allen & Warren by John H. Kerr, III for defendant appellees.

SHARP, J. In considering the ground upon which the demurrer was sustained two statutes are applicable.

> G.S. 1-123 provides in part: "The plaintiff may unite in the same complaint several causes of action, of legal or equitable nature, or both, where they all arise out of — (1) The same

transaction, or transaction connected with the same subject of action. (2) Contract, express or implied. . . But the causes of action so united must all belong to one of these classes, and, . . . must affect all the parties to the action, and not require different places of trial, and must be separately stated." G.S. 1-69 provides: "All persons may be made defendants, jointly, severally, or in the alternative, who have, or claim, an interest in the controversy adverse to the plaintiff, or who are necessary parties to a complete determination or settlement of the questions involved. . .If the plaintiff is in doubt as to the persons from whom he is entitled to redress, he may join two or more defendants, to determine which is liable."

The last sentence of G.S. 1-69, quoted above, became law on May 4, 1931. As pointed out by Professor Henry Brandis (now Dean) of the University of North Carolina Law School in a discriminating article, "Permissive Joinder of Parties," 25 N.C.L.R. 1, 43, it is clear that G.S. 1-69 permits the joinder of defendants in the alternative where there is but one cause of action. For instance, if A wishes to sue B, the driver of a motor vehicle, and his employer for B's negligence but is uncertain whether C or D was the principal, he may join them both as defendants in the alternative. *Cain v. Corbett,* 235 N.C. 33, 69 S.E. 2d 20.

When the alternative joinder provision of G.S. 1-69 was adopted in 1931 it made no mention of G.S. 1-123 which is §126 of the 1868 Code of Civil Procedure. Therefore uncertainty has arisen whether, in a case of alternative joinder such as this, all causes must affect all parties. If so, do both causes stated in the complaint affect all parties?

In *Grady v. Warren,* 201 N.C. 693, 161 S.E. 319, the receiver of an insolvent bank sued (1) the directors for negligence resulting in insolvency and (2) another bank, with which the first had merged prior to its insolvency, for breach of contract in its liquidation. There was no allegation of a conspiracy or any continued course of dealing between the two defendants which resulted in loss to the plaintiff. Plaintiff's allegations were not in the alternative; he could have proceeded independently on both causes stated and might have recovered on both. Recovery against one set of directors would not necessarily have exonerated the other. G.S. 1-69 clearly did not apply to the case. However, the opinion contains this statement:

"C. S., 456, as amended by chapter 344, Public Laws 1931, (now G.S. 1-69), applies only when the plaintiff is in doubt as to the persons from whom he is entitled to redress on his cause of

> action; in that case he may join two or more persons as defendants to determine which is liable. The statute manifestly does not authorize a misjoinder of causes of action and of parties. Such was not its purpose. A complaint is demurrable now as before the amendment of C. S., 456, for a misjoinder of parties, and of causes of action. C. S. 511(4) and (5)."

The implication in this case is that G.S. 1-69 would apply only where one cause of action is stated.

In *Peitzman v. Zebulon*, 219 N.C. 473, 14 S.E. 2d 416, the Court specifically permitted the use of the alternative joinder feature of G.S. 1-69 where two causes were involved. Plaintiff sued the town for value of services rendered under a written contract to clean, paint, and test a water tank. The town answered, alleging that the mayor and clerk who made the contract on behalf of the town lacked authority. Plaintiff then made these two individuals parties defendant and amended to allege that if the town were not liable on the contract they were liable for wrongfully making the contract and inducing plaintiff to enter into an unauthorized contract. The Court reiterated that an action arising upon contract can be joined with one arising in tort "where they arise out of the same transaction or are connected with the same subject of action." Thus, the Court treated this case as involving two causes of action thereby negating the inference in *Grady v. Warren, supra*, that G.S. 1-69 applies when only one cause is alleged. The opinion states:

> "The cause of action in the case at bar is in the alternative against the municipal defendant and the individual defendants and arises out of a series of transactions forming one dealing and all tend to one end and the whole is told in one connected story. There are no alternative facts alleged, the only alternative involved under the allegations is as to which of the defendants are liable. The plaintiff is in doubt as to the persons from whom he is entitled to redress, and may, therefore, under the statute, join the defendants to determine which is liable. C. S. 456. (G.S. 1-69). See also title Parties, 47 C.J., pp. 74 and 75, paragraphs 153 and 154."

It is noted that while the Court pointed out that no alternative facts were alleged in *Peitzman*, it did not say G.S. 1-69 had no application when they were.

In the view we take of this case it is not necessary to quarrel with the statement in *Grady v. Warren, supra*, that a complaint is

still demurrable for an improper joinder of causes and parties. Certainly when it enacted the law which is now G.S. 1-69, the legislature did not contemplate multifariousness or the determination of two separate, distinct, and unconnected causes of action between plaintiff and two or more defendants in one law suit. *Insurance Co. v. Waters,* 255 N.C. 553, 122 S.E. 2d 387. However, this Court has said, "G.S. 1-123 will be liberally construed to effectuate its purpose for the judicial determination of actions with reasonable promptness and a minimum of cost to the litigants." *Milling Co. v. Wallace,* 242 N.C. 686, 89 S.E. 2d 413.

The common law made no provision for the joinder of defendants in the alternative and, in the absence of statutory authority, where one or the other of two defendants, but not both, is liable on a claim, plaintiff may not join such persons as defendants on the ground that he has a right to relief against one of them. However, when the statute authorizes a doubtful plaintiff to join two or more defendants in the alternative in order to ascertain which is liable to him, such statute is "a device of convenience" and should be construed so as to prevent a multiplicity of suits. 67 C.J.S., Parties, § 37(2). However, to do this it is not necessary to authorize a joinder in the alternative of defendants against whom unrelated distinct causes of action are asserted and we would not do so.

In construing Rules 3 and 6 under the English Judicature Act which, for the first time, permitted a plaintiff "in doubt as to the person from whom he is entitled to redress" to join two or more defendants so that liability might be "determined as between all parties of the action," Mellish, L.J., in *Honduras Railway Co. v. Tucker,* 2 Ex. Div. 301 (1877) said:

> "The rules ought to be interpreted fairly to carry out the intention of the legislature in making them. There can be no question that the intention of the legislature was that it should not be necessary for a plaintiff to bring an action first against A., and then against B., and to run the risk of the jury taking a contrary view of the evidence in the two cases, but that he should have both defendants before the Court at once, and try it out between them."

Plaintiff's objective in this action is the recovery of the $8,000.00 benefit specified in the certificate which Insurance Company issued to Conger. She is not blowing hot and cold; she has but one cause of action but does not know which of the two defendants she should sue. If the policy were in force at Conger's death, plaintiff is entitled to

recover the money from Insurance Company; if it were not, she says she is entitled to recover it from Stores as damages for its breach of contract with Conger to pay the premiums.

In the present (pleading) stage of this case while there is doubt as to which defendant may be liable, there is no possibility of recovery against both. As pointed out by Dean Brandis in 25 N.C.L.R., *supra,* 45 and 49, this mutual exclusiveness in a very practical sense makes both cases affect all parties. He says: "(I)t seems sound to say that in a *Peitzman* case situation, all causes do affect all parties because recovery on either will bar recovery of the other. The controlling issue in each case is the same."

In the instant case, upon the facts alleged in the complaint, the rights of all parties depend upon whether Stores paid the premiums to Insurance Company. The trial of this action will unfold one connected story. It may have one chapter or it may have two, but there is no logical reason why it should take two law suits to tell it. The whole matter can be completely and finally determined, with all parties before the Court at one time, in one action without embarrassing or prejudicing the rights of either defendant. On the trial plaintiff may be unable to sustain either of the causes she has alleged or, the evidence may require the submission of both causes to the jury under proper instructions. The alternative causes are not separate and distinct; they are so interwoven that if one defendant is liable the other is not. Of course, neither may be liable. It seems to us that this complaint, though it contains alternative factual allegations, discloses one of the situations for which G.S. 1-69 was passed sixty-three years after G.S. 1-123.

Defendants rely upon *Smith v. Land Bank,* 213 N.C. 343, 196 S.E. 481, in which plaintiff, who had executed a mortgage to the Land Bank, joined two causes of action. In the first cause, plaintiff alleged that defendant Bank foreclosed the mortgage which lacked a sufficient power of sale and then bought at its own sale through its agent, defendant F; that thereafter F conveyed the land to the Bank which then conveyed to defendant H Corporation which, in turn, conveyed different portions of the land to defendants J, D, and S. Plaintiff alleged that the individuals took with notice of plaintiff's equities. The prayer was that plaintiff recover the land and have an accounting of rents and profits from all parties. In the second cause of action, plaintiff prayed that if it should be found in the first that H Company or its grantees were innocent purchasers for value then plaintiff should recover from the Bank the value of the land less the mortgaged indebtedness. Defendants' demurrers for a misjoinder of causes and

parties were sustained and the action dismissed. The Court said, "In the case at hand the first cause of action affects all the defendants. The second affects only the defendant Land Bank. Hence there is a misjoinder of parties." The Court further said that the two causes were inconsistent and plaintiff could not maintain both at the same time.

Although the 1931 amendment to G.S. 1-69 was in effect at the time *Smith* was decided, it is nowhere mentioned either in the briefs or the opinion, and the opinion in *Peitzman* does not mention the *Smith* case.

In the *Smith* case the Land Bank was involved in both causes of action but the relief sought in one precluded the relief sought in the other. Plaintiff did not seek both. It appears that *Smith* involved a clear alternative joinder of causes and that *Peitzman* (the later case) reached a result inconsistent with *Smith. Brandis,* 25 N.C.L.R., *supra* 48; McIntosh, North Carolina Practice and Procedure (2d ed.) § 653. *Peitzman* seems to us to reach the conclusion most likely to expedite the prompt administration of justice.

For the reasons stated we hold that G.S. 1-69 permits the joinder of the two alternative causes stated in the complaint.

Reversed.

J. J. GRABENHOFER, TRADING AS RIVIERA FURNITURE CO., RIVIERA BEACH, FLORIDA, PLAINTIFF v. LAHOMA GARRETT, DEFENDANT.

(Filed 19 July 1963.)

Husband and Wife § 15; Execution § 16—

A judgment creditor of the husband alone is not entitled, in supplemental proceedings after execution is returned unsatisfied, to the appointment of a receiver for lands held by the husband and wife by the entireties.

APPEAL by plaintiff from *Hobgood, J.,* November Term 1962 of ALAMANCE.

The hearing below was on plaintiff's motion that a receiver be appointed to take possession of certain real property in Alamance County, North Carolina, owned by defendant and his wife, Ethylene Garrett, as tenants by the entirety, and that the receiver rent said property and apply the rentals to the payment of a judgment plaintiff had obtained against defendant.

The only evidence was plaintiff's verified motion and defendant's verified answer thereto.

The court's findings of fact are quoted below.

"1. That on or about December 8, 1960, the plaintiff secured a Judgment against the defendant in the above entitled action in the Superior Court of Alamance County, North Carolina, in the sum of $1,623.52, plus interest thereon at the rate of six per cent per annum from and after October 25, 1958. (Note: Execution was issued and returned unsatisfied.)

"2. That on or about August 8, 1962, and pursuant to an Order of the Clerk of the Superior Court of Alamance County, North Carolina, the plaintiff examined the defendant relative to any property, both real and personal, then owned by said defendant and which could be subject to execution to satisfy said Judgment. That at said hearing it was determined that the defendant and his wife, Ethylene Garrett, were the owners in an estate by the entireties of 1.9 acres of land located in Patterson Township, Alamance County, North Carolina, in the approximate value of $13,000, and upon said land was situated the home of the defendant and his family.

"3. That in 1957 the defendant obtained temporary employment in the State of Florida on a construction job, and thereafter has spent some time in the State of Florida, and some time in the State of North Carolina, and in the year 1958, the defendant was permanently injured in an accident arising out of the course and scope of his employment, and thereafter has received medical treatment both in the State of Florida and in the State of North Carolina. That the land located in Patterson Township, Alamance County, North Carolina, was purchased by the defendant and his wife in 1947, and thereafter the defendant and his wife erected a dwelling house on said property in the year 1948, and have continuously maintained their residence thereat except for periods of time since 1957 when they stayed in the State of Florida.

"4. That the defendant is a citizen and resident of Alamance County, North Carolina, and has established and maintained at all times his domicile in the State of North Carolina, and is presently a citizen and resident and domiciled in the State of North Carolina. That the dwelling house located on the 1.9 acres of land in Patterson Township, Alamance County, North Carolina, is owned jointly by the defendant and his wife in an estate by

the entireties, and is used by the defendant and his family as their home, and that said property is not subject to execution to satisfy any Judgment against the defendant, Lahoma Garrett, individually."

The court, by order dated November 12, 1962, denied plaintiff's said motion. Thereupon, plaintiff excepted "to the foregoing ruling of the Court" and appealed. In "Assignments of Error" dated March 27, 1963, plaintiff set forth (1) that the court erred in denying plaintiff's said motion, and (2) that the court erred "in finding that the defendant was a resident of the State of North Carolina at the time the motion was made for the appointment of a receiver and that the property in question was the 'home' of defendant."

Gerald C. Parker, for plaintiff appellant.
Ross & Wood for defendant appellee.

BOBBITT, J. The properties and incidents of an estate by the entirety are set forth in *Davis v. Bass,* 188 N.C. 200, 124 S.E. 566, and in *Johnson v. Leavitt,* 188 N.C. 682, 125 S.E. 490. For a comprehensive exposition, with full citations, see valuable article by Professor Robert E. Lee, "Tenancy by the Entirety in North Carolina," 41 N.C.L.R. 67-100.

Under prior decisions of this Court, defendant has no (divisible) interest in the subject property which, during coverture, is subject to sale under judgment and execution against him alone. *Edwards v. Arnold,* 250 N.C. 500, 109 S.E. 2d 205; *Harris v. Distributing Co.,* 172 N.C. 14, 89 S.E. 789. Professor Lee, *op cit.,* p. 84, cites these and other North Carolina decisions in support of the following statements: "In North Carolina a tenancy by the entirety is not subject to levy under execution on a judgment rendered against either the husband or the wife alone. Neither the husband nor the wife has such an interest in an estate by the entirety as can be sold under execution to satisfy a judgment against him or her alone." Also, see *Lee, op. cit.,* p. 86.

During coverture, a judgment against either the husband or the wife is not a lien on land owned by husband and wife as tenants by the entirety. *Air Conditioning Co. v. Douglass,* 241 N.C. 170, 174, 84 S.E. 2d 828, and cases cited. Hence, their joint deed conveys the land to a purchaser free and clear of the lien of any judgment docketed against either the husband or the wife. *Hood v. Mercer,* 150 N.C. 699, 64 S.E. 897, and cases cited; *Winchester-Simmons Co. v. Cutler,* 199 N.C. 709, 155 S.E. 611, and cases cited; *Lee, op. cit.,* p. 87.

In Annotation, "Interest of spouse in estate by entireties as subject to satisfaction of his or her individual debt," 75 A.L.R. 2d 1172, 1175, this statement appears: "In a majority of jurisdictions, it has been held that under the Married Women's Property Acts the interest of a husband or a wife in an estate by entireties is not subject to the claims of his or her individual creditors during the joint lives of the spouses, and if the debtor spouse dies first the survivor takes the entire estate free from the debts of the deceased." The numerous cases cited in support of this statement include decisions of this Court.

Since "the husband, during coverture and as between himself and the wife, has absolute and exclusive right to the control, use, possession, rents, issues, and profits of property held as tenants by the entirety," it was held in *Lewis v. Pate,* 212 N.C. 253, 193 S.E. 20, cited by plaintiff, that crops raised on land owned by husband and wife as tenants by the entirety belonged to the husband and were subject to levy and sale under execution to satisfy a judgment against him. A sale under execution of said crops, except the portion set apart by appraisers as the judgment debtor's personal property exemption, was ordered. Suffice to say, no question is now presented with reference to crops raised on the subject property.

Plaintiff's motion is made in proceedings supplemental to execution. Defendant was required to appear and answer concerning his property. G.S. 1-352. Then, if not before, plaintiff was advised as to the subject property and as to its ownership by defendant and his wife as tenants by the entirety.

There is no contention that any person or corporation has property of defendant or is indebted to defendant. G.S. 1-360 *et seq.* In this connection, see *Cornelius v. Albertson,* 244 N.C. 265, 268, 93 S.E. 2d 147.

Defendant is in lawful possession of the subject property. If (contrary to our prior decisions) plaintiff's contention that defendant has a divisible interest in the subject property were accepted, it would seem that such interest, except to the extent it would be exempt as a homestead or personal property exemption, would be subject to sale under execution, and such execution sale would constitute plaintiff's remedy. G.S. 1-315. Thus, whether his said contention is rejected or accepted, plaintiff's motion for appointment of a receiver was properly denied.

Obviously, plaintiff's exception "to the foregoing ruling of the Court" is insufficient to support plaintiff's purported assignment of error relating to certain of the court's findings of fact. However, this

Court's decision, which affirms the order of the court below, is not based on any finding of fact referred to in plaintiff's said purported assignment of error.

Affirmed.

J. CLAUDE GASKINS, T/A GREENVILLE FEED MILLS v. HARTFORD FIRE INSURANCE COMPANY.

(Filed 19 July 1963.)

1. Pleadings § 19—

In an action on a policy of fire insurance, a complaint alleging that defendant insurer issued its policy on the premises in question in a stated amount and that the building and its contents, valued in a specified amount as itemized in the complaint, were destroyed by fire, and that plaintiff gave insurer immediate notice and had performed all the conditions of the policy, *is held* to state an enforceable cause of action notwithstanding its failure to allege plaintiff's ownership of the property and consideration for the policy, and, upon demurrer, the cause should not be dismissed but plaintiff should be allowed to amend.

2. Evidence § 1—

A court judicially knows its own records and therefore will take judicial notice of the filing dates of the pleadings in an action before it.

3. Pleadings § 19; Insurance § 87—

Where plaintiff insured filed complaint stating an enforceable cause of action within twelve months of the loss by fire, and after the expiration of the twelve-month period the parties consent that defendant's demurrer should be sustained, and thereafter amended complaint is filed in accordance with the consent order, defendant insurer will not be permitted to assert the provision of the policy that action be instituted within twelve months after loss, since the provision is contractual and subject to waiver or estoppel.

APPEAL by defendant from *Mintz, J.*, September 1962 Term of PITT. Certiorari allowed February 12, 1963.

Plaintiff instituted this action on February 26, 1962. The complaint alleged the following facts:

Defendant is engaged in the business of assuming risks of insurance from loss by fire for a consideration. On October 1, 1960 defendant issued to plaintiff policy No. 270047 insuring plaintiff for five years against loss of the contents of the building at 810 Watauga Avenue in Greenville, North Carolina, in an amount not to exceed $12,500.00.

On March 19, 1961 the building and its contents, valued at $12,381.00 and itemized in the complaint, were destroyed by fire. Plaintiff gave defendant immediate notice of the loss and has performed all the conditions of the policy. When payment was refused plaintiff instituted this action within twelve months from the date of loss.

Defendant demurred to the complaint for failure to state a cause of action for that (1) it appeared the contract was without consideration and (2) there was no allegation that plaintiff had an insurable interest in the property which was destroyed.

On May 29, 1962 Judge Copeland sustained the demurrer and, in the same order, allowed plaintiff thirty days in which to file an amended complaint. His order recited "that the parties have by consent agreed that said demurrer should be sustained for the reasons set out in the demurrer."

On June 21, 1962 the plaintiff filed a more detailed complaint in which he alleged the identical cause of action but supplied the specific averments that plaintiff owned the particular property which was destroyed by fire and that the policy sued on had been issued in consideration of the agreed premium.

On July 13, 1962 defendant demurred to the amended complaint for that it appeared from the complaint that the loss complained of had occurred on March 19, 1961, and the complaint was filed on June 21, 1962, more than fifteen months later, and that the action had not been brought within twelve months of the loss as required by G.S. 58-176.

On December 10, 1962 Judge Mintz overruled the demurrer. Defendant's petition for certiorari was granted, and defendant appealed assigning as error the order of the Court overruling the demurrer.

David E. Reid, Jr., for plaintiff appellee.

J. W. H. Roberts by Eugene A. Smith, Associate, for defendant appellant.

SHARP, J. While the complaint filed in this action was in general terms and some facts left to inference, it nevertheless stated an enforceable cause of action. At worst, it could only have been a defective statement of a good cause. Defendant's proper remedy was by a motion to make the complaint more definite. In demurring, counsel for defendant followed the practice mentioned by Barnhill, C.J., in *Davis v. Rhodes,* 231 N.C. 71, 56 S.E. 2d 43. "When, as is often the case, counsel resort to a demurrer, rather than a motion to make more definite, to challenge the sufficiency of the statement of a good

cause of action and the defect may be cured by amendment, the courts will allow the amendment rather than dismiss the action."

However, in this case, the judge, *by consent*, sustained the demurrer "for the reasons set out in the demurrer." His judgment, even though the complaint was not demurrable, became the law of the case. *Nothing else appearing*, the new complaint having been filed more than twelve months "after the inception of the loss" the action would be barred for failure to comply with G.S. 58-176. *Holly v. Assurance Co.*, 170 N.C. 4, 86 S.E. 694; *Rouse v. Insurance Co.*, 203 N.C. 345, 166 S.E. 177; *Boyd v. Insurance Co.*, 245 N.C. 503, 96 S.E. 2d 703; *Webb v. Eggleston*, 228 N.C. 574, 46 S.E. 2d 700; *Davis v. Rhodes, supra; Stamey v. Membership Corporation*, 249 N.C. 90, 105 S.E. 2d 282. The Court will take judicial notice of the filing date of the amended complaint; it judicially knows its own records in the suit being tried. *Harrell v. Lumber Co.*, 172 N.C. 827, 90 S.E. 148; *Webb v. Eggleston, supra; Massenburg v. Fogg*, 256 N.C. 703, 124 S.E. 2d 868. In this case we think *something else* appears.

At the time counsel for both defendant and plaintiff consented that the demurrer be sustained, the twelve months had already expired and, unless the complaint could have been amended so that the amendment related back, counsel for plaintiff would have been giving away his client's law suit. This, of course, he had no right to do, and we presume that he no more intended to give away his law suit than counsel for defendant thought he did.

It is implicit in his Honor's judgment, and the somewhat unusual procedure, that counsel's consent that the demurrer be sustained was intended merely as a device to make the original complaint more definite and certain. This was the only relief to which defendant was then entitled, and the consent of both counsel that the demurrer be sustained implied their consent to the amendment. Permission to amend was included in the order sustaining the demurrer without objection by defendant.

A provision in a standard fire insurance policy that action on it must be commenced within twelve months after inception of the loss is contractual. It is, therefore, subject to waiver or estoppel. Strong's N. C. Index, Vol. 2, Insurance, § 87; *Dibbrell v. Insurance Co.*, 110 N.C. 193, 14 S.E. 783; *Meekins v. Insurance Co.*, 231 N.C. 452, 57 S.E. 2d 777; *Boyd v. Insurance Co., supra.*

Affirmed.

PARKER, J. Concurring in the result. I concur only in the result affirming the judgment below overruling the demurrer to the amended

complaint on the ground that the cause of action stated in the amended complaint has not been brought within twelve months of the loss as required by the provision of the policy, which policy, it is stipulated, is a Standard Fire Insurance Policy as set forth in G.S. 58-176, for the simple reason that the objection that the action stated in the amended complaint was not commenced within the time limited by the provision of the policy cannot be taken advantage of by demurrer, but can only be taken by answer. G.S. 1-15; *Stamey v. Membership Corp.*, 249 N.C. 90, 105 S.E. 2d 282; *Lewis v. Shaver*, 236 N.C. 510, 73 S.E. 2d 320.

Defendant is not required to plead this provision of its policy as a bar to plaintiff's action alleged in his amended complaint, nor is any person required to plead as a defense to an action the bar of the Statute of Limitations. However, if defendant does plead it as a defense, defendant will be entitled to a peremptory instruction in its favor that plaintiff's action as stated in his amended complaint will be barred by this provision of the policy limiting the time in which action can be brought, unless plaintiff alleges a waiver by defendant of this provision of the policy, or an estoppel of defendant to rely upon it, or both, and introduces evidence in support of such allegations, because no facts constituting a waiver or an estoppel appear in the amended complaint. *Miller v. Casualty Co.*, 245 N.C. 526, 96 S.E. 2d 860.

In *Wright v. Insurance Co.*, 244 N.C. 361, 93 S.E. 2d 438, the Court said:

> "The rule is well settled in this jurisdiction, and it seems to be the majority rule elsewhere, that, if the insured relies upon a waiver or an estoppel *in pais* or an equitable estoppel affecting the real and substantial merits of the matter in controversy and has an opportunity to plead it, and the facts constituting a waiver or estoppel do not appear in the pleadings of the parties, he must specially plead it, and if he does not do so, evidence to prove it is not admissible over objection." (Citing numerous authority.)

FLOYD L. MAYBERRY, TRUSTEE OF JOHN FRANKLIN MAYBERRY, INCOMPETENT, PLAINTIFF v. CHARLOTTE CITY COACH LINES, INC., A CORPORATION, WAYNE HEATH THOMAS AND PRESTON DOUGLAS GRIER, JR., DEFENDANTS.

(Filed 19 July 1963.)

1. Automobiles § 17—

The charge of the court in regard to the duty of a motorist, notwithstanding he is given the right-of-way by a flashing yellow traffic signal, to keep a lookout commensurate with the danger created by the weather and the obstructed view of the intersection, and that if he saw or should have seen the other vehicle approaching under circumstances which gave or should have given notice that the other motorist could not or would not stop, he was required to use all precautions reasonably at his command to avoid collision, *held* not to contain prejudicial error.

2. Appeal and Error § 39—

The burden is on appellant not only to show error but that except for the asserted error a different result was reasonably probable.

APPEAL by plaintiff from *Patton, J.*, December 3, 1962 Regular Civil "B" Term of MECKLENBURG.

Suit for personal injuries rising out of a collision between an automobile and a bus in the City of Charlotte. Plaintiff, a passenger in the automobile, sued the driver of both vehicles and the bus company. The jury returned a verdict against the driver of the automobile. The evidence, remarkably free from conflict, tends to show the following:

Plaintiff, a young man twenty-four years of age, and the defendant, Preston Douglas Grier, Jr., worked at the Charlotte News as route supervisors. On November 22, 1960 Grier had attended classes at Charlotte College until noon. Thereafter he worked at the Charlotte News until 9:30 p.m. when he, plaintiff, and four other employees left for a full night of "partying." About 5:45 a.m. on November 23, 1960 plaintiff and Grier were returning to the Charlotte News in Grier's 1958 Chevrolet Convertible which he was operating in a westerly direction on East Fourth Street. It was raining. Grier intended to go hunting that morning before reporting for work at noon.

East Fourth Street runs generally east and west. It is forty-three feet wide and divided into four traffic lanes, two for traffic in each direction. The width of each lane, from north to south, is 12, 10, 9, and 12 feet respectively. South Brevard Street runs north and south and intersects East Fourth Street at right angles. Brevard Street, north of Fourth, is forty-five feet wide and divided into three lanes for traffic moving south only. The two outside lanes are eighteen feet

wide; the center lane, nine feet. On the north side of Fourth Street is a pedestrian sidewalk seven feet wide. An eight-foot wide pedestrian crosswalk had been marked off at the eastern edge of the intersection on Fourth Street. Five feet east of its eastern line was a stop line. There was a similar crosswalk on South Brevard Street on the north side of the intersection. In the northeast corner of the intersection is a two-story building flush with the sidewalk on both streets. However, the corner of the building pointing to the intersection is "chopped off." It measures 8½ feet across the corner. There are two utility poles at the curb in the northeast corner.

This intersection was controlled by flashing signal lights installed by the City of Charlotte. The light for Fourth Street flashing red; for Brevard Street, yellow. The applicable ordinance provided:

> "Section 25. FLASHING SIGNALS. Whenever flashing red or yellow signals are used they shall require obedience by vehicular traffic as follows:
>
> "(a) Flashing red (Stop Signal). When a red lens is illuminated by rapid intermittent flashes, drivers of vehicles shall stop before entering the nearest crosswalk at an intersection or at a limit line when marked, and the right to proceed shall be subject to the rule applicable after making a stop at stop sign.
>
> "(b) Flashing yellow (Caution Signal). When a yellow lens is illuminated with rapid intermittent flashes, drivers of vehicles may proceed through the intersection or along said street or highway past such signal only with caution."

A civil engineer who surveyed this intersection for the plaintiff testified that in the daytime the line of vision down Fourth Street, measured from a point at the stop line north of the intersection and approximately three feet west of the line marking off the west traffic lane on Brevard Street, is approximately one hundred and ninety-five feet.

At the intersection of Brevard and Fourth Streets there was a collision between the Grier Chevrolet and a bus of the defendant Charlotte City Coach Lines which was being operated by the defendant Wayne Heath Thomas. Plaintiff was thrown from the automobile. He received injuries which have left him partially paralyzed and mentally incompetent. The circumstances of the collision may best be described in the words of the drivers themselves.

Grier's version:

> ". . .I did not slow down. I continued on the same speed as I came into the intersection.

". . .(W)hen I was in the intersection and I saw the bus, it was just moments before it hit me. I saw it just as it hit me. I saw the bus to my right. The right rear of my automobile was damaged. My automobile was over half way through the interesection at the time it was struck.

". . .It was raining hard enough to have my windshield wiper on . . . The windshield wipers were necessary for you to see where you were going. My lights were on low beam. Visibility was limited to some degree by the rain.

". . .I looked at the flashing red lights after the accident. They were flashing red. I didn't see the lights when I went through, when the accident occurred.

"There was nothing in front of me to block my visibility. I don't know whether I looked to my right before I went through that intersection. I testified I didn't slow down. I was aware that Brevard Street was one-way south. I only had to look in one direction.

"I testified I was doing approximately 20 to 25 miles an hour. I could have been going as much as 25.

"I previously answered your question: 'When you looked to the right — Where were you when you looked right?' by saying 'I was in the intersection.' I say that I saw the bus only moments before the collision occurred. It all occurred in one big flash.

"At the time of the accident, I had been drinking beer, both in North and South Carolina, and had been partying for a period of in excess of seven and one-half or eight hours — after attending school for approximately a half a day. I had been with three different women. I had had no sleep for about twenty-four hours."

Thomas' version (not in sequence):

"At the intersection of Fourth and Brevard I saw a flashing yellow traffic signal. In response to the flashing yellow light, I had slowed the bus down to approximately four or five miles an hour, looked to the left, saw the way was clear, looked to the right and had proceeded to go across Fourth. . .I was in, or near the crosswalk of East Fourth Street when I looked to my left and right. I looked to my left first and then looked to my right. Then I looked straight ahead. . .I don't believe I ever looked again after the first time. I looked one time and no more.

"After I had then started up, back into, in or about the first lane of E. Fourth Street, just like a flash — that's the first time

I saw him. I then brought my bus to a stop. I was in a collision. "He had gone half way into the intersection at the time I first saw him, that much at least. I would say he was approximately twenty-five feet into the intersection when I first saw him.

"At that time I was already in the intersection myself. Everything happened so fast, I really don't know what is the first thing I did when I first saw the automobile. I don't know whether I got to the brakes just that instant. Just a second later I finally stopped.

"The right rear side of the automobile was struck by the bus—the rear part. The point of impact was in the northwest sector of the intersection, over to my right, but coming down South Brevard. It was north of the center line of Fourth Street and west of the center line of Brevard Street.

"At the time I struck the car, not anything much happened to the bus. It didn't give quite a jar to anything. I then braked the bus. The bus stopped about middleways of the intersection approximately.

"I would say that at the speed I was going into that intersection on that particular morning with my air brakes working as they were, I could have stopped that bus without injury to the bus, myself or anyone else in approximately six to eight feet."

The investigating officer found debris in the intersection at about the point where the east line of the westernmost traffic lane for southbound traffic at Brevard Street intersects the north line of Fourth Street if it were extended into the intersection. The Chevrolet was up against a building at the south west corner of the intersection. It was a total loss. From the debris to the Chevrolet was one hundred and twenty-nine feet. He found damage on the left front of the bus, the bumper and panel bent in, tag bent, and left headlight hanging down. Grier told the officer that he had been going about twenty-five miles per hour. The jury exonerated Thomas and the Coach Company of actionable negligence and the plaintiff of contributory negligence. It awarded substantial damages against the defendant Grier. The plaintiff appealed assigning errors in the charge with reference to the defendants Thomas and Coach Company.

Bradley, Gebhardt, Delaney and Millette by Ernest S. Delaney, Jr., for plaintiff appellant.

Lassiter, Moore and Van Allen by James O. Moore and John T. Allred for defendant appellees.

PER CURIAM. The actionable negligence of the defendant Grier is established by his own testimony with absolute finality. As to the defendant Thomas, the question was whether his failure to observe Grier's approach constituted negligence which was a proximate cause of the collision producing plaintiff's injuries. The answer depends upon whether, in the exercise of a proper lookout as he entered the intersection, what he could or should have seen would have been sufficient to put him on notice, in time to have avoided the accident, that Grier did not mean to stop in obedience to the flashing red light. *Stathopoulos v. Shook*, 251 N.C. 33, 110 S.E. 2d 452. The Court fully charged the jury that Thomas was under the duty to keep a lookout commensurate with the dangers created by the weather and the obstructed view to his left, and that he was not relieved of this duty by the presence of a flashing red light on Fourth Street. He further instructed the jury:

> "If the defendant Thomas saw or in the exercise of due care in keeping a proper lookout should have seen the defendant Grier's vehicle travelling on Fourth Street and approching the intersection at such a rate of speed or under such other circumstances that the defendant Thomas, in the exercise of ordinary care, knew or should have known that the defendant Grier could not, or would not stop, for the blinking red light, then the defendant Thomas was required to reduce his speed, stop if necessary, and use all precautions reasonably at his command to avoid collision."

Considered contextually, we are of the opinion that the entire charge fairly presented the case to the jury and that the jurors must have understood the issue of fact and the law which applied to it. After hearing all the evidence, the jury reached the conclusion that no negligence on the part of the Bus Company's driver contributed to this accident and its tragic consequences. The burden is on the appellant not only to show error but to show that if the error had not occurred there is a reasonable probability that the result of the trial would have been favorable to him. *Stathopoulos v. Shook, supra.* The jury having reached the decision it did on the evidence in this case, we find nothing in the record to suggest that result would be different on another trial.

No error.

STATE HIGHWAY COMMISSION v. KENAN OIL COMPANY, A CORPORATION, OLLIE CLARK, DURHAM BANK & TRUST COMPANY, TRUSTEE, AND HOME SECURITY LIFE INSURANCE COMPANY.

(Filed 19 July 1963.)

Trial § 35—

An instruction on the issue of the amount of compensation for the taking of land that plaintiff had testified to a difference in the value of his land before and after the taking in a specified amount "which is more than some of his own witnesses testified to" must be held for error as tending to impeach the credibility of defendant as a witness. G.S. 1-180.

APPEAL by defendant Kenan Oil Company from *Hobgood, J.*, at the September 1962 Term of ORANGE.

This proceeding was instituted by the State Highway Commission under G.S. 136-19 and G.S. 136-103 *et seq.* Prior to February 9, 1961, the defendant Kenan Oil Company owned a lot, used as a filling station, in the southwestern intersection of N. C. Highway No. 54 and Ayr Road in Chapel Hill. The property fronted 165 feet on the south side of Highway No. 54 and 201.2 feet on Ayr Road. In order to widen Highway No. 54 the plaintiff appropriated a strip 28.25 feet wide across the northern portion of the lot abutting Highway No. 54. As its estimate of just compensation, plaintiff deposited with the clerk of the Superior Court of Orange County the sum of $12,700.00 which, on March 3, 1961, was disbursed to the defendant Oil Company under G.S. 136-105 by order of the judge. The defendant, in its answer to the complaint, declaration of taking, and notice of deposit, alleged that the value of the land taken and the damage to the remaining property amounted to $45,000.00.

Upon the trial defendant's president, Mr. Kenan, testified that in his opinion the difference in the market value of the property before and after the strip was taken was $45,000.00. Defendant's other three witnesses, realtors of Chapel Hill, fixed the damage at either $31,000.00 or $31,200.00. Witnesses for the plaintiff, appraisers in the Chapel Hill area, fixed the damage at $8,250.00 and $10,500.00 respectively. The jury awarded defendant compensation of $15,000.00 with interest from February 9, 1961. From a judgment on the verdict the defendant Oil Company appealed.

T. W. Bruton, Attorney General, Harrison Lewis, Assistant Attorney General, William W. Melvin, Trial Attorney for plaintiff appellee.

John T. Manning for defendant appellant.

SHARP, J. The defendant assigns as error the following portions of the charge which are in parentheses:

". . . Mr. Kenan himself has testified he suffered the loss of $40,000 to $45,000 because he says that the property was worth $80,000 immediately before the taking, the fair market value, and less than $40,000 afterwards, in his opinion about $35,000, which would make a difference of about $45,000 (which is more than some of his own witnesses have testified to)—EXCEPTION NO. 3 — you would take in consideration his natural interest in the outcome of this, because after all he was the owner of the property. When I say 'he', he is president of the corporation which owns the property and (there may be specific values in his mind which the real estate appraisers will not consider). EXCEPTION NO. 4.

"Now, on the other hand his witness, Mr. Hornaday, has come up with a reasonable market value of the property before the taking of $71,200, and $40,000 as the reasonable market value thereafter, making a difference of $31,200. . . ."

Immediately preceding the quoted portion the judge had told the jury that there was a great divergence of opinion among the witnesses as to the value of the property before and after the taking and, in passing upon the credibility of the witnesses, that jurors had a right to take into consideration the bias, if any, which a witness might have.

The statement which constitutes Exception No. 4 seems to be in defendant's favor. However, we think the statement which is the subject of Exception No. 3 was an inadvertent expression of opinion indicating that the judge questioned either the credibility or judgment of defendant's witness, Mr. Kenan. This assignment of error must be sustained. "A trial judge in this jurisdiction is not permitted to cast doubt upon the testimony of a witness or to impeach his credibility." *State v. Smith,* 240 N.C. 99, 81 S.E. 2d 263; G.S. 1-180.

It is clear to us that the able and conscientious trial judge meant to be stating a contention of the defendant. However, the jurors were nowhere so informed and they undoubtedly interpreted the statement, when considered along with his reference to Mr. Hornaday's evidence, to mean that the judge thought Kenan's evaluation of the damage too high. There are so many hazards to judicial navigation that not even the most circumspect navigator can avoid them all.

Since the case goes back for a new trial it is not necessary to discuss the assignment of error relating to the charge on the measure of damages. The applicable principles are discussed in *Kirkman v. Highway Commission,* 257 N.C. 428, 432, 126 S.E. 2d 107.

New trial.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1963

STATE v. CARL WOOLARD.

(Filed 18 September 1963.)

1. **Criminal Law § 72—**

   Declarations, statements, and admissions of a defendant of facts pertinent to the issue and which tend, in connection with other facts, to prove his guilt of the offense charged, are competent against him in a criminal action.

2. **Criminal Law § 165—**

   The admission of evidence relating to charges upon which defendant is acquitted cannot have prejudiced defendant in regard to such charges.

3. **Criminal Law § 160—**

   The burden is upon appellant not only to show error but also that the asserted error was prejudicial so that a different result would likely have ensued.

4. **Criminal Law § 164—**

   Where there is ample evidence to be submitted to the jury on the question of defendant's guilt of the charges upon which he was convicted, the fact that in regard to other charges upon which defendant was acquitted the evidence may have been insufficient to be submitted to the jury, ordinarily could not prejudice him.

5. **Criminal Law § 156—**

   An exception to the charge on the ground that it failed to explain and apply or correlate the law to the various aspects of the case presented by the evidence, without specifying the specific legal propositions which appellant asserts were improperly omitted from the charge, is a broadside exception and will not be considered.

6. Criminal Law § 159—

An assignment of error not brought forward and discussed in the brief will be taken as abandoned. Rule of Practice in the Supreme Court No. 28.

APPEAL by defendant from *Bundy, J.*, March 1963 Session of BEAUFORT.

Defendant appeals from a judgment imposed upon a verdict of guilty of the reckless driving of an automobile upon a public highway, a violation of G.S. 20-140.

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

LeRoy Scott and John A. Wilkinson for defendant appellant.

PARKER, J. A chronological history of the criminal charges made against defendant is necessary to an understanding of this appeal.

On 3 January 1963 a warrant was issued by a justice of the peace based upon the affidavit of C. E. Greenhill, a State Highway Patrolman, charging defendant on 2 January 1963 with operating an automobile on a public highway with an improper muffler that created excessive noise, a violation of G.S. 20-128. Upon motion of the State the warrant was amended to charge defendant additionally with reckless driving of an automobile on a public highway, a violation of G.S. 20-140—the date of this charge is not stated. Defendant pleaded not guilty to the charges. The justice of the peace found probable cause and sent the case to the recorder's court of Beaufort County for trial.

A trial on the amended warrant was held in the recorder's court, apparently on 11 January 1963. Defendant pleaded not guilty. The recorder's court dismissed the charge as to improper muffler and adjudged the defendant guilty of reckless driving. From the judgment imposed, defendant appealed to the superior court.

In the superior court defendant was tried on an indictment charging him on 2 January 1963 with the reckless driving of an automobile on a public highway, a violation of G.S. 20-140, and charging him in an additional count on the same date with driving an automobile on a public highway at a speed in excess of 55 miles an hour in a 55-mile an hour speed zone, and also on a warrant charging him with driving an automobile on a public highway equipped with a muffler that caused excessive noise, a violation of G.S. 20-128. This warrant is not in the record. It appears from the judge's charge to the jury, which is in the record, that the warrant upon which defendant was tried in the superior court charged the date of defendant's violation of G.S. 20-128, improper muffler, as 31 December 1962.

Defendant pleaded not guilty to all the charges. Verdict: Guilty of reckless driving, not guilty of speeding and of driving an automobile on a public highway equipped with an improper muffler.

The State offered evidence tending to show the following facts: On the night of 31 December 1962 defendant was operating a 409 red Chevrolet automobile, year model 1962, on U. S. Highway 17, the muffler of which was crackling and making a loud noise. C. E. Greenhill, a State Highway Patrolman, stopped the automobile and looked under it. The mufflers had cut-outs that ran from the front of the mufflers out to the side, and the caps of the cut-outs were closed. The cut-out is a pipe extension that goes from the front of the muffler from the exhaust out to the side of the car, by-passing the muffler when it is cut off. The caps open in the back and the pressure goes out the straight pipe instead of through the muffler. That alone creates excessive noise. It is said the use of the cut-out increases the speed of the car on the drag strip. Greenhill told defendant he had warned him about mufflers before. Defendant said those mufflers were on the other car, not on the car he was driving. Greenhill replied, "These mufflers on this car are as loud as those you had on the other one."

Greenhill went to his patrol car and got out his citation book. Defendant asked him what he was going to give him a ticket for. The patrolman told him his mufflers were too loud and began writing a ticket. Defendant then said, "This is a hell of a way to make a living." Greenhill replied, "Yes, I guess there is better ways." Defendant then said, "A patrolman steals your wife and every time you get on the road one of them writes you a ticket." Defendant objected and moved to strike. The motion was denied, and defendant excepted and assigns this as error.

Greenhill finished writing the ticket. Defendant said he would pay it. Greenhill said, "I am concerned about you getting the mufflers off; you are in violation when you are operating it with mufflers like this." Defendant replied, "I am going to pay this ticket. I am not taking them off. The things are welded on there and I am not going to take the damn things off." Greenhill told him again, "You are in violation when you operate it with mufflers like that." Defendant said, "I am going to pay the ticket." Greenhill said he had plenty of books and handed him the citation. Defendant took it and said, "It would be the last damn ticket I would ever give him." Defendant objected and made a motion to strike. The motion was denied, and defendant excepted and assigns this as error. Defendant turned around, started walking to his car, and said, "I will do you like I done that last patrolman." Defendant objected, was overruled, excepted, and assigns this as error.

On the night of 2 January 1963, Greenhill, driving a patrol automobile, saw a 409 red Chevrolet automobile traveling at a high rate of speed on a rural paved road. He pursued this automobile 2.3 miles at a top speed of 110 miles an hour and did not gain on it. The speed limit was 55 miles an hour. The Chevrolet automobile stopped at the stop sign at Highway 33 and proceeded southeast on this highway at a high rate of speed. Greenhill got behind the automobile and was able to see that defendant was driving it, and that he was traveling over 55 miles an hour. When oncoming traffic permitted Greenhill to pull up beside defendant's automobile, he blew his siren. He then dropped behind the Chevrolet automobile and saw defendant glancing up at his rear-view mirror. Defendant maintained his speed and kept glancing up at his rear-view mirror. Greenhill then blew his siren behind the Chevrolet. Defendant failed to stop. Greenhill blew his siren again, and defendant kept going. Whereupon, Greenhill drove beside defendant again and blew his siren. Defendant kept traveling. They entered a curve, and because of oncoming traffic Greenhill dropped behind the Chevrolet again. Defendant, without giving any signal, suddenly applied his brakes, the rear end of his automobile raised up, and started sliding down the middle of the highway. The left wheels of defendant's automobile skidded 69 feet and his right wheels 52 feet. At the time Greenhill was traveling 40 to 45 miles an hour. He could not cut to the left because of an approaching automobile and did not have time to turn to the right, and he slid into the rear of defendant's automobile. When defendant suddenly applied his brakes, there was no automobile or obstacle in front of him. He stopped a mile and one-fourth from the stop sign. Greenhill asked defendant if he had taken the mufflers off. Defendant replied, "Hell, no, I have not taken them off. I told you I am not going to take the damn things off. They are welded on there and I am not going to take them off." Whereupon, Greenhill gave him a citation for an improper muffler, and for nothing else. This was the second citation he had given defendant for an improper muffler.

Defendant offered evidence to the following effect: He has been convicted of whisky violation, of speeding, and of non support. The 409 Chevrolet he was driving on 31 December 1962 had a big motor in it. He bought it secondhand from a car dealer in Columbia. The car has a cut-out on it and caps that you take off. It is used principally on drag strips. Before the cut-out will work you have to unscrew and disconnect the caps from the outside, and to do that you have to use a wrench. The muffler is the same that came on the car. The car makes more noise than a regular Chevrolet with a smaller motor.

He had never put the cut-out in operation or made any changes in the car. When Greenhill stopped him on the highway on 31 December 1962, the car was making "no undue fuss." Greenhill gave him a ticket for an improper muffler. He told Greenhill the mufflers are legal. Greenhill said they were not, and said, "I am going to give you a damn ticket every time I catch you on the road with it." He told Greenhill, "he just as well go ahead, because I was going to be on the road seven days a week with it." He carried the car to Guy Lane Cutler's Service Station. He said, "there was not anything wrong with the mufflers, that they looked like they came with the car." He told Cutler to saw the mufflers off, which he did. Being unable to get in town any mufflers to fit, he finally had the mufflers put back on the car.

On 2 January 1963 he was driving the same car on Highway 33 at a speed of 55 or 60 miles an hour. He heard a siren behind him. He took his foot off his accelerator, and Greenhill, who was right at his rear bumper, ran into the rear of his Chevrolet. Greenhill had not driven beside him. On this occasion he had not violated any law. Greenhill jumped out of his car and said, "I ought to knock your g. . damn teeth out. You had this set up just right for me to run in the back end of your car." Defendant cursed him some, and Greenhill cursed him until Sergeant Howell came. He asked Sergeant Howell what right Greenhill had to curse him and call him a damn bootlegger and everything else, and Howell said he had no right to do so. Greenhill gave him a ticket for an improper muffler, and nothing was said there about speeding or reckless driving.

Defendant was acquitted of the charge of operating an automobile on 2 January 1963 with an improper muffler in the recorder's court. In the instant case he was tried in the superior court on a charge of operating an automobile on 31 December 1962 with an improper muffler, and on charges of speeding and reckless driving of an automobile on 2 January 1963. So far as the record shows, he did not object to a consolidation of these charges for trial in the superior court. There was ample evidence offered by the State to carry the case to the jury on all three charges. The jury convicted him of reckless driving and acquitted him of operating an automobile with an improper muffler and of speeding.

Defendant's first three assignments of error relate to the court's denial of his motions to strike testimony of the patrolman Greenhill as to certain alleged statements made by him on 31 December 1962 when he was given a citation or ticket at the scene for operating an automobile with an improper muffler, and to the court's overruling his objection to similar testimony, which testimony is set forth above.

It seems to be well-settled law in this jurisdiction that the declarations, statements, and admissions of a defendant of facts pertinent to the issue, and tending, in connection with other facts, to prove his guilt of the offense charged, are competent against him in a criminal action. *S. v. Bryson,* 60 N.C. 476; *S. v. Lawhorn,* 88 N.C. 634; *S. v. Abernethy,* 220 N.C. 226, 17 S.E. 2d 25; *S v. Ragland,* 227 N.C. 162, 41 S.E. 2d 285; *S. v. Artis,* 227 N.C. 371, 42 S.E. 2d 409; Stansbury, N. C. Evidence, 2d Ed., sec. 167, particularly pp. 427-429; Wharton's Criminal Evidence, 12th Ed., Vol. 2, sec. 400.

Even if we concede that the alleged statements of defendant on 31 December 1962, whose retention in evidence defendant challenges, were not pertinent in part or in whole to the issue raised by his plea of not guilty to the charge of operating an automobile that night with an improper muffler, and consequently were incompent in evidence, yet it is utterly manifest the retention in evidence of such alleged statements by defendant was not prejudicial to him on that charge because he was acquitted on that charge. The same is true as to the speeding charge on 2 January 1963, for he was also acquitted on that charge.

The State presented ample evidence to carry the case to the jury on the charge against defendant of reckless driving of an automobile on 2 January 1963. Defendant in his brief does not contend otherwise but does contend he is entitled to a new trial. Considering carefully the evidence in the case, the fact that defendant was acquitted of the other two charges, his testimony of the words that passed between Greenhill and himself when he was given a citation on 31 December 1963 for operating a car with an improper muffler, and Greenhill's testimony as to the words that passed between him and defendant on the same occasion, it is clear and plain that the retention in evidence of the challenged testimony as to his alleged statements on 31 December 1962, as testified to by Greenhill, did not prejudice him in his trial on the charge of reckless driving, and that if its retention in evidence was error, it was harmless error. It is not enough for the appellant to show error, and no more. He must make it appear that it was prejudicial to his rights, and that a different result but for the error would have likely ensued. "The injury must be positive and tangible, and not merely theoretical." *S. v. Beal,* 199 N.C. 278, 303, 154 S.E. 604, 618; *S . v. Perry,* 226 N.C. 530, 39 S.E. 2d 460; *S. v. Creech,* 229 N.C. 662, 671-2, 51 S.E. 2d 348, 355.

Defendant assigns as error the denial of his motion for judgment of nonsuit as to the charges of operating a car with an improper muffler and of speeding, made at the close of all the evidence. His con-

tention is that the State's evidence was insufficient to carry these two charges to the jury, and that the submission of these charges to the jury prejudiced his defense on the reckless driving charge. So far as the record shows the defendant did not object to the consolidation of all these charges for trial, and the State's evidence was sufficient to carry all three charges to the jury. Even if the State's evidence was insufficient to carry the case to the jury on these two charges, defendant has not shown that he was prejudiced thereby in his trial on the reckless driving charge.

Defendant makes a broadside exception to the charge as a whole for that the judge failed "to explain and apply or correlate the law and highway safety statutes to the different phases of the evidence as provided in G.S. 1-180." This assignment of error is too general and indefinite to present any question for decision. Unpointed, broadside exceptions will not be considered. The Court will not go "on a voyage of discovery" to ascertain wherein the judge failed to explain adequately the law in the case. *S. v. Dilliard*, 223 N.C. 446, 27 S.E. 2d 85; *S. v. Britt*, 225 N.C. 364, 34 S.E. 2d 408; *S. v. Triplett*, 237 N.C. 604, 75 S.E. 2d 517; *S. v. Haddock*, 254 N.C. 162, 118 S.E. 2d 411.

Defendant has not brought forward and discussed in his brief his assignments of error Nos. 4, 6, 7, and 8 relative to the admission and exclusion of evidence, and consequently 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; *S. v. Parrish*, 251 N.C. 274, 111 S.E. 2d 314; *S. v. Smith*, 164 N.C. 475, 79 S.E. 979.

All defendant's assignments of error are overruled. Defendant has shown no error that would warrant the granting to him of a new trial.

No error.

DOROTHY ISABELLA OVERTON, WIDOW, PETITIONER v. ANNABELLE OVERTON, NON COMPUS MENTIS, JENNETTE OVERTON, FREDERICK OVERTON, SYLVIA LEE OVERTON, MINORS, AND ELIJAH CHERRY, TRUSTEE AND EXECUTOR OF THE ESTATE OF ANTHONY ASHLEY OVERTON, DECEASED, RESPONDENTS.

(*Filed 18 September 1963.*)

1. Marriage § 2—

Proof or admission of a ceremonial marriage raises a presumption of its regularity and validity, but the introduction in evidence of an authenticated marriage record does not establish the marriage even *prima*

facie in the absence of evidence or admission of the identity of the contracting parties, and therefore when the adverse parties contend that claimant, asserting rights as the widow of the decedent, was not actually present but that another stood in for her, the burden remains upon claimant to prove her presence as an essential element of a valid marriage.

2. **Marriage § 1—**

The personal presence of both contracting parties is essential to a proper ceremonial marriage, and marriage by proxy is invalid as a ceremonial marriage.

3. **Appeal and Error § 44—**

An erroneous instruction given in accordance with appellant's written prayer for special instructions is invited error of which appellant may not complain notwithstanding the statement of the court that it would have given such instructions even in the absence of a request.

4. **Evidence § 24—**

Authentication adds nothing to the weight and effect of a public document as evidence, but merely renders the copy competent in evidence.

5. **Same; Marriage § 2—**

The introduction of a certified copy of the marriage record, authenticated according to the Act of Congress, does not establish marriage *prima facie* when the identity of the contracting parties is questioned and there is a material discrepancy between the age of the bride as given in the marriage record and the then age of the litigant who claims to have been the bride, and an instruction that the authenticated marriage record itself established the marriage *prima facie* is prejudicial error.

6. **Judgments § 30; Pleadings § 24—**

The denial of a motion to be allowed to amend during the course of the trial does not preclude a like motion prior to retrial, since *res judicata* does not apply to ordinary motions incidental to the trial.

APPEAL by respondents from *Peel, J.*, March 1963 Session of PASQUOTANK.

J. Kenyon Wilson, Jr., and Killian Barwick for Petitioner.
Frank B. Aycock, Jr., and W. C. Morse, Jr., for Respondents Annabelle Overton and Gerald F. White, guardian ad litem.

MOORE, J. This is a sequel to *Overton v. Overton,* 259 N.C. 31, 129 S.E. 2d 593, heard at the Spring term 1963. The first appeal was by petitioner. The case was tried at the September 1962 Term of the Superior Court of Pasquotank County before Bundy, J., and a jury. The jury answered the issue in favor of petitioner, but the judge, notwithstanding the verdict and contrary thereto, entered judgment in favor of respondents. The former opinion deals with the questions of

law raised by the entry of such judgment. We directed that the judgment be vacated and a judgment be entered in accordance with the verdict, respondents to have the right to appeal from the latter judgment when entered, if so advised. At the March 1963 Session of the Superior Court of Pasquotank Peel, J., entered judgment in accordance with the verdict as directed, and respondents excepted and appealed, assigning error.

The recitals of fact appearing in the former opinion should be ignored for the purposes of the present appeal. They related to matters then under consideration. The pleadings and evidence pertinent to the present appeal are limited to those involved in the trial of the issue before the jury.

The petition alleges in substance: Anthony Ashley Overton (hereinafter referred to as Anthony) died 12 November 1959 leaving a last will and testament. He willed his property to Annabelle Overton, Jennette Overton, Frederick Overton and Sylvia Lee Overton, respondents. At the time of his death he owned valuable property, real and personal. Petitioner, Dorothy Isabella Overton (Dorothy) is the widow of Anthony and is entitled to a year's support and dower.

Respondents, answering the petition, deny that Dorothy is the widow of Anthony and deny that she is entitled to any of his property.

Petitioner introduced in evidence a duly authenticated copy of the marriage record of New York County, State of New York, containing: (1) a copy of a "license for marriage," setting out the application therefor of one, Anthony Ashley Overton, age 22, born in Weeksville, North Carolina, and of one, Dorothy Isabella White, age 23, born in Weeksville, North Carolina; and (2) copy of "marriage certificate" of Rev. James A. Manning stating that he solemnized the rites of matrimony between the parties (naming them as above) at Brooklyn, New York, in the presence of Benjamin B. Overton (Benjamin) and Viola C. Overton (Viola) as witnesses on 30 November 1929 — the marriage certificate is subscribed by Rev. Manning and the witnesses, Benjamin and Viola.

Petitioner's witnesses testified to the following effect: Careful investigation does not disclose that there has been any action for or judgment of divorcement or annulment of the marriage of Anthony and Dorothy in New York or North Carolina. Dorothy has had no notice of any divorce or annulment action, nor has she heard that any such action has been instituted anywhere. She was 15 years of age in 1929. In New York in 1929 a girl of 15 could marry with the consent of a parent, guardian or a person standing *in loco parentis,* and if she married without such consent the marriage was only voidable. The

signatures on the application for marriage license are the genuine signatures of Anthony, the deceased, and Dorothy, the petitioner. On one occasion Anthony had visited Dorothy in the home of her mother at Weeksville (it does not appear whether this was before or after 30 November 1929). Since November 1929 Dorothy has gone by the name of Dorothy Overton.

Respondents' evidence tends to show: Benjamin is the brother of Anthony, the deceased, and lived in Brooklyn, New York, in 1929. Dorothy was in Brooklyn in 1929 and so was Anthony. Dorothy became pregnant and Anthony acknowledged that she was pregnant by him. Benjamin arranged for Rev. Manning to come to his (Benjamin's) home to solemnize the rites of marriage of Anthony and Dorothy. A ceremony was performed in Benjamin's living room on 30 November 1929. Dorothy did not take part in the ceremony, but remained at all times in another part of the house. Beulah Lewis stood in for Dorothy at the ceremony and stated to Rev. Manning that she was Dorothy White. (It is suggested that Beulah was asked to stand in for Dorothy for fear that Rev. Manning would refuse to perform the ceremony for one so young as Dorothy when no consent had been obtained from her parent for her marriage.) Benjamin and Viola, his wife, signed the certificate as witnesses. Viola and Rev. Manning are now dead. The whereabouts of Beulah Lewis is unknown. Dorothy stayed in Benjamin's house until after the baby was delivered — stillborn. Anthony did not cohabit with her after the ceremony.

In rebuttal Mr. Rubin, a New York attorney, testified that he had a telephone conversation with Benjamin in which the latter stated that the only persons present at the marriage ceremony were Rev. Manning, Anthony, Dorothy, Viola and himself, that Benjamin did not mention Beulah Lewis, and that Benjamin later refused to sign an affidavit that Anthony and Dorothy were married. Benjamin, being recalled, testified that he had a conversation with the attorney, that he refused to sign the affidavit because it was untrue, that Dorothy was not present at the ceremony and he did not tell the attorney she was.

An issue was submitted to and answered by the jury as follows: "Is Dorothy Isabella Overton the widow of Anthony Ashley Overton, deceased, as set forth in her petition? Answer: Yes."

In apt time the respondents requested Judge Bundy in writing to charge the jury:

> ". . . (T)hat, if the jury finds as a fact from the evidence, that Dorothy Isabella Overton did not participate in the marriage ceremony performed in the home of Benjamin B. Overton on November 30, 1929, but was seated in a room some distance from

where said marriage ceremony was performed, then such purported marriage was a nullity and, if the jury should so find by the greater weight of the evidence, the jury should answer the only issue 'NO' ".

Respondents assign as error that part of the following excerpt from the charge enclosed in parentheses:

"... (O)ne must be present and participate in marriage as one of the contracting parties to constitute a legal and valid marriage, the Court instructs you that it has been asked to do, which it would have done so anyway, that if the jury finds as a fact from the evidence that Dorothy Isabella Overton did not participate in the marriage ceremony performed in the house of Benjamin B. Overton on November 30, 1929, but was seated in a room some distance from where said marriage ceremony was performed, then such purported marriage was a nullity and if the jury should find by the greater weight of the evidence, the jury should answer the only issue in this case 'NO' ".

"(I told you that the burden of that issue, the burden of this issue, the burden of proof on the issue is upon the plaintiff to satisfy you by the greater weight of the evidence that she is the widow, but when she offers a certified copy of the marriage ceremony properly exemplified or other evidence of fact that there was a marriage, that a marriage ceremony took place between Anthony Ashley Overton and herself, Dorothy Isabella White, then she has made out a prima facie case, that is, one which stands until the contrary is shown; then if the respondents, contending that she was not actually in participation, a participant in the marriage ceremony, and that she was somewhere else, that is an affirmative defense, and the burden is upon them to prove that it is as they said, that she was not present during the marriage ceremony, participating in it, as one of the contracting parties.)"

At the trial before the jury there was no evidence or suggestion that Anthony entered into a marriage ceremony with another woman after November 1929, so the sole question for determination upon the evidence presented was whether he married Dorothy as alleged in the petition.

If a ceremonial marriage is in fact established by evidence or admission it is presumed to be regular and valid, and the burden of showing that it was an invalid marriage rests on the party asserting its invalidity. *Kearney v. Thomas,* 225 N.C. 156, 33 S.E. 2d 871; *Faggard v. Filipowich,* 27 S. 2d 10 (Ala. 1946); *In re Callahan's*

Estate, 254 N.Y.S. 46 (1913); 35 Am. Jur., Marriage, s. 192, pp. 303, 304; 55 C.J.S., Marriage, s. 43c(1), p. 890. It is presumed that a marriage entered into in another State is valid under the laws of that State in the absence of contrary evidence, and the party attacking the validity of a foreign marriage has the burden of proof. 55 C.J.S., Marriage, s. 43c(2), p. 893. The judge below probably had these principles in mind when he placed the burden of proof upon the respondents. But these principles have no application to the facts in the instant case. The marriage had not been *established* or *admitted;* the very question of fact to be determined by the jury on the evidence adduced was whether there was a marriage, not whether a proven or admitted marriage was invalid. Respondents introduced evidence that Dorothy was not present and did not participate in the ceremony. In the solemnization of a ceremonial marriage in the State of New York the parties must declare in the presence of a clergyman or magistrate and an attending witness that they take each other as husband and wife. Domestic Relation Laws of N. Y., s. 12; Ch. 14, s. 12, Consolidated Laws of N. Y.; Ch. 19, Laws of N. Y., 1909. "Under statutes requiring the solemnization of the marriage, . . . the personal presence of both the bride and the groom at the marriage rites is essential to a proper solemnization of the marriage, so that a marriage by proxy is invalid as a ceremonial marriage." 55 C.J.S., Marriage, s. 32, p. 865. Common law marriages are recognized in New York, but there is no evidence of a common law marriage in the present case. There is no presumption that persons are married. 55 C.J.S., Marriage, s. 43a, p. 887. A person claiming property of a deceased person by reason of marriage to deceased has the burden of proof of the marriage, and the personal representative, lawful heirs or devisees of deceased do not have the burden of proving non-marriage. *In re Sandusky's Estate,* 52 N.E. 2d 285 (Ill. 1943); 35 Am. Jur., Marriage, s. 211, p. 318. In the case at bar the court mistakenly placed the burden of proving non-marriage on the respondents. The contention of respondents, by the evidence offered, that Dorothy was not present and did not participate in the ceremony is not — as stated by the court — an affirmative defense. Moreover, respondents' answers merely deny petitioner's allegation that Dorothy is widow of Anthony. It was incumbent upon petitioner to prove by the greater weight of the evidence that she and Anthony were married as alleged, that is, that they were both present and participated in the rites of marriage.

However, in this case respondents may not assert the objection that the court wrongfully placed the burden of proof of the issue upon them. They requested in their prayer for instructions that the

burden of proof be so placed, and the court complied. "When the court is led into error by a specific prayer for instruction which counsel in good faith has requested, ordinarily the client is bound by the instruction given, to the extent at least that he may not assert it in this Court as error." *Carruthers v. R.R.*, 218 N.C. 377, 378, 11 S.E. 2d 157; *Blum v. R.R.*, 187 N.C. 640, 122 S.E. 562; *Kelly v. Traction Co.*, 132 N.C. 368, 43 S.E. 923; *Moore v. Parker*, 91 N.C. 275; *Buie v. Buie*, 24 N.C. 87. It is true the judge stated that he would have given the instruction anyway, but in our opinion this does not relieve the respondents of their solemn commitment to the court on this point.

Nevertheless, we are of the opinion that there was prejudicial error in that portion of the challenged instruction which undertakes to explain the effect of the introduction of the authenticated copy of the purported marriage record. The court charged: ". . . (W)hen she (petitioner) offers a certified copy of the marriage ceremony properly exemplified *or* some other evidence of the fact that there was a marriage, that a marriage ceremony took place between Anthony . . . and herself . . ., then she has made out a prima facie case, that is, one which stands until the contrary is shown . . . ." (Emphasis added). The effect of this instruction, in the use of the disjunctive "or", is that the introduction of a certified copy of the marriage record, authenticated according to the Act of Congress, makes out a *prima facie* case of marriage. The purpose of the Act is to make a copy of a record of a foreign State admissible in evidence, without the necessity of bringing in and identifying the original. Authentication adds nothing to the weight and effect of the document as evidence. By their evidence respondents deny that a marriage took place between Anthony and Dorothy, deny that Dorothy was present at the ceremony, and assert that one Beulah Lewis stood in as proxy. Where, as here, the identity of the contracting parties is questioned, and there is a material discrepancy between the age of the bride as given in the marriage record and the age at the time of the litigant who claims to have been that bride, the authenticated copy of the marriage record alone does not make out a *prima facie* case. ". . . (T)he general rule is that a properly authenticated marriage record or register or copy or transcript thereof is admissible to prove marriage. It is, of course, necessary to identify the parties as the persons mentioned in the record." 35 Am. Jur., Marriage, s. 211, p. 318.

In re Sandusky, supra, is factually analagous. Plaintiff claimed an interest in the estate of deceased and alleged that she was his widow. Deceased was a resident of Illinois. Plaintiff introduced an authenticated marriage record from Kentucky. The record showed the age of the groom as 55; deceased was 81 at the time of the purported

marriage. Defendants denied the marriage. The court held that the burden was on the plaintiff to prove the marriage and to identify the parties.

It is not suggested in the present case that petitioner failed to make out a *prima facie* case. The authenticated copy of the marriage record together with the testimony of the witnesses in the case suffice to carry the issue to the jury. The vice of the instruction is that it gives to the authenticated copy of the marriage record greater weight and effect as evidence than the law permits under the circumstances, and thereby increases the burden of the already overladen respondents. There must be a new trial.

The parties hereto may desire to amend their pleadings before a retrial is had. If so, they may move therefor in superior court. It lies within the sound discretion of the court to allow or deny such motions. It is pointed out that prior rulings on motions to amend are not necessarily *res judicata*. The doctrine of *res judicata* does not apply to ordinary motions incidental to the progress of the trial, but only to those involving a substantial right. 3 Strong: N. C. Index, Judgments, s. 30, p. 46; *Revis v. Ramsey,* 202 N.C. 815, 164 S.E. 358.

New trial.

JOSEPH LICHTENFELS, JOHANNA L. ABRAHAMS, CAROLYN L. GREEN AND HELEN L. GUMPERT v. NORTH CAROLINA NATIONAL BANK, A CORPORATION.

(Filed 18 September 1963.)

1. **Fiduciary—**

All fiduciaries may be compelled by appropriate proceedings to account for the handling of properties committed to their care.

2. **Executors and Administrators § 32—**

An executor or administrator, as well as a trustee or successor trustee performing duties imposed upon the executors by a testamentary trust, may be compelled to account by special proceedings or civil action, G.S. 28-122, G.S. 28-147, or the court which appointed them may, *ex mero motu*, compel a proper accounting by attachment for contempt, G.S. 20-118.

3. **Same—**

An executor's duty to account is not fulfilled by the mere filing of a statement of receipts and disbursements, but he must also pay over to the parties entitled thereto the monies which they are entitled to receive.

4. Same—

An executor, clothed with the duties of a testamentary trustee, may not be required to file his final account and make settlement prior to the date fixed for the settlement of the trust.

5. Same; Venue § 3—

An action by beneficiaries of a testamentary trust alleging mismanagement of the successor trustee, challenging its account and seeking to recover from it as trustee losses sustained by reason of the asserted mismanagement, is properly brought in the county in which the will was probated, G.S. 1-78, G.S. 28-53, and the trustee's motion to remove to the county in which it maintains its principal office, should not be allowed.

6. Same; Banks and Banking § 1—

A national bank, by qualifying as a testamentary trustee, waives any right to have an action for an accounting instituted against it in the county in which the will was probated removed to the county in which it maintains its principal office.

APPEAL by plaintiffs from an order of *Pless, J.*, made in Chambers in BUNCOMBE on 25 March 1963.

Carrie Long died 6 July 1927. Her will was probated in Buncombe, the county of her residence. Item Second of the will names her two brothers "and the survivor of them to be the Executors of, and Trustees under" her will.

By Item Fifth Mrs. Long devised and bequeathed "unto my Executors and the survivor of them, IN TRUST" the residue of her estate. They were given authority to manage the trust assets, directed to pay the income from one-half thereof to Mrs. Long's daughter, Edna L. Lichtenfels, during her life, and upon her death to her children if they had reached their majority.

In 1936 Mrs. Lichtenfels and the other beneficiaries of the trust instituted a special proceeding in Buncombe County against North Carolina Bank and Trust Company, Gurney P. Hood, Commissioner of Banks, and the conservator of that bank for removal of that bank as trustee under Mrs. Long's will. The clerk, by order dated 29 April 1936, removed North Carolina Bank and Trust Company and its conservator and appointed Security National Bank of Greensboro "as Trustee under the Trust created by the fifth paragraph of the Last Will and Testament of Carrie Cone Long, deceased, in the place and stead and with all the rights, titles, powers, privileges and interests, and subject to the same obligations and duties as the original Trustee thereunder." This order was approved by the resident judge 4 May 1936. Pursuant to said order, the Security National Bank of Greensboro "acted as trustee thereof from the 8th day of May, 1936

until the 30th day of June 1960, under the probate jurisdiction of the Superior Court of Buncombe County. . ."

On 30 June 1960 there was a consolidation of banks to which Security National Bank of Greensboro was a party. Defendant came into existence as a result of that consolidation. Defendant has, since consolidation, "administered said trust subject to the supervision of the probate division of the Superior Court of Buncombe County."

Security National Bank of Greensboro was a national banking association organized pursuant to the laws enacted by the Congress of the United States. It has never had or maintained a place of business in Buncombe County. Defendant is a banking corporation organized under the laws duly enacted by the Congress of the United States. Its principal office is in Charlotte, N. C. It has never had or maintained a place of business in Buncombe County.

Mrs. Lichtenfels died 11 October 1962. Plaintiffs are her children. All have reached their majority. This action was begun 1 February 1963. The complaint alleges neither Security National Bank of Greensboro nor defendant filed any accounting with the clerk of the Superior Court of Buncombe County until 10 January 1963; that defendant and its predecessor, Security Bank of Greensboro, had mismanaged the trust, causing a loss to plaintiffs, beneficiaries thereof, in excess of $2,000,000. They challenge the account filed and seek to recover from defendant as trustee under the will losses sustained by reason of the asserted mismanagement.

Defendant, in apt time, filed with the clerk of the Superior Court of Buncombe its motion to remove as a matter of right to the Superior Court of Mecklenburg County. The clerk declined to allow the motion. Defendant appealed to the judge. He ordered the cause removed to the Superior Court of Mecklenburg County. Plaintiffs excepted and appealed.

Williams, Williams and Morris by Robt. R. Williams, Jr., for plaintiff appellants.

Uzzell and DuMont by Harry DuMont and Adams, Kleemeier, Hagan & Hannah by Charles T. Hagan, Jr., for defendant appellee.

RODMAN, J. All fiduciaries may be compelled by appropriate proceeding to account for their handling of properties committed to their care. When the fiduciary is an executor, administrator, collector, or personal representative of a deceased, he may, at the instance of an interested party, be compelled to account by special proceeding or civil action, G.S. 28-122 and 147; or the court which appointed him

may, *ex mero motu,* compel a proper accounting by attachment for contempt, G.S. 28-118.

An executor or administrator is liable in his official capacity for breach of his duty to properly handle and account for the estate which the court entrusts to him. *Rudisill v. Hoyle,* 254 N.C. 33, 118 S.E. 2d 145; *Davis v. Davis,* 246 N.C. 307, 98 S.E. 2d 318. His duty to account has not been fulfilled by merely filing a statement of receipts and disbursements. He must also pay over to the parties entitled thereto the monies which they are lawfully entitled to receive. As said by Stacy, C.J., in *McGehee v. McGehee,* 190 N.C. 476, 130 S.E. 115: "An executor is one named by the testator and appointed to carry the will into effect after the death of the maker, and to dispose of the estate according to its tenor." Where, as here, testatrix did not specifically appoint a trustee but directed the executors to handle the trust estate, the executors could not be required to file their final account and make settlement prior to the date fixed for the termination of the trust. *In re Trust Co.,* 210 N.C. 385, 186 S.E. 510. No matter what title was given to defendant and its parent, Security National Bank, it was nevertheless performing the duties which Mrs. Long had expressly imposed on her executors.

The proper venue for actions against executors and administrators is the county in which they qualify. G.S. 1-78; *Godfrey v. Power Co.,* 224 N.C. 657, 32 S.E. 2d 27; *Thomas v. Ellington,* 162 N.C. 131, 78 S.E. 12; *Stanley v. Mason,* 69 N.C. 1. True, this statute, by express language is limited to actions against executors and administrators; but there can, in our opinion, be no doubt that the Legislature intended the words used to encompass all fiduciaries, irrespective of technical titles, who act by reason of a court appointment and are by law required to account to the court appointing them. Testamentary trustees are required to file in the court where the will is probated inventories and annual and final accounts "such as are required of executors and administrators." G.S. 28-53. Trustees as well as executors and other fiduciaries are permitted to resign; but before the resignation shall become effective, they must file with the court a final account of the trust estate, and the resignation shall not become effective "until the court shall be satisfied that said account is true and correct." G.S. 36-15. The successor, executor, trustee, or other fiduciary must give such bond as may be required by the court. G.S. 36-17. By express decision the statute, G.S. 1-78, has been held to include guardians notwithstanding the only words used are "executors" and "administrators." *Cloman v. Staton,* 78 N.C. 235. As said by the Supreme Court of Vermont: "An administrator is a technical

trustee." *In re Watkin's Estate,* 41 A 2d 180, 157 A.L.R. 212; *Fricke v. Safe Deposit & Trust Co.,* 38 A. 599; *LaRabee v. Tracy,* 134 P. 2d 265.

Defendant asserts the order of removal was proper notwithstanding state statutes, since state statutes must yield to statutes enacted by Congress prescribing the place where national banks may be sued. It relies on sec. 94, Title 12 (Banks and Banking), of the United States Code, which reads: "Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

The statute does not limit the jurisdiction of state courts. Congress has merely accorded national banks the privilege of having controversies to which they are parties determined in the county of their residence. *Mercantile National Bank v. Langdreau,* 371 U.S. 555, 9 L. ed. 2d 523, 83 S. Ct. 520. This privilege, granted for the convenience of national banks can be waived. *Michigan Nat. Bank v. Robertson,* ...... U.S. ......, 9 L. ed. 961, 83 S. Ct. ......; *Mercantile National Bank v. Langdreau, supra; First National Bank of Charlotte, North Carolina v. Morgan,* 132 U.S. 141, 33 L. ed. 282. Mr. Justice Harland, speaking in the *Morgan* case, said: "No reason can be suggested why one court of a State, rather than another, both being of the same dignity, should take cognizance of a suit against a national bank, except the convenience of the bank. And this consideration supports the view that the exemption of a national bank from suit in any state court except one of the county or city in which it is located is a personal privilege, which it could claim or not, as it deemed necessary."

One appointed by court order to administer the estate of a deceased is an officer of the court making the appointment. *Byers v. McAuley,* 149 U.S. 608, 37 L. ed. 867. This is true whether he be designated in the order of appointment as administrator, collector, executor, or trustee. Hence "(i)t is within the power of a state to make the whole administration of the estate a single proceeding, to provide that one who has undertaken it within the jurisdiction shall be subject to the order of the court in the matter until the administration is closed by distribution, and on the same principle, that it shall be required to account for and distribute all that he receives, by the order of the probate court." *Michigan Trust Co. v. Ferry,* 228 U.S. 346, 57 L. ed. 867; *Trust Co. of Georgia v. Smith,* 188 S.E. 469.

The right of a defendant to challenge the venue selected by plaintiff may be waived by conduct prior to the institution of the action. Congress, by 28 U.S.C.A. 1391(a) and (b), fixed the venue in diversity cases. Even so, a nonresident who appoints a process agent in another state waives the benefit of the privilege which Congress accorded him. *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 84 L. ed. 167, 60 S. Ct. 153, 128 A.L.R. 1437; *Oklahoma Packing Co. v. Oklahoma G & E Co.*, 309 U.S. 4, 84 L. ed. 537; *Davis v. Smith*, 253 F. 2d 286.

Neither defendant nor Security National were under compulsion to handle the trust estate created by Mrs. Long's will. Undoubtedly they sought and accepted the grant of authority conferred on them by the Superior Court of Buncombe County for pecuniary reasons. We take judicial notice of the fact that both state and national banks seek the privilege of acting as fiduciaries, administering on the estates of decedents and incompetents. When Security National qualified, it did so with knowledge that it was required by law to file annual accounts with the Superior Court of Buncombe County and at the appropriate time distribute the estate under the orders of that court. It looked to the Superior Court of Buncombe to fix the compensation to which it was entitled for services rendered. Defendant, when it entered upon the performance of its duties as trustee, did so with like knowledge.

Defendant's asserted right to remove requires an answer to this question: Can defendant deprive the Superior Court of Buncombe County of its right and nullify its duty to inquire into the accuracy of defendant's final account merely because it best suits defendant's convenience for the inquiry to be made in Mecklenburg, where it has its principal office, rather than in Buncombe, where it qualified and the law requires it to account? Manifestly the answer must be and is no.

Reversed.

ROBERT ROUSE AND MARGARET LEWIS ROUSE, TRUSTEES UNDER THE WILL OF J. C. LEWIS, DECEASED; ROBERT ROUSE AND WIFE, MARGARET LEWIS ROUSE, INDIVIDUALLY, AND NORA MAE SUTTON LEWIS v. WILLIAM W. KENNEDY AND WIFE, META MAE KENNEDY.

(Filed 18 September 1963.)

Trusts § 6— Precatory words will not be given mandatory effect so as to preclude use of best judgment in exercise of discretionary powers.

Where the trustees of a testamentary trust are given broad powers to hold and dispose of lands in accordance with their best judgment, and are empowered to sell the realty of the trust if necessary to carry out the purpose of the trust, provisions of the will that it was testator's "wish and desire" that if sale of realty became necessary a designated tract be first sold, *held* not to preclude the trustees from first selling a portion of another tract when such sale is rendered more feasible and desirable because of the location of a hard surfaced road and school near thereto, since the precatory words will be given their commonly accepted sense and will not be artifically construed by the court as embodying a mandatory condition.

APPEAL by defendants from *Bone, Emergency Judge,* May Term 1963 of LENOIR.

This is a controversy without action. The findings of fact and the conclusions of law are as follows:

"1. That J. C. Lewis, late of Lenoir County, died in December 1959, leaving a last will which was duly probated and appears of record in the office of the Clerk of Superior Court of Lenoir County in Record of Wills I, at page 338. That Robert Rouse and his wife, Margaret Lewis Rouse the said Margaret Lewis Rouse being the only child of J. C. Lewis, deceased, were appointed as Co-Executor and Executrix of the estate of said deceased, and issued letters testamentary as such by the Clerk of the Superior Court of Lenior County on January 5, 1960, and have fully administered said estate and filed their final account on February 28, 1961, and that the personal property of said estate was amply sufficient to pay the debts of the estate. That the said J. C. Lewis left surviving him his widow, Nora Mae Sutton Lewis, and his said daughter, Margaret Lewis Rouse, who are named as the legatees, devisees, and beneficiaries of the estate of said deceased in his aforesaid will, both of whom are of lawful age.

"2. That the said testator at the time of his death was seized in fee simple of three tracts of land situate in Lenoir County, as follows:

"(a) Tract in Southwest Township described as the 'Homeplace' on which testator lived, containing 38 acres.

"(b) Tract in Southwest Township, described as 'Lettie Taylor Place,' containing 68 acres.

"(c) Tracts in Woodington Township described as the 'Harris Place,' containing 60 acres.

"3. That the above described three tracts of land were devised under Item V of the will of J. C. Lewis, deceased, to his son-in-law, Robert Rouse, and his daughter, Margaret Lewis Rouse, as Co-Trustees, with full general powers in their best judgment and discretion to hold, manage, and dispose of said lands for the uses and purposes set forth in Item V of said will creating said trust estate.

"4. That the Trustees since the final account of the Executors was filed, have administered the trust estate as authorized and directed therein, and the principal assets of the trust estate consist of the three tracts of land hereinabove described and the income of the trust estate is derived from rents in the operation of said farm lands, which rents for the years 1961 and 1962 have been less than the sum of $1800.00.

"5. That Section B, Section 1 of Item V of said will, the Trustees are directed to pay to Nora Mae Sutton Lewis, widow of the testator, during her lifetime or until her remarriage, from the net income of said trust estate the sum of $1,800.00 annually, and if the said income does not amount to said sum the Trustees are authorized to pay from the principal of the trust estate such additional amounts as may be necessary to pay the annual income to said beneficiary of $1,800.00, and subject to said provisions, the remaining income from said trust estate is directed to be paid to Margaret Lewis Rouse. That after the death or remarriage of Nora Mae Sutton Lewis, the trust estate terminates, and the remaining trust estate, both principal and accumulated income, is directed to be paid to the said Margaret Lewis Rouse, daughter, free and discharged of the trust.

"6. That in addition to the general powers and authority given the Trustees in handling the said trust estate, they were given the specific authority and direction as follows in Section A of Item V:

" '2. To retain the properties now or hereafter received by my said Trustees, or dispose of them as and when they shall deem advisable, by public or private sale, or exchange, or otherwise for cash, or upon credit, or partly for cash and partly for credit, and upon such terms and conditions as they shall deem proper; to subdivide and develop said property, or any part thereof into subdivisions for the sale of lots. In connection herewith, it is my express wish and desire that my

Trustees shall retain my farm lands herein referred to, as long as it is bringing in adequate rental income for the purposes of this trust, and that the same not be sold by my said Trustees until it is necessary in their best judgment and discretion that said farm or portions thereof be subdivided and sold so that the proceeds can be reinvested in a more profitable and better manner to yield the best income and enable my Trustees to carry out the purposes of this trust, and be of the most benefit to the beneficiaries of this trust. If it becomes necessary in the judgment of my Trustees to sell any of the real estate, it is my wish and desire that the farm lands known as the "Harris Place" be first sold to provide the necessary funds to carry out the purposes of this trust.'

"7. That the said Trustees in performance of their duties as directed under the provisions of said will and in the use of their best judgment and discretion to provide adequate income from the trust estate to be of the most benefit to the beneficiaries of the trust, caused a survey and map to be made of a subdivision into lots of a portion of the lands held in trust known as the 'Homeplace,' and located on N. C. paved Highway 58 and situate across the highway from Southwood School, which is one of Lenoir County's consolidated schools, which said map appears of record in Map Book 9, at page 17, of the Public Registry of Lenoir County, and which subdivision contains fifteen residential lots. That in the opinion of the Trustees in the use of their sound judgment and discretion, the subdivision made by them of the portion of the Homeplace is the most practical to provide for sale for their best value, ready available lots, and the proceeds from said sales to be reinvested as provided by the trust estate to produce adequate income and to carry out the provisions of the trust for the best interest and benefit of the beneficiaries, and the preservation of the said trust estate.

"8. That the said Trustees have agreed to sell to William W. Kennedy and wife, Meta Mae Kennedy, Lot No. 3 as shown on said map of subdivision, for the cash purchase price of $1500.00, and the said proposed purchasers have agreed to purchase the said lot and are ready, able, and willing to pay the purchase price in cash and accept deed conveying to them a good marketable title in fee simple thereto. That the Trustees have tendered to the proposed purchasers a duly executed and acknowledged deed purporting to convey to them a good marketable title in fee simple to said lot, and demanded the purchase price therefor, said deed being dated May 10, 1963, and that the proposed purchasers have refused to accept the deed as tendered and

pay the purchase price, contending that the deed as tendered does not convey to them a good marketable title in fee simple under the authority and direction given the Trustees in the Will of J. C. Lewis, deceased.

"Upon the foregoing findings of fact and the agreed statement of facts, with exhibits attached thereto, including the Will of the deceased and the deed as tendered, the court is of the opinion and now holds that the said Trustees are devised a good marketable title in fee simple to the lands described in the will of the deceased creating said trust estate, and are given full power, authority, and direction as said Trustees to subdivide into lots and sell and convey a good marketable title in fee simple such portion thereof as in their best judgment and discretion will enure to the best interest of the trust estate and its beneficiaries. The court is further of the opinion that the provisions of said will do not require the Trustees in the exercise of their best judgment and discretion to first sell the 'Harris Place' or to first subdivide into lots and sell any portion thereof, if in the best judgment and discretion of the Trustees it becomes necessary to sell any of the real estate, for that the testator merely expressed a wish and desire that if it became necessary in the judgment of the Trustees to sell any of the real estate that the Trustees first sell the Harris Place, and that such wish and desire is not mandatory on the Trustees, if in the best judgment and discretion of the Trustees it will be to the advantage of the trust estate and its beneficiaries to sell other portions of said real estate.

"IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:

"That the deed dated May 10, 1963, of Robert Rouse and Margaret Lewis Rouse, Trustees of the trust estate created under the Will of J. C. Lewis, deceased, and joined in by Robt. Rouse and wife, Margaret Lewis Rouse, individually, and Nora Mae Sutton Lewis, widow, to William W. Kennedy, and wife, Meta Mae Kennedy, and duly executed by the said grantors and tendered to the said purchasers, conveys a good marketable title in fee simple to the said lot of land described therein, and subject only to the convenants and restrictions set out in said deed, and that the said defendants, William W. Kennedy and wife, Meta Mae Kennedy, grantees therein named, be and they are hereby required to accept the said deed conveying the lands therein described and to pay the purchase price as therein set out."

The defendants appeal, assigning error.

Whitaker & Jeffress for plaintiff appellees.
R. S. Langley for defendant appellants.

DENNY, C.J. The only assignment of error is to the judgment entered below.

The appellants contend that in view of the following provision in the last will and testament of J. C. Lewis, to wit, "If it becomes necessary in the judgment of my Trustees to sell any of the real estate, it is my wish and desire that the farm lands known as the 'Harris Place' be first sold to provide the necessary funds to carry out the purposes of this trust," the trustees are not empowered to subdivide and sell any portion of the "Homeplace," or the "Lettie Taylor Place," until after the "Harris Place" has been sold.

The testator clearly expressed the desire that his trustees should not sell any of his farm lands unless it became necessary to do so in order to carry out the purposes of the trust. It has been determined that the rents from the farms which constitute the principal assets of the trust are insufficient to carry out the purposes of the trust. Furthermore, it appears from the findings of fact that by subdividing and selling a small portion of the "Homeplace," consisting of only 15 residential lots fronting on North Carolina paved Highway 58, located across the highway from Southwood School, which is one of Lenoir County's consolidated schools, the financial requirements of the trust will be met and the farming operations of the trustees will not be materially affected. The "Homeplace" is situate near the City of Kinston.

The trustees are expressly empowered "to subdivide and develop said property, or any part thereof into subdivisions for the sale of lots." The location of land adjacent to an improved highway has a great deal to do with its desirability and sale value as a subdivision. No doubt the decision to subdivide the particular land involved herein was influenced by its location adjacent to a hard surfaced highway, its accessibility to a consolidated public school, and its nearness to the City of Kinston.

In view of the broad powers vested in the trustees to hold, manage, and dispose of said lands in accord with their best judgment and in their discretion, for the uses and purposes set forth in Item V of said will, creating the trust estate, we hold that the "wish and desire" expressed with respect to the disposition of the "Harris Place," were merely precatory words and did not constitute a testamentary disposition of the property or a mandatory request with respect to the priority of disposition.

In 54 Am. Jur., Trusts, Section 55, page 65, it is said: " * * * (T)he English and American majority rule is that precatory words are presumably indicative of no more than a request or an expectation, and do not create a trust unless the context or the surrounding circumstances at the time of the making of the trust instrument show that the trustor, although he used the language of request, really meant to leave the trustee (devisee, legatee, or legal donee) no option in the matter," citing *Carter v. Strickland,* 165 N.C. 69, 80 S.E. 961, Ann. Cas. 1915D 416. This case has been cited many times with approval by this Court. See *Hardy v. Hardy,* 174 N.C. 505, 93 S.E. 976; *Laws v. Christmas,* 178 N.C. 359, 100 S.E. 587; *Springs v. Springs,* 182 N.C. 484, 109 S.E. 839; *Brinn v. Brinn,* 213 N.C. 282, 195 S.E. 793; *In re Estate of Bulis,* 240 N.C. 529, 82 S.E. 2d 750; *Andrew v. Hughes,* 243 N.C. 616, 91 S.E. 2d 591. *Cf. Moore v. Langston,* 251 N.C. 439, 111 S.E. 2d 627.

In *Springs v. Springs, supra,* this Court said: "It is true that under the old English decisions, which were followed by a few of the early cases in this country, the expression of a wish by the testator, like that of a sovereign, was construed as a command, but all the later cases, both in England and in this country, repudiate the doctrine, and hold that in the absence of a clear indication of a contrary intent, expressions of 'wish,' 'desire,' etc., are to be taken as used in their commonly accepted sense, and are not to be artifically construed by the courts as a trust."

We hold that upon the delivery of the deed heretofore tendered to the defendants, and payment of the purchase price agreed upon, the defendants will have a good and indefeasible fee simple title to the premises conveyed.

Therefore, the judgment entered by the court below is in all respects

Affirmed.

JERRY A. SIMPSON v. BURL WOOD.

(Filed 18 September 1963.)

Automobiles §§ 33, 46—

A pedestrian violates G.S. 20-174(d) if he walks along his right side of the highway notwithstanding that he walks on the right shoulder completely off the hard surface, and an instruction to the effect that he

violates the statute only if he walks along the right side on the hard surface or main traveled portion of the highway is favorable to him and cannot be held prejudicial on his appeal.

BOBBITT, J., dissents.

APPEAL by plaintiff from *Patton, J.*, January Session 1963 of RUTHERFORD.

This is a civil action to recover for personal injuries sustained by the plaintiff on 25 December 1959, allegedly caused by the negligence of the defendant in the operation of an automobile on a public highway in Rutherford County.

Plaintiff alleged in his complaint that about 9:00 p.m. on the above date he was walking in a path several feet from the paved portion of the Harris-Henrietta highway, in the Town of Henrietta, and was approaching the intersection of said highway with Highland Avenue. That he was walking in a northerly direction on the right-hand side of the highway.

The defendant alleged that at the time of the accident he was driving his automobile about 30 miles per hour in a northerly direction, and met another motor vehicle with bright headlights going south. That about the time the defendant was meeting said automobile, he saw the plaintiff in the road ahead of him walking in the same direction the defendant was traveling and directly in defendant's lane of travel on said paved road.

The defendant in his answer denied that he was negligent in any respect, but if he were negligent, he alleged the plaintiff was guilty of contributory negligence.

The plaintiff testified that he was not walking on the paved portion of the highway but was walking about two feet from the pavement when he was struck by defendant's automobile which approached from behind him.

The defendant testified that while he was approaching the street (Highland Avenue) turning to the right, another motor vehicle was meeting him. That he had his lights on dim. "I saw the plaintiff when I was about 10 or 12 feet from him. * * * He was walking approximately two or three feet out on the highway on the right-hand side of the road. * * * When I saw the plaintiff there in the road ahead of me I immediately applied my brakes and cut to the left to try to avoid hitting him, but it was so close I just couldn't help hitting him."

A Deputy Sheriff of Rutherford County who arrived at the scene of the accident a few minutes after it occurred, testified: "When I arrived at the scene * * * Mr. Wood's car was in the middle of the

road. Mr. Simpson had been moved. * * * I found some short skid marks leading up to Mr. Wood's car. * * * These skid marks were entirely on the black surface of the highway in the middle of the road. I did not find any skid marks on the shoulder of the road."

The jury answered the issues of negligence and contributory negligence in the affirmative. Judgment was entered on the verdict. The plaintiff appeals, assigning error.

Hamrick & Jones, and Oscar J. Mooneyham for plaintiff appellant.
Jones & Jones for defendant appellee.

DENNY, C.J. Assignments of error Nos. 3 and 4 challenge the correctness of certain portions of the charge of the court to the jury.

Assignment of error No. 3 is to the following portion of the court's charge: "The court instructs you that by 'traveled portion' of a highway, means that portion intended for normal travel, and not that part intended for emergency use only. It means, again, that portion of the roadbed that customary and usual travel occupies and takes, on the public highway.

"The court instructs you that if you find that the shoulder of the road was not used for customary travel at the time and place in question, then that, the court instructs you, would not be the traveled portion of the highway, within the meaning of the law.

"On the other hand, if you should find that at this particular place in question, not only was the hard surface of the highway used in the usual course of travel, but also the other part, then the whole thing would be the traveled portion. BUT, AS APPLICABLE TO THIS CASE, THE COURT INSTRUCTS YOU SPECIFICALLY THAT THERE IS NO EVIDENCE IN THIS CASE THAT THE SHOULDERS WERE USED IN ORDINARY VEHICULAR TRAFFIC, BUT THE SHOULDERS WERE USED FOR OTHER PURPOSES, THAT IS, GETTING OFF, AND STOPPING, AND THINGS LIKE THAT. (Appellant's emphasis.) So, the court instructs you, that as applicable to this case, the traveled portion of the highway would mean that portion of the highway which was used at that particular time, and intended for normal vehicular travel, and would not include that portion intended for emergency use only."

Assignment of error No. 4 is to that portion of the court's charge on the second issue, as follows: "Now, again, the court instructs you on the second issue that as the court understands the law, by traveled portion of a highway, means that portion intended for normal traffic, and not that portion intended for emergency use only, and that it

means that portion of the roadbed that customary and usual travel occupy and take on that particular highway at that particular time. If you find from this evidence that the shoulder of the road on the right-hand side was not intended — and was not used for normal travel, then the court instructs you that would not be a portion of the traveled portion of the highway. But, if you should find that on that particular highway, at that particular time, that the place where the plaintiff was, if he was off the hard surface of the highway, if at that time that portion was intended and used for normal travel, and not for emergency purposes, then that would be a portion of the traveled portion of the highway.

"Now, as bearing upon the second issue, if the defendant has satisfied you from this evidence and by its greater weight, that the plaintiff at the time of this accident was walking on the right side of the highway, along the traveled portion of said highway, that would be an act of negligence on his part, and may be considered by you in determining whether, on all the evidence, he was guilty of contributory negligence; and on Issue #2, if the defendant has satisfied you from the evidence, and by its greater weight that the plaintiff at the time and place in question was walking on the right-hand side of the highway, on the traveled portion thereof, or if he was traveling, walking anywhere on the right traveled portion of the highway, or if you are satisfied from this evidence, and by its greater weight, that in walking along there, he did not exercise ordinary care for his own safety, that is, he did not look, or keep a lookout for vehicles on the highway, or use ordinary care for his own safety — either one of those things would be negligence on his part. It would be a negligent act on his part, and if you are further satisfied from the evidence and by its greater weight, that such act, or acts of negligence on his part, concurring with the negligence of the defendant Wood, produced his injuries as one of the proximate causes thereof, then you should answer Issue #2 yes."

G.S. 20-174 (d) reads as follows: "It shall be unlawful for pedestrians to walk along the traveled portion of any highway except on the extreme left-hand side thereof, and such pedestrians shall yield the right of way to approaching traffic."

As we construe this statute, a pedestrian walking on the right-hand side of the highway, along the traveled portion thereof, does not have to be on the hard surface or the traveled portion thereof to be in violation of this statute. *Spencer v. Motor Co.*, 236 N.C. 239, 72 S.E. 2d 598.

G.S. 20-174 (d) makes it unlawful to walk along the traveled portion of any highway except on the extreme left-hand side thereof. It follows, therefore, that it is unlawful to walk on the right-hand shoulder of a highway along the traveled portion thereof. In view of our decisions, however, interpreting this statute, it is to be left to the jury to consider a violation of the statute as evidence of negligence along with the other evidence in determining whether or not the plaintiff contributed to his own injury and was, therefore, guilty of contributory negligence. *Bank v. Phillips,* 236 N.C. 470, 73 S.E. 2d 323; *Simpson v. Curry,* 237 N.C. 260, 74 S.E. 2d 649; *Moore v. Bezalla,* 241 N.C. 190, 84 S.E. 2d 817; 4 A.L.R. 2d Anno: Pedestrian's Noncompliance With Statute, pages 1253 through 1264.

In *Spencer v. Motor Co., supra,* there was no evidence tending to show that the plaintiff, a pedestrian, was walking on the paved portion of the highway. There was evidence tending to show that she was walking on the shoulder of the road on the right-hand side thereof when she was hit by a car traveling in the same direction. There was likewise evidence from which it might be inferred that she was walking on the left-hand side of the highway facing oncoming traffic. This Court said:" * * * (I)f plaintiff were walking north on her right-hand side of the highway, this was in violation of the statute, G.S. 20-174 (d), and would be evidence of negligence to be considered in connection with surrounding circumstances as to whether she used reasonable care and caution commensurate with visible conditions."

In *Radford v. Young,* 194 N.C. 747, 140 S.E. 806, the appeal involved the interpretation of an ordinance adopted by the Highway Commission pursuant to the provisions of Public Laws of 1923, Chapter 160, which, among other things, provided: "Pedestrians walking on the highways shall keep to the left-hand side of the road. Any violation of the foregoing rules, regulations or ordinances shall constitute a misdemeanor and be punished as provided by statute." The defendant offered evidence tending to show that at the time of the injury the plaintiff was walking on the right-hand side of the highway in violation of the above ordinance. The plaintiff's evidence tended to show he was not walking on the paved portion of the highway. The question presented on appeal was whether or not walking along the right-hand side of the highway in violation of the ordinance constituted contributory negligence. This Court said: "The judge charged the jury in substance that if they should find that the plaintiff was walking on the right side of the highway in violation of the ordinance enacted by the State Highway Commission, and that if such conduct was the proximate cause of the injury, plaintiff was not entitled to

recover. This is a correct interpretation of the law." *Hunnicutt v. Kimbrell,* 207 N.C. 494, 177 S.E. 323; *Miller v. Motor Freight Corp.,* 218 N.C. 464, 11 S.E. 2d 300.

In the case of *Crouse v. Pugh,* 188 Va. 156, 49 S.E. 2d 421, 4 A.L.R. 2d 1242, the evidence tended to show that the plaintiff Pugh, appellee, was walking eastwardly on the gravel shoulder off the right edge of the hard surface of the road when he was, without warning, struck from behind by the automobile of defendant Crouse, appellant. The defendant testified that he was driving about 25 or 30 miles an hour on his right side of the road; that immediately prior to the accident he met an oncoming car traveling west with bright lights; that he was blinded by the lights, and just as the oncoming car passed him he saw the plaintiff six feet in front of him on the hard surface of the road, just to the right of the center of the front of his car; that he slammed on his brakes, but struck the plaintiff before he could stop.

The Motor Vehicles Code of Virginia, section 2154 (126) (g), which was in effect at that time, read as follows: "Pedestrians shall not use the highways or streets other than the sidewalks thereof, for travel, except when necessary to do so because of the absence of sidewalks, reasonably suitable and passable for their use, in which case they shall keep as near as reasonably possible to the extreme left side or edge of the highways or streets."

The Virginia Court said: "While a pedestrian walking on a right shoulder may not occupy as dangerous a position as one walking on the right edge of the paved surface, he is, nevertheless, in a position of danger by reason of the possible inadvertence and negligence of operators of vehicles, by conditions requiring the use of the shoulder by motorists, or by such circumstances as are claimed to have arisen in this case. Though less compelling, the same reasons of safety which require a pedestrian to walk so as to face oncoming vehicles apply to one who walks on the right shoulder of the highway. A pedestrian who does not comply with the statute and its purpose does not avail himself of every reasonable precaution for his safety. A violation of Code, section 2154 (126) (g) amounts to negligence as a matter of law. Whether or not such violation be a remote cause or the cause which proximately contributes to the injury is a question for the jury."

We hold that the plaintiff's evidence to the effect that he was walking about two feet from the pavement on the right-hand side of the highway was sufficient to estabilsh a violation of G.S. 20-174 (d) on the part of the plaintiff which was evidence of negligence to be considered along with the other facts and circumstances involved in determining whether or not the plaintiff was guilty of contributory negligence.

In our opinion, the instructions given by the court, challenged by the foregoing assignments of error, were more favorable to the plaintiff than he was entitled to under the law. Therefore, he was not prejudiced thereby.

Other assignments of error present no prejudicial error which in our opinion would justify a new trial.

In the trial below, we find no error which entitles the plaintiff to the relief sought.

No error.

BOBBITT, J., dissents.

STATE OF NORTH CAROLINA, ON RELATION OF ROBERT S. SWAIN, SOLICITOR OF THE 19TH SOLICITORIAL DISTRICT v. WILLIAM E. CREASMAN, JUSTICE OF THE PEACE FOR ASHEVILLE TOWNSHIP.

(Filed 18 September 1963.)

1. Appeal and Error § 35; Evidence § 1—

The Supreme Court will take judicial notice of its own records.

2. Courts § 17; Public Officers § 12—

Where a petition for the removal from office of a justice of the peace is heard by the resident judge who appointed him, and the judgment of the court recites that the petition came on to be heard under the provisions of G.S. 7-115, and it appears that the judge promptly heard the proceeding in chambers after notice to the justice of the peace, instead of fixing the hearing at the next term after the petition was filed, it *is held* that the proceeding was under G.S. 7-115 and not under G.S. 128-16 through G.S. 128-20.

3. Same—

A justice of the peace is not entitled to recover his costs and attorney's fees upon final judgment in his favor in a proceeding under G.S. 7-115 to remove him from office, since G.S. 7-115, unlike G.S. 128-20, makes no provision for such recovery.

4. Same; Statutes § 5—

G.S. 7-115, relating to the removal of a justice of the peace by the resident judge appointing him, is restricted in its scope and provides a procedure different from that specified in G.S. 128-16 through G.S. 128-20, and the two statutes are not in *pari materia*, and the provisions of G.S. 128-20, relating to the recovery of costs and attorney's fees is not applicable to a proceeding under G.S. 7-115.

APPEAL by respondent from *Martin, S.J.*, 11 February 1963 Session of BUNCOMBE.

Motion in the cause filed 27 November 1961 for the allowance of reasonable and necessary expense, including a reasonable attorney fee, pursuant to the provisions of G.S. 128-20. There was a final termination of the proceeding in which this motion was filed by a decision of this Court on appeal favorable to respondent, which is reported in 255 N.C. 546, 122 S.E. 2d 358.

From an order denying the motion, respondent appeals.

W. M. Styles for respondent appellant.
Tom S. Garrison, Jr., for plaintiff appellee.

PARKER, J. On 16 January 1961 Robert S. Swain, solicitor of the 19th solicitorial district, filed a petition in the name of the State of North Carolina with W. K. McLean, resident judge of the 28th judicial district, to remove from office William E. Creasman, a justice of the peace for Asheville Township, Buncombe County, for an alleged conspiracy to cheat and defraud Buncombe County out of fees collected for service of process from May 1960 until the present time, and for an alleged issuing of process for certain business firms and not collecting the required fees until the present time. It is alleged in the petition that the solicitor is acting under the provisions of G.S. Ch. 128, secs. 16 and 17.

Taking judicial notice of our own records, when this proceeding was before us at the Fall Term 1961, *S. v. McMilliam,* 243 N.C. 775, 92 S.E. 2d 205, this appears from the record proper: the day the petition was filed by solicitor Swain he presented it to W. K. McLean, resident judge of the 28th judicial district, who on the same day entered an order wherein, after reciting that William E. Creasman is a justice of the peace for Asheville Township, Buncombe County, duly appointed by him under and by virtue of G.S. 7-115, and after reciting a summary of the charges alleged in the petition against Creasman, Creasman is ordered to appear before him in chambers on 28 January 1961 there to be heard in the proceeding.

On 28 January 1961 respondent filed an answer denying the material allegations of the petition and alleging a number of facts as a further answer and defense.

Taking further judicial notice of our records, it appears the proceeding came on to be heard by Judge McLean at the appointed time and place, who, after hearing the evidence and counsel, entered a judgment reciting that the petition came on to be heard by him under and

by authority of the provisions of G.S. 7-115, and removing Creasman from office. On appeal this Court reversed the judgment below. 255 N.C. 546, 122 S.E. 2d 358. Our opinion was filed 1 November 1961. The motion in the cause was filed 27 November 1961.

The motion in the cause alleges the initiation of the proceeding to remove him from office, wherein it is stated the solicitor is acting under the provisions of G.S. Ch. 128, secs. 16 and 17, the judgment removing him from office, the reversal of the judgment on appeal, the final termination of the proceeding favorable to him, and prays that he be allowed reasonable and necessary expense, including a reasonable attorney fee.

The motion was heard by Judge Martin upon the petition and answer, decision of this Court on appeal, motion in the cause, and arguments of counsel as to whether or not upon the record respondent was entitled as a matter of law to the allowance of any expenses. Judge Martin entered an order to the effect that the proceeding in the superior court and thereafter to remove Creasman from office was pursuant to the provisions of G.S. 7-115, that G.S. 128-20 is not applicable to proceedings under G.S. 7-115, that Creasman, a justice of the peace, is not a county officer within the meaning of G.S. 128-20, and denied respondent's motion. Respondent excepted and appeals.

G.S. 128-16, which was enacted by the General Assembly before 1920, prior to 1959 provided that "any city prosecuting attorney, any sheriff, police officer, or constable, shall be removed from office by the judge of the superior court upon charges made in writing" for certain specified offenses. The General Assembly at its 1959 Session amended G.S. 128-16 by inserting after the comma following the word "attorney" the words "any justice of the peace," which amendment became effective after its ratification 20 June 1959. Session Laws of North Carolina 1959, Ch. 1286. The General Assembly at its 1961 Session again amended G.S. 128-16 by striking out the words "Any city prosecuting attorney" at the beginning of the statute and inserting in lieu thereof the words "Any judge or prosecuting attorney of any court inferior to the Superior Court," and by inserting after the words "Superior Court" the words "resident in or holding the courts of the district where said officer is resident." Session Laws of North Carolina 1961, Ch. 991. The 1961 amendment became effective after its ratification 17 June 1961, and Judge McLean's judgment removing respondent from office was entered 6 February 1961, as appears from the records of this Court.

G.S. 128-17 provides that the petition for removal may be filed by the solicitor of the district, or by others specified therein.

G.S. 128-20 provides that the trial of such a removal proceeding shall take precedence over all other cases upon the court calendar, "and shall be heard at the next term after the petition is filed, providing the proceedings are filed in said court in time for said action to be heard," and the superior court shall fix the time of hearing. This section further provides, "if the final termination of such proceedings be favorable to any accused officer, said officer shall be allowed the reasonable and necessary expense, including a reasonable attorney fee, to be fixed by the judge, he has incurred in making his defense, by the county, if he be a county officer, or by the city or town in which he holds office, if he be a city officer."

G.S. 128-16 through G.S. 128-20, both inclusive, are codified in General Statutes under Ch. 128, entitled "Offices and Public Officers," Art. 2, entitled "Removal of Unfit Officers."

Prior to 1955 G.S. 7-115, which appears in General Statutes under Ch. 7, entitled "Courts," Subchapter V, entitled "Justices of the Peace," Art. 14, entitled "Election and Qualification," provided that the Governor may, from time to time, at his discretion, appoint one or more fit persons in every county to act as justices of the peace and issue to each justice of the peace a commission, and it further provided that he may under certain circumstances revoke such commission. This section prior to 1955 did not provide for the removal from office of a justice of the peace by a court.

In 1955, the General Assembly, 1955 Session Laws, Ch. 910, amended G.S. 7-115 by striking out all the language of the section and substituting in lieu thereof language to this effect: In addition to other methods provided by law for appointment or election of a justice of the peace, the resident judge of the superior court of the district in which a county is situated may, from time to time, at his discretion, appoint one or more fit persons as justice of the peace in said county, who shall hold office for two years, provided the appointing judge shall find to his satisfaction there is then existing a need for such additional justice or justices of the peace. G.S. 7-115, as amended, rewritten, and enacted by the 1955 General Assembly specifically provides, "*Any justice of the peace so appointed* may, after due notice and hearing, be removed from office by the resident judge of the superior court of the district in which the county is situated, for misfeasance, malfeasance, nonfeasance or other good cause." (Emphasis ours.) This Act became effective 1 July 1955. *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E. 2d 888, 891. G.S. 7-115 in effect since 1 July 1955 has no provision, like G.S. 128-20, to the effect that if the removal hearing results in a final termination

of the proceeding favorable to the accused justice of the peace, the said justice of the peace shall be allowed reasonable and necessary expense, including a reasonable attorney fee, incurred in defending himself.

Respondent Creasman was appointed a justice of the peace for Asheville Township, Buncombe County, by W. K. McLean, resident judge of the superior court of the district in which Buncombe County is situate. Although the solicitor in his petition alleged that he was acting under the provisions of G.S. Ch. 128, secs. 16 and 17, it is manifest that the proceeding was heard under the provisions of G.S. 7-115 for two reasons: One, Judge McLean so stated in his judgment removing Creasman from office (see first appeal in this proceeding, 255 N.C. 546, 547, 122 S.E. 2d 358, 359), and two, he proceeded promptly to hear the proceeding, after due notice to Creasman, in chambers, instead of fixing the time of hearing the proceeding "at the next term after the petition is filed," as provided in G.S. 128-20.

Since the 1959 amendment to G.S. 128-16, any justice of the peace, and also many other officers, may be removed from office under the provisions of G.S. 128-16 through G.S. 128-20, both inclusive, if at a hearing at a term of the superior court he is found guilty of the commission of one or more acts prohibited by G.S. 128-16. G.S. 7-115, as rewritten and enacted by the 1955 General Assembly, is far more restrictive in its scope than G.S. 128-16 through G.S. 128-20, both inclusive, because it provides that a justice or justices of the peace appointed by the resident judge may be removed from office by the resident judge, not some other judge, for cause, after a hearing, and it does not provide for a hearing at term, thereby affording a more prompt procedure for the hearing of charges against such a justice of the peace than provided under the provisions of G.S. 128-16 through G.S. 128-20, both inclusive, and further because it has no application to a justice or justices of the peace not appointed by the resident judge, or to any other officer.

When the 1955 General Assembly rewrote and enacted G.S. 7-115, it did not write in the Act a provision like the provision in G.S. 128-20 that if in a proceeding under G.S. 7-115 there was a final termination of the proceeding for the removal of a justice of the peace appointed by the resident judge favorable to him, he should be allowed the reasonable and necessary expense, including a reasonable attorney fee, incurred in making his defense. By reason of this omission, and of the fact that the 1955 Act makes no reference to G.S. 128-20, and of the very restrictive scope of G.S. 7-115, it

seems the Legislature never intended that the provisions of G.S. 128-20 should be applicable to proceedings under G.S. 7-115. G.S. 7-115 and G.S. 128-16 through G.S. 128-20, both inclusive, do not deal with the same subject or matter, because of the very restrictive scope of the provisions of G.S. 7-115, so as to bring into effect the familiar rule of statutory construction that statutes in *pari materia* are to be construed together, if possible, and make the provisions of G.S. 128-20 applicable to proceedings for removal of a justice of the peace under the provisions of G.S. 7-115, when there is a final termination of the proceeding favorable to the accused justice of the peace. *Coach Lines v. Brotherhood,* 254 N.C. 60, 68, 118 S.E. 2d 37, 43, as to statutes in *pari materia.*

The hearing here was under the provisions of G.S. 7-115, and in our opinion the provisions of G.S. 128-20 are not applicable to proceedings under G.S. 7-115, and such was the legal conclusion of the judge below with which we agree.

Having arrived at this conclusion, which is fatal to respondent's appeal, we do not reach for determination the superfluous legal conclusion of the judge below that a justice of the peace is not a county officer within the meaning of G.S. 128-20, and on that interesting question we express no opinion.

All respondent's assignments of error are overruled and the judgment below is

Affirmed.

STATE OF NORTH CAROLINA ON RELATION OF J. BEN PITTS v. DEXTER F. WILLIAMS.

(Filed 18 September 1963.)

Public Officers § 2—

Where a board of county commissioners appoints one of its members a member of the county board of public welfare for a three-year term, the fact that the member's term of office as county commissioner expires during the three-year term does not terminate his term as a member of the county board of public welfare, G.S. 108-11. The statute does not use the term "ex officio" in its technical sense.

APPEAL by defendant from *Hubbard, J.*, February 1963 Session of CRAVEN.

This action by J. Ben Pitts, plaintiff's relator, is for an order declaring him to be the duly appointed and qualified member of the Craven County Welfare Board for the three-year term ending on June 30, 1965. Pitts gave bond and obtained leave of the Attorney General to bring this action in the name of the State in accordance with G.S. 1-515 *et seq.*

The parties filed pleadings, waived a jury trial and submitted the cause for decision upon an agreed statement of facts and attached exhibits. The agreed facts are summarized below.

R. L. Stallings, Sr., under appointment by the Board of County Commissioners of Craven County, served two successive terms of three years each as a member of the Craven County Welfare Board. His second three-year term expired June 30, 1962. He was not a member of the Board of Commissioners when appointed to membership on the Welfare Board or at any time thereafter.

At its regular meeting on July 2, 1962, the Board of Commissioners, then composed of George W. Ipock, Chairman, Johnnie E. Daugherty, C. D. Lancaster, Dexter F. Williams and J. B. Pitts, adopted by unanimous vote a motion "appointing J. Ben Pitts to the Craven County Board of Public Welfare for the ensuing term." Pitts took no separate oath of office as a member of the Welfare Board but had previously taken the oath as a member of the Board of Commissioners.

Pitts' term of office as a member of the Board of Commissioners expired December 3, 1962. He had been a candidate for the office of County Commissioner in the Democratic Primary of 1962 but was not nominated. In the general election in November 1962, the persons elected members of the Board of Commissioners "for the next ensuing term of four years," (Chapter 604, Public-Local Laws of 1939) were D. Livingston Stallings, Johnnie E. Daugherty, James Chance, Dexter F. Williams and Grover C. Lancaster, Jr. They were duly sworn, assumed their offices and held their first meeting on December 3, 1962.

The Board of Commissioners at a meeting regularly held on December 17, 1962, adopted by unanimous vote a motion "that a member of the present Board of Commissioners be appointed as a member of the Craven County Welfare Board, replacing J. Ben Pitts," and thereafter adopted by unanimous vote a motion appointing Dexter F. Williams "as a member of the Craven County Welfare Board, to succeed Mr. J. Ben Pitts." By letter dated December 19, 1962, Frank Ballard, Chairman of the Welfare Board, was so advised. A copy of this letter was sent to Pitts. Upon receipt thereof, Pitts, by letter dated December 20, 1962, addressed to "The Chairman

and Members of the County Board of Commissioners of Craven County," after referring to matters set forth above and after quoting pertinent provisions of G.S. 108-11, concluded as follows:

> "I have not submitted my resignation as a member of the Craven County Board of Public Welfare, and, under the law my term of office does not expire until the first Monday of July 1965. Your arbitrary action in attempting to oust me from the Craven County Board of Public Welfare, and naming Mr. Dexter F. Williams as my successor, is void and contrary to law, and I wish to assure you that I expect to continue to serve on this board for my three year tenure regardless of what action you have taken.
>
> "It would be appreciated by me if you would rescind the action taken by you on Monday, December 17, 1962, naming Mr. Dexter F. Williams as my sucessor and notify the public of this action through the local press."

The Board of Commissioners at a meeting regularly held on January 7, 1963, after a discussion of the matters set forth above, adopted by unanimous vote a motion "for the previous action on the matter to stand."

Judge Hubbard, based on the agreed facts and his conclusions of law, entered judgment providing:

> "IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the plaintiff, J. Ben Pitts, was duly appointed a member of the Craven County Board of Public Welfare for a three-year term beginning July 1, 1962, and that the appointment of the defendant, Dexter F. Williams, by the Board of Commissioners of Craven County to serve in the place and stead of the said plaintiff is without force and effect and that the plaintiff is entitled to such writ or other process as is necessary to enable him to continue to serve as a member of said Craven County Board of Public Welfare until the expiration of such three-year term for which he was appointed, which began on July 1, 1962. It is further ordered that the defendant shall pay the costs."

Defendant excepted and appealed, assigning as error designated conclusions of law and the judgment.

Laurence A. Stith for defendant appellant.

No counsel contra.

BOBBITT, J. The question is whether the term of office of Pitts as a member of the Welfare Board expired on December 3, 1962, on account of the expiration on that date of his term of office as a member of the Board of Commissioners.

Decision must be based on G.S. 108-11 which, in pertinent part, provides:

> "Each of the several counties of the State shall have a county welfare board composed of three members who shall be appointed as follows: The board of county commissioners shall appoint one member who may be one of their own number to serve as ex officio member of the county welfare board with the same powers and duties as the other two members, or they may appoint a person not of their own number to serve on the county welfare board; the State Board of Public Welfare shall appoint one member; and the two members so appointed shall select the third member. In the event the two members thus appointed are unable to agree upon the selection of the third member, such third member shall be appointed by the resident judge of the superior court of the district in which the county is situated.
>
> "Appointments of county welfare board members shall be made on or before the first day of July of the year in which the term of appointment expires, and shall be effective as of that date, and the terms of office shall be three years each. Appointments to fill vacancies shall be for the remainder of the term of office. Prior service on a county welfare board shall not disqualify any person for service under this article, but no member shall be eligible to serve more than two successive terms."

R. L. Stallings, Sr., whose term of office expired June 30, 1962, was not eligible for reappointment. It was the duty of the Board of Commissioners at their meeting on Monday, July 2, 1962, to appoint a member of the Welfare Board to succeed Mr. Stallings; and the first sentence of the second paragraph of G.S. 108-11 expressly provides that the *term of office* of such appointee "shall be three years." At said meeting, the Board of Commissioners appointed J. Ben Pitts (as successor to R. L. Stallings, Sr.) "for the ensuing term." The "ensuing term" was the statutory term of three years. The Board of Commissioners as constituted on July 2, 1962, was authorized and obligated to appoint Mr. Stallings' successor; and, with knowledge that he would not be a member of the Board of Commissioners after

December 3, 1962, Pitts was appointed for the three-year term ending June 30, 1965.

It is noted that the three-year term of *one* of the three members of the Welfare Board expires on June 30th of each year. The obvious purpose of this statutory plan is to give assurance there will always be at least two members with prior knowledge and understanding of the Welfare Board's functions, program and problems.

Attention is directed to this provision in the first paragraph of G.S. 108-11: "The board of county commissioners shall appoint one member who may be one of their own number to serve as ex officio member of the county welfare board with the same powers and duties as the other two members, or they may appoint a person not of their own number to serve on the county welfare board."

Originally, the statute contained no provision for the appointment by a board of county commissioners of one of their own number to serve as a member of the county welfare board (formerly county board of charities and public welfare). See N. C. Code of 1939 (Michie), § 5014. The statute was amended so as to *authorize* a board of county commissioners, if it saw fit to do so, to appoint "one of their own number" to serve as a member of the county welfare board. Public Laws of 1941, Chapter 270, Section 2. The amendment did not require that a board of county commissioners appoint "one of their own number," but by authorizing it to do so removed any question as to the legality of such appointment.

From July 2, 1962, through December 3, 1962, while a county commissioner, and from December 3, 1962, until June 30, 1965, while not a county commissioner, Pitts was eligible for appointment and service as a member of the Welfare Board. His eligibility for such appointment did not depend upon whether he was or was not a county commissioner. Under his appointment, Pitts was "to serve as ex officio member of the county welfare board" from July 2, 1962, through December 3, 1962. His service after December 3, 1962, would be as an appointed member who was not a county commissioner. When this change in status occurred, it would seem that an oath of office as member of the Welfare Board should be administered to and taken by Pitts.

"Ex officio" is defined as follows: "From office; by virtue of the office; without any other warrant or appointment than that resulting from the holding of a particular office." Black's Law Dictionary, Fourth Edition, 661; 18 Cyc. 1500; 12 A. & E. Encycl. of L., 2d Edition, 391; 32 C.J.S. 1145.

Obviously, the term "ex officio" is not used in G.S. 108-11 in its technical sense. The authority of Pitts as a member of the Welfare Board did not result from the fact that he was a county commissioner but from the fact that the Board of Commissioners had appointed him to serve as a member of the Welfare Board for the three-year term ending June 30, 1965. What the General Assembly intended by the use of the term "ex officio" when it enacted the 1941 Amendment is unclear. It may have been apprehensive as to the dual office holding provision of Article 14, Section 7, of the Constitution of North Carolina. It may have intended to make plain that a county commissioner, when appointed and while serving as a member of the Welfare Board, was not entitled to additional compensation for such service.

The Board of Commissioners on July 2, 1962, under the clear mandate set forth in the second paragraph of G.S. 108-11, was under duty to appoint a member of the Welfare Board *for a three-year term.* It appointed Pitts for such three-year term. G.S. 108-11 contains no provision sufficient to suport the view that the expiration of the term of office of Pitts as county commissioner disqualified him from further service as a member of the Welfare Board or created a vacancy in the office to which he had been appointed. Hence, the action of the (new) Board of Commissioners on December 17, 1962, purporting to appoint defendant to succeed Pitts, was null and void. Present statutory provisions require that the judgment of the court below be affirmed.

Affirmed.

R. L. COBURN AND WIFE, MARTHA H. COBURN v. ROANOKE LAND AND TIMBER CORPORATION, COASTAL LUMBER COMPANY, L. B. BLACKMAN, B. H. OATES AND WIFE, RUTH OATES, J. W. WELLS AND WIFE, RUTH WELLS, K. P. LINDSLEY AND WIFE, MURCEIL P. LINDSLEY, L. P. LINDSLEY AND WIFE, MARGUERITE G. LINDSLEY.

(Filed 18 September 1963)

1. Appeal and Error § 4—

Only the party aggrieved by the judgment may appeal therefrom, and the party aggrieved is one whose substantial rights are affected by the judgment. G.S. 1-271, G.S. 1-277.

2. Judgments § 35—

In an action to restrain the cutting and removal of timber, a judgment of dismissal based on findings of the referee, approved by the court, that plaintiffs had failed to show title to the tract in controversy, is not equivalent to a voluntary nonsuit but is equivalent to an express jury finding that plaintiffs were not the owners of the land in controversy, and precludes plaintiffs thereafter from asserting title to such land.

3. Injunctions § 16; Judgments § 5—

Where judgment on the merits is entered adjudicating that plaintiffs are not the owners of the tract of land in controvsery, and the cause is retained solely for the assessment of damages against plaintiffs' injunction bond, a trespass committed by plaintiffs subsequent to the judgment does not come within the scope of the action, and defendants may not recover damages for such trespass by motion in the cause.

4. Appeal and Error § 4—

Where plaintiffs are estopped from claiming the land in controversy by judgment on the merits that they are not the owners thereof, no judgment in regard to the use of the land can affect any substantial right of theirs, and their attempted appeal from an order continuing to the hearing an order restraining them from cutting timber from the land will be dismissed.

APPEAL by plaintiffs from an order of *Bundy, J.*, in Chambers in BEAUFORT County, continuing a restraining order until the final hearing.

This action was instituted in August 1957 for the purpose of (1) establishing plaintiffs' title to a tract of land in Martin County containing 87.79 acres, (2) recovering damages for timber cut therefrom by Roanoke Land and Timber Corporation (Timber Corporation), and (3) restraining further cutting by Timber Corporation.

Timber Corporation denied plaintiffs owned the land described in a deed to it conveying the timber on the Conoho farm of defendants Lindsley; it admitted it had cut part of the timber described in that deed and asserted the right to cut the remaining timber.

At plaintiffs' instance a preliminary restraining order issued 21 August 1957 prohibiting Timber Corporation from further cutting. On 3 September 1957 this order was by consent, continued to the final hearing on condition that plaintiffs give bond in the sum of $1000 "to indemnify the defendants against any loss which they may sustain by reason of the restraining order." The bond was given.

The cause was referred, *Coburn v. Timber Corp.*, 257 N.C. 222, 125 S.E. 2d 593. The referee reported: "The evidence, considered in the light most favorable to plaintiffs, fails to show color of title to the 87.79 acres described on the Court Map, and fails to show open,

notorious, continuous and adverse possession for seven years under known and visible lines, next preceding the institution of this suit. . . . The evidence, considered in the light most favorable to plaintiffs, fails to show that plaintiffs or either of them were in possession of the 87.79-acre tract of land openly, notoriously, continuously and adversely, and under known and visible lines for twenty years next preceding the institution of this suit." These findings of the referee were adopted by the court as its own. Based on the findings so made and approved, judgment was entered at the November Term 1962 that plaintiffs recover nothing of Timber Corporation; that Timber Corporation's time to cut the remaining timber on the land in controversy be extended for a period equal to the period the restraining order was in effect. The cause was retained for the ascertainment of the damages resulting from the wrongful issuance of the restraining order. On appeal this Court found "No Error" in the judgment. *Coburn v. Timber Corp.*, 259 N.C. 100. The mandate of this Court was transmitted to the Superior Court of Martin County on 2 April 1963.

Thereafter plaintiffs began cutting timber on the land in controversy. Defendant Timber Corporation, by motion in the cause, applied for an order restraining this cutting. Plaintiffs admitted they had cut timber but denied that they had cut timber owned by Timber Corporation. A temporary restraining order issued. This was continued to the hearing. Plaintiffs excepted and appealed.

Griffin & Martin, C. W. Everett, and R. L. Coburn, by Clarence W. Griffin for plaintiff appellants.

Peel & Peel and Bourne & Bourne by Henry C. Bourne for defendant appellees.

RODMAN, J. Plaintiffs state the question for decision: "Did his Honor Judge Bundy commit error in continuing the temporary restraining order herein?"

The right to appeal is limited to a party aggrieved. G.S. 1-271. A party is aggrieved if his rights are substantially affected by judicial order. G.S. 1-277. If the order complained of does not adversely affect the substantial rights of appellant, the appeal will be dismissed. *Bank v. Melvin*, 259 N.C. 255; *Ferrell v. Basnight*, 257 N.C. 643, 127 S.E. 2d 219; *In re Application for Reassignment*, 247 N.C. 413, 101 S.E. 2d 359; *Gregg v. Williamson*, 246 N.C. 356, 98 S.E. 2d 481; *Langley v. Gore*, 242 N.C. 302, 87 S.E. 2d 519.

Manifestly plaintiffs have no right to complain of an order prohibiting them from cutting the timber, if the judgment rendered by

Judge Fountain, and found by this Court to be free of error, estops plaintiffs from asserting title to the timber. Therefore, the crucial question is: Are plaintiffs estopped to deny Timber Corporation's title. Plaintiffs contend the judgment is the equivalent of a voluntary nonsuit and hence could not constitute an estoppel. They cite and rely on *Grimes v. Andrews*, 170 N.C. 515, 87 S.E. 341, and *Taylor v. Scott*, 255 N.C. 484, 122 S.E. 2d 57, which applied the principles announced in *Grimes v. Andrews*.

In *Grimes v. Andrews, supra,* relied on by plaintiffs, the court said: "The dismissal of the former suit, if for the same cause of action, did not constitute an estoppel, as the case was not heard and decided on its merits, but the dismissal was equivalent to a nonsuit, granted because plaintiff in that suit had not prosecuted the same. . . . We do not say that where it appears that the merits have been considered and passed upon, the judgment of dismissal may not be successfully pleaded as a former adjudication, but no such thing occurred here. The other suit was dismissed, with costs against the plaintiff, simply because he had failed to restore the lost record, and in no sense were the merits touched upon. It could have no more legal effect than a nonsuit, where plaintiff fails to prosecute his cause, or is called and fails to appear. His laches put him out of court, and that is all it does, and he may come back again at his will and pleasure and pursue the same cause without being affected by any bar of the former judgment."

In the present case there was a full hearing with opportunity to each of the parties to establish their respective claims. Here numerous documents consisting of deeds, wills, and other writings were offered in evidence by the respective parties. Sixteen witnesses testified at length with respect to the merits of the controversy, the location of the lands, possession, and other facts on which the parties relied to establish or controvert plaintiffs' title. Plaintiffs and defendants Lindsley, under whom Timber Corporation asserts the right to cut timber, are the owners of adjoining properties, the Lindsley property being known as the Conoho farm. As said by Sharp, J., in the first appeal (257 N.C. at p. 227): "The instant case involves a complicated question of boundary which, we may assume, required a personal view of the premises since the referee, with counsel, did make one." The crucial question in the case, therefore, has at all times been: Who owned the 87.79 acres in controversy? Was it a part of the Coburn farm, or was it a part of the Conoho farm? The report of the referee, approved by the judge, is equivalent to an express jury finding that plaintiffs were not the owners of the land in con-

troversy. They are now estopped as to Timber Corporation to assert that they do own the land. *Wicker v. Jones,* 159 N.C. 102, 74 S.E. 801; *Land Co. v. Guthrie,* 123 N.C. 185; *Yates v. Yates,* 81 N.C. 397; *Falls v. Gamble,* 66 N.C. 455; *Rogers v. Ratcliff,* 48 N.C. 225; *Permian Oil Co. v. Smith,* 111 A.L.R. 1152; *Herschbach v. Cohen,* 69 N.E. 932, 99 Am. St. Rep. 233; 50 C.J.S. 253; 18 Am. Jur. 102-3; 52 Am. Jur. 894.

The right of appellee to recover damages for timber assertedly cut from the land in controversy in April 1963 is not presented by this appeal. The cause was retained merely for the purpose of assessing damages, if any, sustained by reason of the issuance of the restraining order in 1957. *Gruber v. Ewbanks,* 199 N.C. 335, 154 S.E. 318; *Timber Co. v. Rountree,* 122 N.C. 45; *Pearson v. Carr,* 97 N.C. 194; *Brendle v. Herren,* 97 N.C. 257.

Since plaintiffs are estopped to assert title to the land in controversy, it follows that an order enjoining them from cutting timber which they do not own does not affect any substantial right of theirs. They are not parties aggrieved.

Appeal dismissed.

STATE v. DALLAS ORR

(Filed 18 September 1963.)

1. Criminal Law § 99—

The evidence must be viewed in the light most favorable to the State upon defendant's motion to nonsuit.

2. Criminal Law § 98—

The credibility of witnesses and the weight to be given their testimony are questions for the jury and not the court.

3. Rape § 5—

The evidence in this prosecution for rape *held* sufficient to require the court to submit the issue of guilt to the jury.

4. Criminal Law §§ 106, 161— Inadvertence in charge may be cured by prompt and complete correction.

In this prosecution for a capital crime the court correctly placed the burden upon the State to show guilt beyond a reasonable doubt and correctly defined that term, but in one instance in stating defendant's contentions and also in attempting to correct the inadvertence, used the phrase "by the greater weight of the evidence." Immediately before the

jury retired, the court emphatically corrected its inadvertence and charged that the burden was on the State to prove guilt beyond a reasonable doubt. *Held:* It must be assumed that the jurors were men of sufficient intelligence to understand the court's unequivocal correction of its slip of the tongue, and the conflict in the instructions was removed.

APPEAL by defendant from *Brock, S.J.*, March, 1963 Term, GRAHAM Superior Court.

In this criminal prosecution the defendant, Dallas Orr, was charged with the capital felony of rape. The offense is alleged to have occurred on December 3, 1961. A jury trial resulted in a verdict of guilty. As a part of the verdict the jury recommended life imprisonment.

The defendant did not offer evidence. After verdict and judgment his court-appointed counsel was permitted to withdraw upon the ground his family had employed counsel to represent him on this appeal.

T. W. Bruton, Attorney General.
James F. Bullock, Asst. Attorney General, for the State.
McKeever & Edwards, by Herman Edwards for defendant appellant.

HIGGINS, J. The defendant contends that the trial court committed error (1) by overruling his motion to dismiss; and (2) by giving the jury conflicting instructions as to the quantum of proof necessary to convict. All other exceptions and assignments of error are abandoned.

The prosecuting witness, a woman 57 years of age, testified for the State, detailing circumstances sufficient to go to the jury and to sustain its verdict. The victim was well acquainted with the defendant. She made complaint to the members of her family and to the sheriff at the first opportunity. The story she told them immediately after the alleged assault was in substance the same as her testimony at the trial.

The defendant left the community on the day of the alleged assault. He was arrested ten months later in Knoxville, Tennessee. While in custody he told the investigating officer that on December 3, 1961, he went to the home of the prosecutrix, stayed a short time, left, but after seeing her husband and daughter leave the house, he "then walked back up to Roscoe's house and stayed there awhile and then left and went . . . home; that after he had been at his home awhile someone . . . told him something was in the air, and he left and went to Detroit. . . . He said he would tell his story in court;

that he had rather not say anything concerning the offense he was charged with at that time."

In passing on the motion to dismiss, we must view the evidence in the light most favorable to the State. *State v. Tessnear,* 254 N.C. 211, 118 S.E. 2d 393; *State v. Gay,* 251 N.C. 78, 110 S.E. 2d 458. The credibility of witnesses and the proper weight to be given their testimony must be decided by the jury — not by the court. *State v. Kelly,* 243 N.C. 177, 90 S.E. 2d 241. The evidence in the case was sufficient to require the court to submit the issue of guilt to the jury. The motion to dismiss was properly denied.

Inasmuch as the defendant has raised the question of conflicting instructions, we here repeat the parts of the charge material to decision on the assignment of error:

> "Now, upon the defendant's plea of not guilty to the charge the burden is upon the State to satisfy you beyond a reasonable doubt of each and every element of the offense charged. There is no burden upon the defendant to prove anything. The burden rests entirely upon the State.
>
> "In criminal cases in our State, and in all the States of the United States, there is a presumption of innocence upon a plea of not guilty. The defendant is presumed innocent and that presumption remains with him throughout the trial until such time as the State has offered competent evidence which is sufficient to satisfy you beyond a reasonable doubt that the defendant is guilty.
>
> "Now, I want to call your attention to the phrase 'reasonable doubt,' so that we might understand at the outset what is meant by it, because in my charge I will use the phrase a number of times. A reasonable doubt, members of the jury, is not a vain, imaginary or fanciful doubt, but it is a sane and rational doubt. When we say you must be satisfied of defendant's guilt beyond a reasonable doubt, it is meant that you must be fully satisfied, or entirely convinced, satisfied to a moral certainty that the defendant is guilty of the charge against him. So I charge you, gentlemen of the jury, that you will bear in mind throughout your deliberations that the burden of proof rests upon the State to satisfy you beyond a reasonable doubt of each element of the offense charged."

After reciting the substance of the State's evidence, the court charged:

"Now, upon this evidence, members of the jury, and upon this charge as contained in the bill of indictment, the State says and contends that the defendant did forcibly have carnal knowledge with the prosecuting witness, Mattie Orr, against her will, and they say and contend that the evidence offered here should be sufficient to satisfy you beyond a reasonable doubt that he is guilty of the charge as contained in the bill of indictment. . . .

"The defendant, on the other hand, says and contends, through his plea of not guilty, that you should not be satisfied by the greater weight of the evidence that this is so.

"The defendant says and contends that the evidence offered by the State is not sufficient to satisfy you beyond a reasonable doubt of any of the three elements of the charge contained in the bill of indictment, and he says and contends that, even if the evidence might be sufficient to establish one of the elements, that it is not sufficient to establish all three, and that therefore you should not be satisfied beyond a reasonable doubt that he is guilty as charged in the bill of indictment.

"So, members of the jury, the Court instructs you that if you are satisfied beyond a reasonable doubt that on the occasion on December 3, 1961, that the defendant did, forcibly and against her will, and they have been defined to you, carnally know the prosecuting witness, as that has been defined to you, then it would be your duty to return a verdict of guilty as charged in the bill of indictment. If the State has not satisfied you of each of those elements beyond a reasonable doubt, then, gentlemen, it would be your duty to return a verdict of a lesser degree of the crime, as I will define that to you, or a verdict of not guilty." * * * *

"Gentlemen of the jury, it has been called to my attention that somewhere in my instructions to you I used the phrase 'by the greater weight of the evidence.' That is incorrect, it is improper in a criminal action. It was a slip of the tongue on the part of the Court, which is a hangover from the trial of civil actions. It has no application in this case, and what the Court intended to say in the place of that phrase, if he did use it, is 'beyond a reasonable doubt,' because that is the application that has to be used in criminal actions. So, in your consideration of whether or not you find the defendant guilty of anything, you will use the greater weight of the evidence, and let the State have the burden of satisfying you by the greater weight of the evidence upon all these facts."

Finally, just before the jury retired, the court concluded:

> "Gentlemen, please, if I have slipped up again and say 'by the greater weight of the evidence,' I will say to you it is a hangover from many weeks of civil court, and I do intend for you to understand that I meant beyond a reasonable doubt, and that is the theory you will apply in your consideration of all the evidence."

It is fundamental that evidence must satisfy a jury of guilt beyond a reasonable doubt before conviction of crime is authorized. A finding of guilt by the greater weight of the evidence cannot be sustained in a criminal prosecution. A charge that a jury may convict on the greater weight of the evidence is error. Since a correct charge is a fundamental right of every accused, it must appear with reasonable certainty in any case — especially in one involving a capital offense — that the court's error in giving the greater weight of the evidence rule was corrected, its harmful effect entirely removed, and the correct rule clearly fixed in the minds of the jury in order for the conviction to stand.

In this case the court first correctly charged that evidence must show guilt beyond reasonable doubt, correctly defined that term, but then, in stating the defendant's contentions applied the greater weight of the evidence rule. In the first attempt at correction the court again made the same mistake. However, just before the jury retired the court again admitted its inadvertent reference to the greater weight of the evidence, cautioned the jury that the court intended to say and that the jury could convict only if satisfied of guilt beyond a reasonable doubt. We must assume members of the jury were men of sufficient intelligence to serve as jurors. The fullness with which the court charged on reasonable doubt, then explained to the jury its inadvertence in stating the rule in civil cases, and its unequivocal correction removed any danger that the jury could have been misled and failed to apply the reasonable doubt rule.

Many times this Court has passed on the trial court's power and duty to correct inadvertent errors of the type here involved. "The error (in the court's charge) was sufficiently retracted, and the correct rule given as to the *prima facie* case, presumption of innocence, reasonable doubt, and burden of proof." *State v. Baldwin* 178 N.C. 693, 100 S.E. 345. "It is plain that this prompt and explicit withdrawal and correction of the erroneous instruction rendered its original giving harmless error." *Wyatt v. Coach Co.*, 229 N.C. 340, 49 S.E. 2d 650. "In the beginning of the charge the court used an inadvertent

expression in connection with the *quantum* of proof required of a defendant, who admits an intentional killing with a deadly weapon, to rebut the presumption of murder in the second degree. *S. v. Gregory,* 203 N.C. 528, 166 S.E. 387. However, this was later corrected, and we perceive no harm as having come to the defendant in this respect." *State v. Rogers,* 216 N.C. 731, 6 S.E. 2d 499; *State v. Brooks,* 225 N.C. 662, 36 S.E. 2d 238. "The error which the court inadvertently made in the charge upon the third issue was subsequently corrected. The assignment of error based on the exception . . . cannot be sustained." *Jones v. R.R.,* 194 N.C. 227, 139 S.E. 242.

The legal principles discussed in the briefs for the State and for the defendant, and the cases cited as authority are based on the assumption the court left with the jury conflicting instructions as to the quantum of proof required to support a guilty verdict. Notwithstanding the court's slip of the tongue statement on two occasions that conviction may be had on the greater weight of the evidence, the court cautioned the jury that it had inadvertently said "greater weight of the evidence," having meant to say, "beyond a reasonable doubt," and that the jury must apply the reasonable doubt rule. The court had the authority and we think properly exercised it in this instance to correct its inadvertence. We must assume the jury understood and heeded the instruction that a guilty verdict required proof beyond a reasonable doubt. The correction removed from the jury any idea that a verdict of guilty could be returned on the greater weight of the evidence. This correction removed the conflict from the court's charge. Surely the trial court has power to correct an inadvertence, especially if the discovery is immediate and the correction prompt and complete.

No error.

ROBERT ELLIS FORGA v. RICHARD WILSON WEST.

(Filed 18 September 1963.)

1. **Automobiles §§ 14, 15, 42e—Evidence held to show contributory negligence as matter of law in following more closely that was reasonable and prudent under the circumstances.**

Testimony of the driver of an empty dump truck, traveling slightly down grade on a wet and slick highway, that under the circumstances it would have taken 150 feet to stop the truck at the speed it was traveling, and that he was following a preceding car at a distance of 100 feet, *is*

held to show contributory negligence as a matter of law on the part of the driver of the truck, constituting a proximate cause of an accident occurring when the preceding car suddenly stopped and the truck driver, to avoid colliding with its rear, turned the truck to the right into the enbankment, which threw it across the road into collision with another truck traveling in the opposite direction. Consequences of a generally injurious nature were reasonably foreseeable, and if the stopping of the car constituted an emergency, the truck driver was a party to the creation of the emergency.

2. Automobiles § 19—

A party may not invoke the doctrine of sudden emergency when such party's negligence contributes to the creation of the emergency.

3. Automobiles § 55½—

The owner of a truck is precluded from recovery of damages to the truck resulting from a collision when the negligent operation of the truck by the owner's employee in the course of his employment constitutes a proximate cause of the collision, since the negligence of the driver will be imputed to the owner as contributory negligence.

APPEAL by Plaintiff from *Huskins, J.*, May 1963 Civil Session of HAYWOOD.

Civil action to recover $500 for damages to a dump truck and $250 for loss of profits while it was being repaired allegedly caused by the actionable negligence of defendant.

Defendant in his answer denies negligence, conditionally pleads contributory negligence of plaintiff's employee in the operation of the dump truck in furtherance of his employer's business as a bar to recovery by plaintiff, and alleges a counterclaim for $500 for damages to his dump truck and for $600 for loss of profits due to the damage to his dump truck.

Plaintiff filed a reply in which he admits that at the time of the collision of his dump truck and of defendant's dump truck Talmadge Golden was driving his dump truck as his employee in furtherance of his business, and further conditionally pleads contributory negligence of defendant as a bar to recovery on his counterclaim.

From a judgment of compulsory nonsuit entered at the close of plaintiff's evidence based on the ground that plaintiff's evidence shows legal contributory negligence on the part of the driver of his dump truck, which judgment also states defendant announced his election to submit to a voluntary nonsuit of his counterclaim, plaintiff appeals.

Uzzell & DuMont by William E. Greene for plaintiff appellant.

Williams, Williams & Morris by William C. Morris, Jr., for defendant appellee.

PARKER, J. On 12 July 1961 plaintiff's employee, Talmadge Golden, and defendant were both operating 1961 Model Ford dump trucks on U. S. Highway 19-A, a black-top road 21 feet wide, hauling gravel from a crusher to a point on the Blue Ridge Parkway at or near Balsam Gap. About 8:30 a.m. on this day Golden, having unloaded a load of gravel on the Blue Ridge Parkway, was driving plaintiff's dump truck in an easterly direction on this highway towards Waynesville on his way to the crusher for another load. He was traveling about 40 miles an hour, and following a passenger automobile driven by Arlie Hall, which was four or five car lengths ahead of him. His dump truck could haul eight or ten tons of gravel per load. It had been raining, and the black-top highway was wet and slippery. His brakes were good. He was paid on the basis of how much he hauled.

When Golden came around a curve on this road, which is slightly downgrade and about three and one-half miles from Waynesville, he saw the Hall automobile ahead slowing down and a dump truck driven by defendant and carrying a load of gravel meeting the Hall automobile on Hall's side of the highway. Defendant's dump truck was passing three or four trucks on a curve with double yellow lines on the highway. Defendant got his truck back on his side of the road before Hall passed him and stopped.

When Golden saw Hall's automobile slowing down, he applied his brakes, slid a little to the right, cut his dump truck into the bank on his right side, and then it jumped back out into the highway and hit defendant's dump truck in about the center of the highway. On the south side of the road the bank was 10 or 15 feet high and the shoulder about 24 inches wide. The collision occurred about 10 or 15 feet behind where Hall's automobile stopped.

Golden testified on direct examination: "I did not apply my brakes with too much force, I know, you can't hardly stop an empty truck on a slick highway." He testified in part on cross-examination in substance: The road was wet and slippery. The road was so slippery he just could not stop the big old dump truck. With the road wet it would have taken 150 feet at least to stop the empty dump truck at the speed he was traveling. At all times he was over 100 feet behind the Hall automobile. On this occasion 100 feet was not enough distance to stop the dump truck.

Defendant told a highway patrolman "he had been traveling on the wrong side of the road for several hundred feet." Defendant "was charged with improper passing; he pleaded guilty to improper passing." Golden told the same patrolman "that as he came around this curve he saw the tail lights on the car ahead of him go on and that

he was so close to it that he had to hit the bank to keep from hitting the rear of that Plymouth automobile; at that time he said he didn't see the defendant West's dump truck."

Plaintiff's evidence clearly shows negligence on the part of the defendant in the operation of his loaded dump truck, which proximately contributed to his damage.

Considering plaintiff's evidence in the light most favorable to him, the inferences and conclusions are inescapable that Golden was driving the dump truck on a wet, slippery, black-top road on a curve, slightly downgrade, behind a passenger automobile ahead of him more closely than was reasonable and prudent, when under the circumstances then existing it would have taken 150 feet at least to stop the dump truck at the speed he was driving, and that in the light of the attending circumstances an ordinarily prudent person ought reasonably to have foreseen that consequences of a generally injurious nature might probably occur as a result of such driving, and that Golden under the attending circumstances was not exercising that degree of care which a reasonably prudent man would exercise under similar conditions. If Golden was faced with a sudden emergency or imminent danger, as plaintiff contends, but which we do not concede, by Hall's slowing down his automobile and bringing it to a stop, it is manifest that Golden by his own want of ordinary care placed himself in a position of danger by following Hall too closely on a wet, slippery road with an empty dump truck at the speed he, Golden, was driving, and consequently Golden being a party to the creation of the emergency, if one existed, plaintiff cannot invoke the sudden emergency doctrine in exculpation of the negligent conduct of his driver. The negligence of his employee and driver acting within the scope of his employment is imputed to him. *Black v. Milling Co.*, 257 N.C. 730, 127 S.E. 2d 515; *Rodgers v. Thompson*, 256 N.C. 265, 123 S.E. 2d 785. There can be no reasonable doubt that plaintiff's evidence, considered in the light most favorable to him, clearly establishes that the negligent operation of his empty dump truck by Golden, his employee, was one of the proximate causes of the damage sustained by his dump truck in the collision. As a result, plaintiff is barred from recovery from defendant by reason of the contributory negligence of his driver an employee acting within the scope of his employment. *Rollison v. Hicks*, 233 N.C. 99, 63 S.E. 2d 190; *Hampton v. Hawkins*, 219 N.C. 205, 13 S.E. 2d 227; 38 Am. Jur., Negligence, sec. 236. This decision is in accord with our decisions in somewhat similar factual situations. *Black v. Milling Co., supra; Crotts v. Transportation Co.*, 246 N.C. 420, 98 S.E. 2d 502; *Sheldon v. Childers*, 240 N.C. 449, 82 S.E. 2d 396;

Moore v. Boone, 231 N.C. 494, 57 S.E. 2d 783; *Fawley v. Bobo,* 231 N. C. 203, 56 S.E. 2d 419; *Austin v. Overton,* 222 N.C. 89, 21 S.E. 2d 887.

The judgment of compulsory nonsuit below is
Affirmed.

STATE v. JAMES EDWARD BROOKS.

(Filed 18 September 1963.)

1. Homicide §§ 6, 20—

Evidence favorable to the State tending to show that defendant, as deceased advanced in his direction, picked up a gun and pushed deceased with the gun and with his other hand, and that the gun discharged, inflicting fatal injury, *is held* sufficient to support conviction of defendant of involuntary manslaughter, since any careless and reckless use of a loaded gun which jeopardizes the safety of another is unlawful, and if death results therefrom is an unlawful homicide.

2. Criminal Law §§ 84, 85—

A written statement of a witness which is generally consistent with the witness' testimony upon the trial is competent for the purpose of corroboration, and slight variation with the witness' testimony upon the trial merely affects the credibility of the evidence, but the State is not entitled to discredit its own witness by introducing prior contradictory statements under the guise of corroboration, nor entitled to introduce "new" evidence upon the guise of corroboration. In the instant case there was no substantial variance between the signed statement and testimony of the witness upon the trial, and the statement was competent.

3. Same; Criminal Law § 155—

If portions of a written statement of a witness are not identical with the testimony of the witness upon the trial and are not, therefore, competent for the purpose of corroboration, it is the duty of defendant to point out the objectionable portions, and objection to the statement *en masse* will not ordinarily be sustained if any part of the statement is competent.

4. Constitutional Law § 36—

Sentence within the discretionary limits provided by statute cannot be deemed cruel or unusual punishment in the constitutional sense. G.S. 14-18, Constitution of North Carolina, Art. I, § 14.

APPEAL by defendant from *Fountain, J.,* at the March 1963 Session of BUNCOMBE.

The defendant was tried upon a bill of indictment charging him with the murder of Robert Jones. The State did not seek a conviction of murder in the first degree; the verdict was involuntary manslaughter.

The testimony of Albert Uddyback summarized the evidence for the State:

Defendant and the deceased were friends. Defendant was the larger of the two. Early in the afternoon of January 17, 1963 the two were shooting dice at the home of the defendant in the presence of Albert Uddyback and James Clark. There had been no quarreling whatever. After the conclusion of the game, defendant said to Jones, "What about paying me my $2.00?" Jones replied that he did not have any money and was not going to pay any that day. Defendant was then sitting by the door. He reached over and got a shotgun which was leaning against the wall. No words were spoken by anyone after he picked up the gun. Jones took a couple of steps toward defendant. Defendant, with the gun in his hand, pushed Jones. The gun discharged simultaneously with the push, and Jones fell to the floor. Jones had no weapon. Only the defendant had hold of the gun at the time the shot was fired. Defendant told Clark to call an ambulance and went out the back door taking the gun with him.

The testimony of James Clark was substantially the same as that of Uddyback. Other evidence for the State tended to show that Jones was dead when he arrived at the hospital. The coroner testified to powder burns about two inches in diameter surrounding a one-inch wound in the deceased's abdomen. Sometime later defendant voluntarily reported to the police station upon the advice of his girl friend.

At the trial, defendant testified there was no argument between him and Jones; that Jones told him he did not have any money but neither was angry about the situation. Defendant maintained the shooting was accidental; that he "was showing the fellows this old gun" while explaining that a woman had given it to him for repairing her house. He said he pulled the gun up from behind the couch; that it was necessary to cock it, and it would not shoot unless the hammer was back; that it was hard to break down. Defendant insisted that Jones pushed him and the gun went off as he was trying to break it. He said he had loaded the gun on New Year's Eve.

On rebuttal, Uddyback testified that he recalled no conversation whatever about the gun. Upon defendant's conviction the court imposed a sentence of not less than ten nor more than fifteen years in the State Prison.

Attorney General Bruton, Assistant Attorney General Richard T. Sanders for the State.

George Pennell and Dailey & Harrell for defendant appellant.

SHARP J. The evidence, taken in the light most favorable to the State, was sufficient to support a finding that the defendant was handing the gun in a culpably negligent manner at the time it fired and killed Jones. *State v. Trollinger,* 162 N.C. 618, 77 S.E. 957; *State v. Kluckhohn,* 243 N.C. 306, 90 S.E. 2d 768. Any careless and reckless use of a loaded gun which jeopardizes the safety of another is unlawful, and if death results therefrom it is an unlawful homicide. *State v. Turnage,* 138 N.C. 566, 49 S.E. 913; *State v. Hovis,* 233 N.C. 359, 64 S.E. 2d 564. For the most recent discussion of this rule of law see the opinion of Parker, J. in *State v. Foust,* 258 N.C. 453, 128 S.E. 2d 889. Defendant's motion for nonsuit was properly overruled.

Defendant contends that he is entitled to a new trial because the court permitted the State to introduce in evidence, over his objection, the signed statement made by Uddyback to the police on January 17, 1963 for the purpose of corroborating his testimony. He argues that this written statement was not, in fact, corroborative. Pertinent portions of the statement follow:

> "On the afternoon of 17th of January I arrived at 23 Clingman Avenue where Robert Jones, the deceased, and James Brooks were shooting crap. Brooks and Jones got into an argument over $2.00 that Jones was supposed to owe Brooks. Brooks asked for the $2.00 and Jones got up and got his hat and coat off the chair and said that he was not going to pay anyone a damn thing today. At this point Brooks reached behind the couch and came up with a shotgun in one hand. He shoved Jones with both the gun and his other hand, and I jumped up off the couch across the room from Brooks and ran over to Brooks' left near the door when the gun went off. Jones fell on his left side and rolled over.
>
> "I asked Brooks, 'You didn't shoot him, did you?' and he said, 'I don't know.' That is when I saw the blood on Jones' coat. Brooks told Sonny James Clark to go and call an ambulance, which Clark did.
>
> "That is when Brooks took the shotgun and left by the back door. I don't know which way he went. Jones was still breathing at this time. I stayed until the ambulance came and took Jones to the hospital."

Defendant's objection and motion to strike were directed to the entire statement.

Although not requested to do so, at the time this statement was admitted, the court instructed the jury that it was offered only for the purpose of corroborating Uddyback if the jury should find that it did corroborate him.

If a prior statement of a witness, offered in corroboration of his testimony at the trial, contains additional evidence going beyond his testimony, the State is not entitled to introduce this "new" evidence under a claim of corroboration. Neither may the State impeach or discredit its own witness by introducing his prior contradictory statements under the guise of corroboration. *State v. Bagley,* 229 N.C. 723, 51 S.E. 2d 298; *State v. Melvin,* 194 N.C. 394, 139 S.E. 762; *State v. Scoggins,* 225 N.C. 71, 33 S.E. 2d 473. However, if the previous statements offered in corroboration are generally consistent with the witness' testimony, slight variations between them will not render the statements inadmissible. Such variations affect only the credibility of the evidence which is always for the jury. *State v. Case,* 253 N.C. 130, 116 S.E. 2d 429; *State v. Walker,* 226 N.C. 458, 38 S.E. 2d 531; *State v. Scoggins, supra.*

We perceive no substantial variance between the signed statement Uddyback gave the police in January and his testimony at the trial in March. No part of the written statement contradicted his testimony at the trial. Portions of it are not identical but, be that as it may, defendant made no motion to strike or exclude any specific part of the statement.

Where portions of a document are competent as corroborating evidence and other parts incompetent, it is the duty of the party objecting to the evidence to point out the objectionable portions. Objections to evidence *en masse* will not ordinarily be sustained if any part is competent. *State v. Litteral,* 227 N.C. 527, 43 S.E. 2d 84; *State v. Wilson,* 176 N.C. 751, 97 S.E. 496; *State v. English,* 164 N.C. 497, 80 S.E. 72; *Gibson v. Whitton,* 239 N.C. 11, 79 S.E. 2d 196; *Grandy v. Walker,* 234 N.C. 734, 68 S.E. 2d 807; *Wilson v. Williams,* 215 N.C. 407, 2 S.E. 2d 19. N. C. Index, Trial, § 15.

We have considered all of defendant's exceptions which have been properly set out in his assignments of error. The judge fairly and clearly submitted the defendant's contention that the shooting was accidental. He charged the jury in accordance with the decisions of this court. *State v. Faust,* 254 N.C. 101, 112, 118 S.E. 2d 769; *State v. Dewitt,* 252 N.C. 457, 114 S.E. 2d 100; *State v. Crisp,* 244 N.C. 407, 414, 94 S.E. 2d 402.

The sentence imposed was within the discretionary limits of G.S. 14-18. *State v. Richardson,* 221 N.C. 209, 19 S.E. 2d 863. As this Court said in *State v. Smith,* 238 N.C. 82, 76 S.E. 2d 363:

"While the punishment inflicted is substantial, abuse of discretion has not been shown nor has it been made to appear that the judgment pronounced comes within the constitutional inhibition against 'cruel or unusual punishments.' Constitution of N. C., Art. I, Sec. 14; *S. v. Swindell,* 189 N.C. 151, 126 S.E. 417; *S. v. Brackett,* 218 N.C. 369, 11 S.E. 2d 146; *S. v. Daniels,* 197 N.C. 285, 148 S.E. 244, and cases cited."

In the trial below, we find
No error.

HANNAH VESTER STRICKLAND AND HUSBAND, BOBBY STRICKLAND; JOHN MILTON VESTER AND WIFE, MADELINE VESTER; AND FRANK LANE VESTER v. H. P. JACKSON AND WIFE, ANNIE S. JACKSON.

(Filed 18 September 1963.)

Appeal and Error § 59; Pleadings § 24—

Where the Superior Court sustains demurrer and grants leave to amend, and plaintiff appeals therefrom, the appeal stays further proceedings, but upon certification of decision affirming the judgment the thirty-day period begins to run, and an amendment filed after the thirty-day period may be stricken. An order of the Superior Court "ratifying and affirming" a decision of the Supreme Court does not affect the rights of either party.

APPEAL from *Latham, S.J.,* May, 1963 Term. PITT Superior Court.

The first chapter in this civil action is recorded in this Court's opinion reported in 259 N.C. 81. The pleadings are there analyzed.

At the September Term, 1962, Judge Mintz entered an order sustaining the demurrer and allowing the plaintiffs 30 days in which to amend. The plaintiffs, refusing to amend, appealed. On March 20, 1963, this Court filed its opinion affirming the order. This Court's Certificate was received by, and recorded in, the Superior Court of Pitt County on April 3, 1963.

On April 19, 1963, Judge Hubbard, upon motion of the defendants' counsel, entered an order in the Superior Court of Pitt County "that the opinion of the Supreme Court in said action be, and the same is hereby in all respects ratified and affirmed." On May 13, 1963, the

plaintiffs attempted to file in the Superior Court of Pitt County an amendment to the complaint. At the May 27, 1963 Term, the defendants moved to strike the proposed amended complaint upon the ground it was not filed within the 30 days allowed by Judge Mintz. After hearing, Judge Latham entered an order striking the amendment upon the ground it was not timely filed. The plaintiffs again excepted and appealed.

Sam B. Underwood, Jr., for plaintiffs, appellants.
James & Hite, by Kenneth G. Hite, for defendants, appellees.

HIGGINS, J. The parties to the present controversy have shown a disposition to stand strictly upon their legal rights. Discretionary power vested in the judges of superior court to permit amendments to pleadings (G.S. 1-161; *Electric Co. v. Dennis,* 255 N.C. 64, 120 S.E. 2d 533; *Dobias v. White,* 240 N.C. 680, 83 S.E. 2d 785;) has not been invoked.

The appeal from the Mintz judgment had the effect of suspending further proceedings pending the appeal. The suspension, however, was lifted when this Court's affirming Certificate was received in the Superior Court of Pitt County on April 3, 1963. As of that date the rights of the parties were fixed by G.S. 1-131, with which the challenged order conformed. The plaintiffs had authority to amend within 30 days. *Dudley v. Dudley,* 250 N.C. 95, 107 S.E. 2d 918; *Teague v. Oil Co.,* 232 N.C. 469, 61 S.E. 2d 345. Judge Hubbard's order of April 19, 1963, neither added to nor took from the rights of either party.

The plaintiffs' amendment of May 13, 1963, was not filed within 30 days. Consequently, the order of Judge Latham striking the amendment is

Affirmed.

J. CLAUDE GASKINS v. BLOUNT FERTILIZER COMPANY AND FRED T. MATTOX, SUBSTITUTED TRUSTEE, AND D. T. HOUSE, JR., CLERK OF THE SUPERIOR COURT OF PITT COUNTY.

(Filed 18 September 1963.)

1. Mortgages and Deeds of Trust § 41—

The purchaser at the foreclosure of a junior deed of trust acquires title subject to the lien of the senior deed of trust and acquires the equity

of redemption thereunder, and the trustor is divested of all interest in the land.

2. Appeal and Error § 4—

Where a trustor's equity has been divested by foreclosure of the junior deed of trust on the property, he has no rights in the property and is not a party aggrieved by an order dissolving an injunction against foreclosure of the senior deed of trust. G.S. 1-271.

3. Appeal and Error § 6—

Where the act sought to be enjoined has been done pending the appeal, the appeal becomes moot and will be dismissed.

APPEAL by plaintiff from *Hubbard, J.*, 18 March 1963 Session of PITT.

Civil action instituted 14 January 1963 to restrain permanently the foreclosure of a deed of trust executed by plaintiff and his wife on 2 January 1961 to Kenneth Hite, trustee, to secure a note of the same date (the record does not show whether it is a note of plaintiff or of plaintiff and his wife) in the sum of $15,000, payable to Max Minges, on the ground that Fred T. Mattox, who purported to act as substituted trustee and offered the real estate described in the deed of trust for sale on 10 January 1963, at which sale the last and highest bid was $17,700, was not appointed substituted trustee in accordance with the provisions of G.S. 45-10(1), and further to restrain the clerk of the superior court from confirming the sale purported to be made by Mattox as substituted trustee. David E. Reid, Jr., was plaintiff's attorney.

Judge Bundy issued a temporary restraining order on 14 January 1963 and made it returnable before Hubbard, J., at 21 January 1963 Session of the superior court of Pitt County.

No answer was filed to the complaint. When the temporary restraining order came on to be heard by Hubbard, J., on its return date, defendants admitted that Mattox had not been appointed as substituted trustee in accordance with the provisions of G.S. 45-10(1), that plaintiff was entitled to have restrained the purported sale made by Mattox, trustee, on 10 January 1963, and defendants said to the court that Mattox would be appointed substituted trustee in accordance with the requirements of G.S. 45-10(1). Whereupon, David E. Reid, Jr., attorney for plaintiff, stated that when Mattox was appointed substituted trustee in compliance with the provisions of G.S. 45-10(1), he would on behalf of plaintiff take a voluntary nonsuit in the action. At that time Hubbard, J. entered no order.

Thereafter, Mattox was appointed substituted trustee in accordance with the provisions of G.S. 45-10(1) and as substituted trustee offered the real estate described in the deed of trust for sale on 28 February 1963, when there was a last and highest bidder for the property. The record does not disclose the amount of the last bid or the name of the bidder.

On 7 March 1963 plaintiff by his new attorney, Charles L. Abernethy, Jr., filed a petition and motion in the action to restrain the foreclosure sale had by Mattox, substituted trustee, on 28 February 1963 on the ground that Mattox is disqualified to act as trustee for the reason that he is a member of the law firm of Blount and Taft, and that the senior member of this law firm, Blount, is one of the main stockholders of Blount Fertilizer Company, and on the further ground that Mattox formerly was attorney for plaintiff in an action brought by him against House and others seeking a partition of the land described in the deed of trust and had withdrawn as counsel in this proceeding. The petition and motion in the action does not disclose what interest Blount Fertilizer Company has in the deed of trust or the indebtedness therein secured. In the answer to this pleading it is alleged that plaintiff did not pay the note for $15,000 owned by Minges and secured by the deed of trust at its maturity, that Minges notified plaintiff he would foreclose the deed of trust unless it was paid, and thereupon plaintiff persuaded Blount Fertilizer Company to take up the note from Minges and carry it for him until 1 October 1962.

On 7 March 1963 Bundy, J., issued an order temporarily restraining the foreclosure sale had by Mattox, substituted trustee, on 28 February 1963, and made it returnable before Hubbard, J., at 18 March 1963 Session of the superior court of Pitt County. On its return date Hubbard, J., dissolved the temporary restraining order issued by Judge Bundy on 7 March 1963. Plaintiff excepted to the dissolution of the temporary restraining order and appeals.

On the same date Judge Hubbard entered a judgment stating that it appeared to the court from statements by David E. Reid, Jr., that since the January 1963 Session Mattox had been appointed substituted trustee in the deed of trust in compliance with the provisions of G.S. 45-10(1), and that plaintiff, in accord with the agreement he made at the January 1963 Session, now elects to take a nonsuit, and decreeing that plaintiff be nonsuited. Plaintiff excepted to the signing of this judgment, contending he did not authorize Reid to take a nonsuit.

Charles L. Abernethy, Jr., for plaintiff appellant.
Albion Dunn for defendant appellees.

PER CURIAM. In defendants' answer to the petition and motion in the action for a temporary restraining order, it is alleged in their second further answer and affirmative defense in substance: On 23 March 1962 plaintiff executed a deed of trust to E. H. Taft, Jr., trustee, securing an indebtedness of $1,301.20 due and owing Blount Fertilizer Company, and payable on 1 October 1962, on the same property described in the deed of trust from plaintiff and wife to Hite, which property is the subject matter of the present action. That plaintiff defaulted in the payment of this indebtedness of $1,301.20 when due, that the deed of trust securing this indebtedness was properly foreclosed on 26 November 1962, and at the sale M. B. Massey, Jr., became the last and highest bidder. That his bid was not raised. Whereupon, the trustee executed and delivered a deed for property to Massey. That Massey is now the owner of the property described in the deed of trust, which is the subject of the present action, subject to the deed of trust executed to Hite, trustee, and that plaintiff and his wife have no interest in the property described in the deed of trust in the instant action. Plaintiff, replying to the above allegations of the answer, avers in substance: That the deed of trust to Taft was not properly foreclosed, that Taft was a member of the law firm of Blount and Taft, that the senior member, Blount, was a stockholder in Blount Fertilizer Company, that it was generally agreed that no deed would be delivered to Massey, and that a deed was executed and delivered by Taft, trustee, to Massey on 22 January 1963.

It affirmatively appears from plaintiff's reply that when Judge Hubbard entered the two judicial orders at the March 1963 Session, plaintiff had no interest in the property described in the deed of trust set forth in the complaint in the present action, for the reason that the deed executed and delivered to Massey, pursuant to the foreclosure of the junior deed of trust by Taft, trustee, is for the same property described in the deed of trust to Hite, and vested in Massey, the purchaser, plaintiff's equity of redemption and rights in the property described in the junior deed of trust and also in the same property described in the deed of trust to Hite. *Military Academy v. Dockery,* 244 N.C. 427, 94 S.E. 2d 354; *Bank v. Watson,* 187 N.C. 107, 121 S.E. 181; *Brett v. Davenport,* 151 N.C. 56, 65 S.E. 611; *Bobbitt v. Stanton,* 120 N.C. 253, 26 S.E. 817; 59 C. J. S., Mortgages, secs. 514, 556; 37 Am. Jur., Mortgages, sec. 760.

Plaintiff was not aggrieved by the two judicial orders entered by Judge Hubbard at the March 1963 Session, because he had no rights at that time in the property described in the deed of trust set forth in the complaint, a foreclosure of which he seeks to enjoin. For a party to be aggrieved he must have rights which were substantially affected by a judicial order. Where a party is not aggrieved by the judicial order entered, as in the present case, his appeal will be dismissed. G.S. 1-271; G.S. 1-277; *Coburn v. Timber Corp.* 260 N.C. 173, 132 S.E. 2d 340.

Further, it appears from a motion to dismiss plaintiff's appeal filed in this Court that immediately following the dissolution of the restraining order by Judge Hubbard at the March Session 1963, the substituted trustee, Mattox, executed a deed to the purchaser upon receipt of the purchase price for the property described in the deed of trust set forth in the complaint, which deed has been properly recorded. Plaintiff in his answer to the motion does not controvert this allegation in the motion to dismiss. It seems that the foreclosure sale which plaintiff sought to restrain has become a *fait accompli.*

Appeal dismissed.

STATE v. CECIL HOLLARS.

(Filed 18 September 1963.)

Criminal Law § 133—

Where sentence is imposed to begin at the expiration of another sentence theretofore imposed upon the same defendant in another prosecution, and thereafter the judgment in the prior prosecution is set aside and a new trial ordered, defendant is not entitled to his release from the subsequent sentence, but the cause should be remanded to the court entering that sentence for a proper judgment.

This was a petition for a writ of *habeas corpus* but treated by the Court as a petition for a writ of *certiorari* to review the status of the sentence the petitioner is now serving.

At the September Term 1957 the petitioner was tried in Watauga County in Case No. 173, upon a charge of breaking and entering and larceny. He entered a plea of *nolo contendere* and was sentenced to not less than two nor more than four years in the State's Prison.

At the same term of court the petitioner entered a plea of guilty to the charge of issuing a worthless check. He was given thirty days, this sentence to run concurrently with the sentence in Case No. 173.

At the same term of court he pleaded guilty to driving while drunk. He was given a sentence of four months to run concurrently with the sentence in Case No. 173.

At the September Term 1958 of the Recorder's Court of Alexander County, in Case No. 3788, the petitioner was convicted on the charge of destroying State property. He was given a sentence of six months, to begin at the expiration of the sentence in Case No. 173 in Watauga County.

The petitioner escaped from the Prison Department on 21 December 1959 and was recaptured the same day. He again escaped on 8 March 1960 and was recaptured 1 August 1960 in the State of Florida.

After the petitioner escaped from the custody of the Prison Department the second time, he committed various crimes and was brought to trial for those crimes in two different counties, Nash and Johnston, after being extradited from the State of Florida. Before being put on trial in Nash and Johnston Counties he had some remaining time to serve on the above unexpired sentences in Watauga County.

The North Carolina Prison Department's records show that the petitioner has served all of his Watauga County sentences and the Alexander County sentence; that these sentences were completed 14 December 1960.

At the October Term 1960 of the Superior Court of Nash County the petitioner was charged in Case No. 8902 with escaping prison. He was found guilty and sentenced to two years, to begin at the expiration of the sentence imposed in Alexander County Recorder's Court. The validity of this sentence is not challenged.

At the November Term 1960 of the Nash Superior Court, in Case No. 8976, the petitioner was tried and convicted on the charge of escape, a second offense. He was given two years in the State's Prison, sentence to begin at the expiration of the sentence imposed at the October Term 1960 in Case No. 8902.

At the same term, November 1960, in Nash County, the petitioner was tried and convicted in Case No. 8977 of armed robbery. He was sentenced to not less than five nor more than ten years in the State's Prison, this sentence to begin at the expiration of the two-year term imposed the same day in Case No. 8976 on the escape charge.

At the December Term 1960 of the Superior Court of Johnston County the petitioner was tried and convicted of armed robbery in Case No. 9795, and sentenced to not less than twenty nor more than

thirty years in the State's Prison, this sentence to begin at the expiration of the sentences imposed at the November Term 1960 of the Superior Court of Nash County in Cases Nos. 8976 and 8977. In this trial he was represented by counsel appointed by the court.

At the April Criminal Term 1963 of the Superior Court of Nash County, upon motion of the petitioner through court appointed counsel, the court set aside the judgments entered in the Superior Court of Nash County at the November Term 1960 in Cases Nos. 8976 and 8977, and ordered a new trial in each case. The order was based upon a finding that the petitioner was without financial resources; that he requested counsel at the November Term 1960, which request was denied.

According to the answer of the Attorney General, the petitioner completed the escape sentence entered at the October Term 1960 of the Superior Court of Nash County, in Case No. 8902, on 14 December 1962.

Attorney General Bruton, Theodore C. Brown, Staff Attorney, for the State

Petitioner in propria persona.

PER CURIAM. There is no contention on the part of the petitioner that his conviction in Johnston County is not valid. He contends, however, that he is entitled to his release because the Johnston County sentence was not to begin until after the expiration of the sentences imposed at the November Term 1960 of the Nash Superior Court, in Cases Nos. 8976 and 8977, which judgments have been set aside.

This contention is without merit. Petitioner is neither entitled to a discharge nor a new trial in the Johnston County case. We think, however, he is entitled to have the cause remanded to Johnston County for a proper judgment. *In re Sellers,* 234 N.C. 648, 68 S.E. 2d 308; *In re Ferguson,* 235 N.C. 121, 68 S.E. 2d 792; *S. v. Templeton,* 237 N.C. 440, 75 S.E. 2d 243.

To the end that the decision here reached may be complied with, the Director of the State's Prison will deliver the petitioner into the custody of the Sheriff of Johnston County prior to the convening in that county of the next term of Superior Court for the trial of criminal cases after the certification of this opinion. The court below will vacate the present sentence and enter a proper sentence in lieu thereof. In pronouncing sentence, the court will give the petitioner

credit for the time served since the expiration of the sentence in Case No. 8902, entered at the October Term 1960 of the Superior Court of Nash County.

Remanded.

ANNA BERGER, PLAINTIFF v. JAMES I. CORNWELL AND ELIZABETH A. CORNWELL, TRADING AND DOING BUSINESS AS CORNWELL ANIMAL HOSPITAL, ORIGINAL DEFENDANTS, AND J. C. SOESBEE AND BLUE BIRD TAXI COMPANY, INC., ADDITIONAL DEFENDANTS.

(Filed 18 September 1963.)

1. Negligence § 37b—

The owners of premises are under duty to maintain their parking area in such condition as a reasonably prudent proprietor would deem sufficient to protect patrons from danger while exercising ordinary care for their own safety.

2. Negligence § 37c—

Evidence tending to show that small patches of snow and ice remained in shady places in defendant's parking lot, and that plaintiff walked to the building and returned to her parked taxi without looking down or observing the ice and snow, and then fell while attempting to re-enter the taxi when she stepped on a patch of ice, *is held* to show contributory negligence on her part as a matter of law in failing to exercise due care for her own safety.

3. Appeal and Error § 41—

Where nonsuit would have to be sustained even if the evidence excluded were admitted, the exclusion of the evidence cannot be prejudicial.

APPEAL by plaintiff from *Martin, Special Judge,* April 22, 1963, Session of BUNCOMBE.

On January 31, 1961, between 4:00 and 5:00 p.m., plaintiff was injured on premises of Cornwell Animal Hospital. Her trip to said hospital was made in a Blue Bird Taxi operated by J. C. Soesbee. Soesbee drove the taxi into a parking area provided for use by patrons of said hospital. Assisted by Soesbee, plaintiff got out of the taxi, walked (carrying her "very big and very unruly" cat) some fifteen feet to the hospital entrance and left her cat in the hospital for treatment. Plaintiff returned to the front of the parked taxi without mishap and there paid Soesbee for the trip to the hospital and the return trip to her home. Upon completion of this transaction, plaintiff,

when taking the second step on her way to get in the taxi for the trip home, slipped and fell.

Plaintiff alleged "she slipped on a patch of slick, clear ice and fell . . ." She alleged her fall and injuries were proximately caused by the negligence of defendants Cornwell in these respects: When plaintiff fell and for several days prior thereto, "there were patches of ice extending intermittently at several points along the parking lot in the shaded areas, some patches as much as three feet in diameter . . ." Defendants Cornwell, notwithstanding they knew or should have known of this condition on their premises, failed to warn patrons of the danger and failed to safeguard patrons by spreading ashes, salt or other materials or by otherwise eliminating the danger.

Answering, defendants Cornwell denied negligence, and conditionally pleaded (1) the contributory negligence of plaintiff, (2) the negligence of Soesbee as the sole proximate cause of plaintiff's fall and injuries, and (3) a cross action for contribution against Soesbee and Blue Bird Taxi Company, Inc., who were made defendants in respect of said cross action.

At the conclusion of plaintiff's evidence, the court, allowing the motion of defendants Cornwell therefor, entered judgment of involuntary nonsuit. Plaintiff excepted and appealed, assigning as error (1) the said judgment of nonsuit and (2) the court's exclusion of certain evidence offered by plaintiff, to wit, all of paragraph 6 and subsections (A) and (B) of paragraph 7 of said cross action of defendants Cornwell.

Parker, McGuire & Baley for plaintiff appellant.
Uzzel & DuMont for defendant appellees.

PER CURIAM. Defendants Cornwell owed plaintiff, an invitee, the legal duty to maintain their parking area in such condition as a reasonably careful and prudent proprietor would deem sufficient to protect patrons from danger while exercising ordinary care for their own safety. *Sledge v. Wagoner*, 250 N.C. 559, 109 S.E. 2d 180.

All the evidence tends to show that the place where Soesbee parked the taxi was shaded by a pine tree hedge and was lower than other portions of the parking area. There was evidence tending to show that, in the shaded area where Soesbee parked, there were icy spots difficult to see against the background of stone and gravel; that defendants Cornwell gave no warning of any dangerous condition on account of ice; that defendants Cornwell did not spread ashes, salt or

other materials on any part of said parking area; and that plaintiff slipped on ice and fell. Plaintiff testified she did not observe or otherwise detect any spots or patches of ice on the parking area before she fell. Indeed, her testimony was to the effect that, in walking from the taxi to the hospital entrance and in returning from the hospital entrance to the taxi, she did not look down on the ground.

On January 31, 1961, in the Asheville area, while the streets and highways were clear or "comparatively clear," there was ice on walkways, sidewalks and shoulders of the highways.

The evidence tends to show there were patches of ice here and there in the large parking area, principally in the shaded portion thereof. However, the only reasonable inference to be drawn from the evidence is that portions of the parking area were free from ice and that persons exercising due care for their own safety could and should have observed and used such portions of the parking area. Hence, if the evidence were considered sufficient to establish defendants Cornwell were negligent as alleged, plaintiff's testimony, in our view, suffices to establish her contributory negligence as a proximate cause of her fall and injuries and to bar a recovery.

We do not perceive that the admission of the portions of said cross action offered by plaintiff would have been of benefit to plaintiff in respect of the question of nonsuit. Indeed, the facts alleged therein tend to show that whatever dangerous conditions in respect of icy spots or patches may have existed in the area where the taxi parked could be readily observed and avoided by persons exercising due care for their own safety.

Having reached the conclusion that the judgment of involuntary nonsuit should be affirmed, and since no new questions of law are presented, we deem it unnecessary to set forth with particularity the testimony of each of the witnesses offered by plaintiff.

Affirmed.

WILLIAM E. TRIPP v. CLINTON A. HARRIS.

(Filed 18 September 1963.)

1. Automobiles § 42g—

Plaintiff, traveling east, entered the intersection after stopping and seeing defendant's truck, still some distance away, approaching from the south. The evidence supported conflicting inferences as to whether a

driver of reasonable care and prudence at the time of seeing the approaching truck, would have been justified in believing that he could pass safely through the intersection ahead of the approaching truck. *Held:* The evidence does not show contributory negligence as a matter of law, since nonsuit for contributory negligence is proper only when no other reasonable inference or conclusion can be drawn from the evidence.

2. **Automobiles § 41g—**

Plaintiff's evidence *held* sufficient to be submitted to the jury on the issue of defendant's negligence in entering the intersection at excessive speed and colliding with plaintiff's car which had first entered the intersection.

APPEAL by defendant from *Hubbard, J.,* January 1963 Session of PITT.

Civil action to recover $617.93 for damage to an automobile allegedly caused by defendant's actionable negligence.

Defendant in his answer denies that he was negligent, conditionally pleads contributory negligence of plaintiff as a bar to recovery, and alleges a counterclaim for $340.55 for damages to his truck.

No jury trial having been demanded by either of the parties in the pleadings, the judge, pursuant to the provisions of G.S. 1-539.5, which is a part of our Act for the adjudication of small claims in the superior courts of the State, answered issues to the effect that plaintiff's automobile was damaged by defendant's negligence as alleged in the complaint, that plaintiff did not by his own negligence contribute to the damage to his automobile, awarded him damages to his automobile in the amount of $600, that defendant's truck was not damaged by plaintiff's negligence as alleged in defendant's counterclaim, and that defendant was entitled to recover no damages from plaintiff.

From a judgment entered in accord with the answers to the issues, defendant appeals.

J. W. H. Roberts and Eugene A. Smith for defendant appellant.
M. E. Cavendish for plaintiff appellee.

PER CURIAM. Defendant assigns as error the denial of his motion for judgment of compulsory nonsuit, made at the close of all the evidence. Defendant's contention is plaintiff's evidence shows he was guilty of contributory negligence as a matter of law.

The collision which gave rise to the action occurred at the intersection of East Gum Street and North Pitt Street, two dirt streets in the city of Greenville, about 10:50 a.m. on 18 September 1961. There

was no traffic control device or signal, no stop sign, and no yield the right of way sign at this intersection. Plaintiff was approaching this intersection driving his automobile in an easterly direction on East Gum Street, and defendant was approaching this intersection driving his truck in a northerly direction on North Pitt Street.

Plaintiff's evidence, considered in the light most favorable to him, tends to show: When he approached the intersection, his view to his right along Pitt Street was obstructed by a high fence and weeds. He stopped his automobile on East Gum Street beyond the fence where he could see to his left and right, and to his right along Pitt Street for 125 or 150 feet. He saw a truck about 125 feet away from the intersection on Pitt Street and approaching it traveling north. He did not judge the truck was running at a high rate of speed, and it looked like he had plenty of time to cross the intersection after he saw the truck. He started his automobile and entered the intersection. When he had passed two-thirds of the way through the intersection, he looked and saw defendant's truck driven by him skidding at a high rate of speed toward the intersection and toward him. The two motor vehicles collided in the intersection. The entire front part of plaintiff's automobile was damaged, and the left front part of the truck was damaged. Plaintiff also testified to the effect that he paid no attention to the speed of the approaching truck until he got out into the intersection, and that he got halfway into the intersection before he noticed its speed.

Plaintiff's evidence, taken in the light most favorable to him, tends to show that he entered the intersection first, at a time when defendant's approaching truck at the speed it was traveling was far enough away so that a person in the exercise of reasonable care and prudence would have been justified in believing that he could safely pass over the intersection ahead of the approaching truck. It is true that other parts of his testimony tend to show that he entered the intersection first, at a time when defendant's approaching truck at the speed it was traveling was not far enough away so that a person in the exercise of reasonable care and prudence would have been justified in believing that he could pass through the intersection in safety ahead of the approaching truck. More than one inference may reasonably be drawn from plaintiff's evidence; consequently, the question of contributory negligence was for the judge sitting without a jury. Plaintiff's evidence, taken in the light most favorable to him, does not establish contributory negligence so clearly that no other reasonable inference or conclusion can be drawn therefrom, and consequently defendant is not entitled to a nonsuit on the ground of plaintiff's contributory

negligence as a matter of law. *Chandler v. Bottling Co.*, 257 N.C. 245, 125 S.E. 2d 584; *Keener v. Beal,* 246 N.C. 247, 98 S.E. 2d 19.

"The very term 'contributory negligence' *ex vi termini* implies, or presupposes negligence on the part of the defendant." *Scenic Stages v. Lowther,* 233 N.C. 555, 64 S.E. 2d 846. Plaintiff's evidence clearly shows negligence on defendant's part proximately resulting in damage to his automobile.

Our decision finds support in G.S. 20-155 (b), and the cases of *Downs v. Odom,* 250 N.C. 81, 108 S.E. 2d 65; *Donlop v. Snyder,* 234 N.C. 627, 68 S.E. 2d 316; *Cab Co. v. Sanders,* 223 N.C. 626, 27 S.E. 2d 631.

The judgment below is

Affirmed.

HARRY J. STOKES v. MARGIE P. STOKES

(Filed 18 September 1963.)

1. Divorce and Alimony § 1—

The provisions of G.S. 50-3 that summons in a divorce proceeding should be returnable to the county in which either the plaintiff or the defendant resides is not jurisdictional but relates to venue, and in the absence of fraud the Superior Court of any county in North Carolina has jurisdiction of an action for divorce if either of the parties are domiciled in this State.

2. Divorce and Alimony § 26; Judgments § 24—

Where the findings of the court after a full hearing support the court's conclusion that there was no fraud in the procurement of the divorce in question upon substituted service, there being evidence that defendant had eloped with a third person and that plaintiff had made every reasonable effort to locate her so that notice of service could be delivered, etc., judgment denying motion to vacate the divorce decree will be upheld.

3. Process § 9—

Where plaintiff's affidavit states that defendant's residence remained unknown after diligent search and inquiry had been made to discover it, the clerk is not required to mail defendant a copy of the notice of service by publication. G.S. 1-99.2(c).

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

APPEAL by defendant from *Burgwyn, E.J.,* January 1963 Session of PAMLICO.

Motion in the cause to set aside the divorce obtained by the plaintiff at the August Term 1958.

In 1952, plaintiff and defendant were married in Beaufort County where they lived together until October 8, 1957. On June 7, 1958, plaintiff instituted this action for an absolute divorce in Martin County. He asked for custody of the two year old child of the marriage. Plaintiff alleged that before and after December 4, 1957, defendant had lived in adultery with one Carl T. Willis, Jr. in Norfolk, Virginia. Summons was served upon the defendant by publication in conformity with statutory requirements. Plaintiff's affidavit, upon which the clerk's order of publication was based, stated that he did not know the whereabouts of the defendant. The case was set for trial as an uncontested divorce action at the August 1958 Term of Martin. Upon motion of the plaintiff after that term was cancelled, the clerk entered an order transferring the action to Pamlico County where, on August 4, 1958, the court granted plaintiff a divorce from defendant and awarded him the custody of their child. On August 6, 1958, plaintiff married Dorothy Arnold Morgan.

On July 13, 1962, the defendant moved the court to set aside the judgment of divorce. She alleged that the plaintiff had purposely instituted this action in Martin County instead of Beaufort County, the residence of the plaintiff and of the defendant's relatives, to prevent her from acquiring notice of the action; that no letter was mailed by the clerk to the last known address of the defendant; and that the court acquired no jurisdiction because of the fraudulent conduct of the plaintiff. Replying to the motion, plaintiff alleged the following facts:

On October 8, 1957, defendant left him and their son to elope with one Carl T. Willis, Jr. Subsequently, plaintiff discovered the defendant and Willis unlawfully cohabiting in Norfolk, Virginia. Six months after this discovery, preparatory to instituting this action, he returned to Norfolk to ascertain defendant's address so that he could have summons served upon her. She had moved from the house in which she and Willis had been living for several months. He made diligent search and inquiry but was unable to ferret out her whereabouts. He instituted this action in Martin County for the single reason that there was no term of Superior Court in Beaufort County during August 1958. After plaintiff secured the divorce, defendant married Willis in Louisiana and a child has been born to them.

Upon the hearing of defendant's motion, there was additional evidence tending to show that between December 4, 1957 and June 7

1958 defendant had lived in five different places, including Louisiana where she married Willis on October 12, 1959.

Judge Burgwyn found as a fact that there had been no fraud of any kind in the procurement of the divorce. He held that the proceedings were in all respects regular and dismissed defendant's motion. She appealed to this Court.

LeRoy Scott for plaintiff appellee.
Frazier T. Woolard for movant appellant.

PER CURIAM. In the absence of fraud, the Superior Court of any county in North Caroliona has jurisdiction of an action for divorce if either of the parties is domiciled in this State. The provisions of G.S. 50-3 that in divorce proceedings the summons shall be returnable to the court of the county in which either the plaintiff or defendant resides are not jurisdictional; they relate only to venue. *Denson v. Denson,* 255 N.C. 703, 122 S.E. 2d 507; *Nelms v. Nelms,* 250 N.C. 237, 108 S.E. 2d 529; *Smith v. Smith,* 226 N.C. 506, 39 S.E. 2d 391. However, if a plaintiff should fraudulently conceal his action from the defendant and the whereabouts of the defendant from the court, jurisdiction would be lacking and a divorce obtained upon service of summons by publication would be a nullity. The court's judgment would be vacated upon a motion in the cause. *McLean v. McLean,* 233 N.C. 139, 63 S.E. 2d 138.

Judge Burgwyn, after a full hearing, found no merit in defendant's allegations that plaintiff had procured the divorce by fraud. G.S. 1-99.2(c) did not require the clerk to mail defendant a copy of the notice of service of process by publication when plaintiff's affidavit stated that her residence was unknown and diligent search and inquiry had been made to discover it. The defendant herself treated the divorce as valid when she married Willis in October 1959. This record discloses no reason why the court should invalidate it in 1963.

The judgment of the court below is
Affirmed.

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

THERESA ANNETTE ADKINS BY HER NEXT FRIEND H. B. ADKINS, PLAINTIFF v. ELMAN DEAN DILLS, DEFENDANT.

(Filed 18 September 1963.)

Automobiles § 38—

Testimony as to speed of plaintiff's car some one-half mile before reaching the intersection at which the accident occurred *held* not too remote under the circumstances of this case.

APPEAL by plaintiff from *Martin, Special Judge,* April 29, 1963, Special Session of BUNCOMBE.

On Saturday, March 24, 1962, about 5:00 p.m., in Buncombe County, at the intersection of Enka Lake Road and Queen Road, there was a collision between a 1959 Ford owned and operated by H. B. Adkins, plaintiff's father and next friend, and a 1947 Chevrolet owned and operated by defendant. Both drivers approached said intersection on Enka Lake Road, Adkins going west and defendant going east.

Plaintiff, then nine years old, was a passenger in her father's car and sustained personal injuries as a result of said collision.

The complaint alleged the collision and plaintiff's injuries were proximately caused by the negligence of defendant and the allegations included, as elements of damage, hospital, nurse, medical and dental expenses incurred in the treatment of plaintiff's injuries.

Answering, defendant denied negligence and alleged the collision and plaintiff's injuries were caused solely by the negligence of Adkins, plaintiff's father and next friend. Conditionally, defendant pleaded the contributory negligence of Adkins in bar of plaintiff's right to recover for the expenses incurred in the treatment of her injuries. Defendant also asserted a cross action against Clifton Adkins, who was joined as an additional party, alleging that H. B. Adkins, operating said Ford, and his brother, Clifton Adkins, operating a Buick, were driving at dangerous and excessive rates of speed and were racing as they traveled west on Enka Lake Road toward said intersection; that the negligence of H. B. Adkins was imputable to Clifton Adkins; and prayed that "in the event this defendant is adjudged liable in any way . . . this defendant have and recover contribution from CLIFTON ADKINS, as by law provided."

Clifton Adkins, answering said cross complaint, denied all allegations as to negligence on his part. At trial, Clifton Adkins' motion for judgment of nonsuit was allowed. He is not a party to this appeal.

Plaintiff's evidence tended to show defendant's car, when first observed by Adkins, was "sitting still" on the south side (defendant's

right) of Enka Lake Road; that Adkins was then 150 feet from said intersection; that, when Adkins was 75 feet from said intersection, defendant, without giving any signal or other indication of his intention to do so, turned left (to enter Queen Road) across Adkins' lane of travel at a speed of "about five miles per hour"; and that under these circumstances Adkins could not avoid the collision. Defendant's evidence tended to show defendant, after giving proper signal of his intention to do so, stopped upon reaching said intersection; that, on account of a curve, the portion of Enka Lake Road east of Queen Road was visible for a distance of only 80 to 100 feet; that, after giving a proper signal for a left turn, he started to turn left within the intersection at a time when there was no traffic within his vision approaching said intersection; and that while he was in the process of completing such left turn into Queen Road the Adkins car appeared and ran into the right side of his car. The evidence was in sharp conflict as to the speed of the Adkins car as it approached and entered said intersection.

The court, without objection, submitted the following issues: "1. Was the plaintiff injured by the negligence of the defendant Dills as alleged in the Complaint? 2. Did the negligence, if any, of H. B. Adkins contribute to plaintiff's injuries, as alleged in the Answer of the defendant Dills? 3. What amount, if any, is the plaintiff entitled to recover?" The jury answered the first issue, "No," and did not reach (answer) the second and third issues.

From judgment that plaintiff have and recover nothing of defendant, plaintiff excepted and appealed.

S. Thomas Walton for plaintiff appellant.
Williams, Williams & Morris for defendant appellee.

PER CURIAM. We have considered each of plaintiff's forty-three assignments of error. None discloses error deemed sufficiently prejudicial to constitute a sound basis for awarding a new trial. We have given particular consideration to the assignments of error, stressed by plaintiff in her brief, relating to the admission over her objection of the testimony of the witnesses James Newland and J. L. Newland as to the speed of the Adkins Ford when it overtook and passed the car in which they were traveling approximately one-half mile before it reached said intersection. In our view, this testimony, when considered in conjunction with the other evidence bearing upon the speed of the Adkins car between the time it passed from the view of these witnesses until the collision, was admissible under legal principles

stated in *Corum v. Comer*, 256 N.C. 252, 254, 123 S.E. 2d 473, and cases cited. Guided by appropriate instructions, the jury determined the crucial (factual) questions in favor of defendant.

No error.

ARTHUR JULIUS WILBURN v.
YETTA ELIZA JACKSON RAGBIR WILBURN.

(Filed 18 September 1963.)

1. Trial § 3—

Continuances are not favored, and the denial of a motion for continuance will not be disturbed in the absence of a showing of abuse of discretion.

2. Same—

Evidence that the case was set for a specified date for the convenience of the parties, that upon defendant's motion it was continued to a later specified date, and that upon the later date defendant moved for a continuance based upon a physician's written statement, dated some twelve days prior to the hearing, that defendant was suffering from a virus, without more, *is held* insufficient to show abuse of discretion in the denial of defendant's second motion for continuance.

3. Abatement and Revival § 3—

The pendency of an action between the parties in another jurisdiction is not grounds for abatement of an action instituted in this jurisdiction.

4. Same—

Plea in abatement cannot be sustained merely upon a showing of the filing of complaint in a prior action when there is no proof of service of process or that process had ever been issued therein.

5. Domicile § 1—

The fact that a party's work requires extensive travel, preventing him from remaining constantly in the State, does not deprive him of his right to establish his residence here.

APPEAL by defendant from *Martin, S.J.*, June 1963 Session of BUNCOMBE.

This action was begun in the General County Court of Buncombe on 4 September 1962 to obtain a divorce. The complaint alleged plaintiff was and had been a resident of the state for more than six months prior to the institution of the action, that the parties married

1 March 1946, separated 1 September 1960, and had since the latter date lived separate and apart.

Defendant, asserting that she was a resident of Washington, D. C., sought and obtained an extension of time in which to answer. Her answer, verified 26 November 1962, denied plaintiff's allegations of residence and separation. As an additional defense she pleaded the pendency of an action for divorce instituted by her in the courts of Maryland, the state of her residence, in bar of plaintiff's right to maintain an action for divorce in North Carolina.

The case was, on motion of plaintiff peremptorily set for trial on 26 February 1963. Plaintiff assigned two reasons for requesting a specific date for the trial: (a) he was an employee of the United States Government, required in the performance of his duty to travel extensively, and (b) defendant's counsel, nonresidents of Buncombe County, would be convenienced by fixing a specific date for trial. The motion was allowed, and on 7 January counsel for defendant were notified the case would be tried on 26 February 1963.

Neither defendant nor her counsel appeared at the time fixed for trial. Counsel for defendant, some time after court convened, communicated with the court and requested a continuance. This motion was allowed over plaintiff's protest. The cause was then peremptorily set for trial at 9:30 a.m. on 5 March 1963. Defendant's counsel were promptly notified of the continuance and the time fixed for trial.

On 5 March 1963 counsel for defendant again moved for a continuance, basing the motion on a writing dated 21 February 1963 purporting to be from a Washington, D. C., physician that defendant was suffering from a virus infection and in his opinion was unable to travel out of Washington. The writing made no further explanation of defendant's condition. Plaintiff had obtained a leave from the government which expired at 5:00 p.m. on 5 March. The court refused to grant defendant's request for a further continuance but proceeded with the trial. Appropriate issues were submitted and answered in accord with plaintiff's allegations.

Defendant appealed to the Superior Court on errors assigned. Judge Martin overruled each of defendant's assignments of error.

George Pennell and Dailey & Harrell by Ruben J. Dailey for plaintiff appellee.

George L. Bumpass, Nathaniel L. Belcher, and Floyd H. Brown for defendant appellant.

PER CURIAM. Defendant assigns as error the court's refusal to grant her request for a continuance made on 5 March. Continuances are not favored. The granting or denial of a motion to continue is a matter in the sound discretion of the trial judge and will not be disturbed unless an abuse of discretion is made to appear. *Cleeland v. Cleeland,* 249 N.C. 16, 105 S.E. 2d 114; *Watters v. Parrish,* 252 N.C. 787, 115 S.E. 2d 1.

The facts appearing in the record, summarized in the foregoing statement, do not show an abuse of discretion. To the contrary, they indicate the court's desire to afford defendant full opportunity to present her defenses. The assignment of error cannot be sustained.

Defendant assigns as error the court's refusal to dismiss plaintiff's action for that she had previously instituted an action for absolute divorce in the courts of Maryland. To sustain a plea in abatement based on the pendency of a prior action, it must appear that the two actions are pending in the same jurisdiction. The plea cannot be sustained when the other action is pending in the courts of another state. *Sloan v. McDowell,* 75 N.C. 29; *Hubbs v. Nichols,* 298 S.W. 2d 801. Were the rule otherwise, defendant's plea could not be sustained because of her failure to show the pendency of the action in Maryland. Her proof consisted of an uncertified copy of the complaint filed by her in the Maryland courts. No process had ever been served on defendant, and, so far as appears, no process had ever issued. Proof only of the filing of a complaint is not sufficient to show the pendency of any action.

Defendant assigned as error the refusal to allow her motion to nonsuit. The exception is based on her contention that plaintiff's work prevented him from becoming a resident of this state. The mere fact that plaintiff's work with the United States Government required extensive travel, preventing him from remaining constantly in the state, did not deprive him of the right to establish his residence in North Carolina. *In re Orr,* 254 N.C. 723, 119 S.E. 2d 880; *Martin v. Martin,* 253 N.C. 704, 118 S.E. 2d 29.

No error.

JIM WALTER CORPORATION v. NATHANIEL GILLIAM, JR. & WIFE, BERTHA GILLIAM, AND CARRIE T. GILLIAM.

(Filed 18 September 1963.)

1. Appeal and Error § 11—

Appellant is required to have the appeal entered by the clerk on the judgment docket and notice of appeal given the adverse party within ten days from the entry of the judgment, G.S. 1-280, G.S. 1-279, and when the statutory requirements are not complied with, the Supreme Court obtains no jurisdiction of the purported appeal.

2. Appeal and Error § 29—

In those instances requiring a case on appeal the appellant must serve statement of case on appeal on appellee or its attorney, and if the parties do not agree, the case must be settled by the court, G.S. 1-283, while if the appeal is on the record proper, it must be certified to the Supreme Court by the clerk of the Superior Court, G.S. 1-284.

3. Appeal and Error § 19—

Exceptions must be grouped under the assignments of error. Rules of Practice in the Supreme Court Nos. 19(3) and 21.

4. Appeal and Error § 38—

The brief must contain a clear and concise statement of the questions involved on appeal. Rule of Practice in the Supreme Court No. 27½, and a succinct statement of the facts, Rule of Practice in the Supreme Court No. 28.

5. Appeal and Error § 19—

The Rules governing appeals are mandatory.

6. Appeal and Error § 12—

The trial court may dismiss the appeal upon failure of appellant to file the stay bond ordered as a condition precedent to the appeal, G.S. 1-289, or when appellant fails to serve statement of the case on appeal within the time specified.

APPEAL by defendant, Carrie T. Gilliam, from *Bundy, J.*, at Chambers July 13, 1963, in PAMLICO.

This is an action by plaintiff upon a contract for cost of labor and materials incurred in the construction of a house for defendants on the land of one of them, Carrie T. Gilliam, and to enforce a mechanic's and materialman's lien.

The lien was filed on 14 March 1961. This action was instituted on 13 September 1961. Defendants employed counsel, and there were negotiations looking to an out-of-court settlement. On 15 May 1962 Carrie T. Gilliam (hereinafter the defendant) advised her counsel and plaintiff's attorney that she was not interested in settling the

case and that she would possibly employ other counsel. Plaintiff's attorney in a letter of that date advised her and her attorney that if no answer was filed on or before 31 May 1962 plaintiff would move for default judgment. No answer was filed. The clerk of superior court entered a judgment by default final on 1 June 1962 and issued execution. Thereafter defendant employed other counsel (the counsel of record on this appeal) and moved to set aside the judgment on the ground of excusable neglect. A temporary restraining order stayed execution sale. The motion to set aside the judgment was heard before Bundy, J., on 18 January 1963. The judge found as a fact that defendant had offered no affidavits or other evidence in support of her allegations of excusable neglect and meritorious defense, overruled the motion and dismissed the temporary restraining order. Defendant gave notice of appeal and moved for stay of execution. An order was entered staying execution pending appeal, on condition defendant furnish within 20 days a stay bond in a specified amount (G.S. 1-289). On motion of plaintiff (served on defendant's attorney 5 June 1963), Judge Bundy on 13 July 1963 dismissed the appeal for failure of defendant to give the bond (G.S. 1-289), and for failure of defendant to serve case on appeal within the time (60 days) specified. Thereafter on 27 July 1963, defendant had the judge sign appeal entries to be attached to the order of dismissal. By order of the judge defendant was allowed to appeal *in forma pauperis*.

Kennedy W. Ward for plaintiff appellee.
Charles L. Abernethy, Jr., for defendant appellant.

PER CURIAM. The purported record filed in this Court shows an utter disregard for the statutes, rules and procedures governing appeals.

The motion to dismiss defendant's appeal from the judgment of Bundy, J., dated 18 January 1963, was heard in superior court after notice served on defendant's counsel. The motion was heard 13 July 1963 and it must be assumed that defendant and her counsel were present and had notice of the adverse nature of the order entered by the judge on that date. If defendant desired to appeal therefrom, it was required that notice of appeal be given within 10 days from the entry of the judgment. G.S. 1-279. Within the 10 days defendant was required to have the appeal entered by the clerk on the judgment docket, and to give the adverse party notice thereof. G.S. 1-280. Defendant did not comply with these statutory requirements. The only attempt to give notice was to have the judge, 14 days after

entry of the order, sign appeal entries on a paper separate from the order. So far as the purported record discloses, no notice as contemplated by the statute was ever given to the adverse party, and no appeal was ever entered on the judgment docket.

When G.S. 1-279 and G.S. 1-280 are not complied with, the Supreme Court obtains no jurisdiction of a purported appeal and must dismiss it. *Aycock v. Richardson*, 247 N.C. 233, 100 S.E. 2d 379.

No case on appeal was ever settled by the judge or agreement of counsel, as ordinarily required. G.S. 1-283. Indeed, it does not appear that any case on appeal was ever served on plaintiff or its attorney. G.S. 1-282. If defendant is appealing on the record proper, making the service and settlement of case on appeal unnecessary, the record proper is not certified to this Court by the clerk of superior court in accordance with G.S. 1-284.

The purported record contains no grouping of exceptions and assignments of error as required by our rules. Rules 19(3) and 21 of the Rules of Practice in the Supreme Court, 254 N.C. 785-824. In her brief defendant failed to set out in clear, concise language the question or questions involved on appeal. *ibid.*, Rule 27½. The brief does not set forth a succinct statement of facts. *ibid.*, Rule 28. The record and brief are faulty in other respects.

We have time and time again called attention to the rules of practice in this Court. They are mandatory. *Balint v. Grayson*, 256 N.C. 490, 124 S.E. 2d 364; 1 Strong: N.C. Index, Appeal and Error, s. 19, p. 89 (Supplement, p. 30), and the many cases cited. The appeal must be dismissed.

Moreover, the purported record shows clearly that the court below did not err in dismissing defendant's appeal from the judgment of 18 January 1963.

Affirmed.

B. E. IPOCK v. E. W. DAUGHERTY.

(Filed 18 September 1963.)

1. Contracts §§ 19, 27—

Where plaintiff's evidence is to the effect that the contract under which plaintiff was to make certain repairs to defendant's dwelling for a specified sum was *abandoned upon* defendant's decision to materially increase the work to be done, and that the parties thereupon substituted an agreement under which defendant agreed to pay plaintiff for labor and ma-

terials used in remodeling the dwelling, upon which agreement there was a balance due in a specified sum, the evidence is properly submitted to the jury, and defendant's motion to nonsuit properly denied.

2. Evidence § 22—

In plaintiffs action to recover for labor and materials, plaintiff may identify invoices rendered him by laborers and material suppliers and testify that the laborers rendering the invoices worked on defendant's dwelling and that he paid them the sums shown, and that the invoices for materials were for materials used in making the repairs to defendant's dwelling, and objection to the introduction of the invoices in evidence cannot be sustained, it being competent for plaintiff to show in this manner what the laborers did and what kinds and quantities of materials were used.

APPEAL by defendant from *Hubbard, J.*, May 1963 Session of CRAVEN.

Plaintiff sought to recover the sum of $1529.34, the balance alleged to be owing on a contract to pay plaintiff for labor and materials used by plaintiff in remodeling defendant's house.

Defendant denied the contract as alleged by plaintiff. By way of counterclaim he asserted a contract for specific work for a fixed price and a breach of that contract by plaintiff.

Issues arising on the pleadings were submitted to the jury. It found defendant had contracted as alleged by plaintiff with a balance owing for the labor and materials furnished of $1229.34. Judgment was entered on the verdict. Defendant appealed.

Dunn & Dunn by Raymond E. Dunn for plaintiff appellee.
John W. Beaman and Robert G. Bowers for defendant appellant.

PER CURIAM. The basic question for decision was a factual one: What was the contract? Was it, as plaintiff alleged, to pay for labor and materials; or was it, as defendant alleged, to remodel the dwelling for the sum of $3150, which defendant has paid?

Plaintiff testified he contracted to do specific work for a specific sum as alleged by defendant, but when he started the work, defendant decided to materially increase the work to be done. They then agreed to abandon the original contract, agreeing instead that plaintiff would be paid for labor and materials used in making the repairs. The court correctly overruled the motion for nonsuit. The credibility of plaintiff's evidence was for the jury.

To show what labor and materials were used in making the repairs, plaintiff identified invoices rendered him by laborers and material

suppliers. He testified that the laborers rendering bills worked on defendant's dwelling and that he paid them the sums shown on the invoices. He testified the materials shown on the invoices were used in making the repairs to defendant's dwelling. The paid invoices detailing the labor and material were offered in evidence. Defendant assigns this as error. It was competent for plaintiff to show in this manner just what the laborers did and what kinds and quantities of materials he used in making the repairs. They were merely his statement of what had been done and used. *Pearson v. Luther,* 212 N.C. 412, 193 S.E. 739.

We have carefully examined the record and each of defendant's assignments of error. We find

No error.

FRANK BYRD, EMPLOYEE, v. FARMERS FEDERATION COOPERATIVE, EMPLOYER, AND NATIONWIDE MUTUAL INSURANCE COMPANY, CARRIER.

(*Filed* 18 September 1963.)

Master and Servant § 63—

A back injury to an employee from a herniated disc does not arise by accident if the employee at the time was merely carrying out his usual and customary duties in the usual way. G.S. 97-2(6).

APPEAL by defendants from *Pless, J.,* July 1963 Session of TRANSYLVANIA.

This is a proceeding under the Workmens Compensation Act.

Defendant, Farmers Federation Cooperative, was engaged in selling general farm supplies at retail, and had a store at Brevard. Plaintiff filed claim with the Industrial Commission for compensation for an injury which arose out of and in the course of his employment by said defendant.

The facts found by the Hearing Commissioner are in summary as follows: Plaintiff and defendant are subject to the Workmens Compensation Act. On 19 September 1961 and prior thereto plaintiff was regularly employed by defendant employer as manager of the Brevard store. Plaintiff's duties involved all types of work including manual labor. For several years plaintiff had been engaged in and accustomed to handling and lifting bags of fertilizer in the usual course of his work. On that date plaintiff was loading 100-pound bags of fertilizer

on a hand truck. He placed ten bags on the hand truck and moved them from the warehouse to a platform where they were unloaded. He then started loading the hand truck again with similar bags of fertilizer. While so handling the bags and while lifting the nineteenth bag of fertilizer that he had handled on this occasion, plaintiff felt a pain in his back. He was lifting the bag and twisting to one side when he felt the pain. "Plaintiff was picking up and handling 100-pound bags of fertilizer in his usual and customary manner at the time he felt the pain in his back. The only different or unusual thing that occurred at such time was the onset of pain in his back." Plaintiff did not sustain an injury by accident. Doctors found that plaintiff had a ruptured disc or disc syndrome.

Upon the foregoing facts it was held that plaintiff was not entitled to compensation. The full Commission affirmed the ruling. On appeal the Superior Court reversed the decision of the Industrial Commission and ordered the cause remanded for award and payment of compensation. Defendants appeal.

Hamlin, Potts, Ramsey & Hudson for plaintiff.
Robert L. Scott for defendants.

PER CURIAM. The facts found by the Industrial Commission are supported by competent evidence. Therefore they are conclusive on appeal. *McGinnis v. Finishing Plant,* 253 N.C. 493, 117 S.E. 2d 490. The judge below erred in ruling "as a matter of law upon the facts found by the Industrial Commission that the plaintiff herein did suffer an injury by accident as defined in G.S. 97-2(6)," and in remanding the case for entry of an award of compensation. An injury to the back from an herniated disc does not arise by accident if the employee at the time is merely carrying on his usual and customary duties in the usual way. *Harding v. Thomas & Howard Co.,* 256 N.C. 427, 124 S.E. 2d 109; *Turner v. Hosiery Mills,* 251 N.C. 325, 111 S.E. 2d 185; *Hensley v. Cooperative,* 246 N.C. 274, 98 S.E. 2d 289.

Reversed.

EMMA FORBES TWIFORD AND HUSBAND, LOUIS TWIFORD v. ARTHUR HARRISON AND WIFE, ANN JONES HARRISON.

(Filed 18 September 1963.)

Appeal and Error § 29—

Where appellant serves no statement of case on appeal on appellee and no case on appeal is settled by the court, there is no proper statement of case on appeal, and the Supreme Court can review only the record proper for errors appearing upon its face. The provisions of G.S. 1-282 and G.S. 1-283 are mandatory.

APPEAL by defendants from *Sink, E.J.*, January 1963 Term of CURRITUCK.

Plaintiffs instituted this action as a special proceeding under Chapter 38 of the General Statutes to establish the boundary line between lands which they alleged were owned by Emma Forbes Twiford and the defendants. Defendants denied plaintiff's title and alleged sole ownership in themselves. Thereafter the cause proceeded as an action to quiet title under G.S. 41-10. A compulsory reference was ordered at the January 1963 term. The referee duly heard the matter, concluded that the defendants were the owners of the land in dispute, and filed his report. The plaintiffs excepted to his findings and conclusions, tendered issues, and demanded a jury trial. Upon the trial, the jury answered YES to the following issue:

"Are the petitioners, Emma Forbes Twiford and Louis Twiford, the owners of the land shown on the Court map enclosed within the lines from A to B to C to D to E to A?"

From judgment entered on the verdict defendants appealed.

Frank B. Aycock, Jr. and Gerald F. White for plaintiff appellees.
F. V. Dunstan and J. W. Jennette for defendant appellants.

PER CURIAM. The transcript of appeal certified to this Court contains no narrative statement of the evidence before the referee or the Superior Court. It contains neither exhibits, muniments of title, nor the court map which was evidently the hub of the trial. There is only a purported summary entitled "Statement of Case on Appeal" in which, on one mimeographed page, counsel profess to abridge the 234 pages of testimony before the referee. In addition to this statement and the record proper, the transcript includes the judge's charge and five assignments of error which are either formal or are not presented by the record.

The record shows that no case on appeal has been settled by the judge or by counsel. Indeed, it reveals that none was ever prepared in the form required by statute and the rules of this Court. When a proper statement of case on appeal has not been certified here, the Supreme Court can determine only whether error appears on the face of the record proper. The provisions of G.S. 1-282 and G.S. 1-283 are mandatory. *Wiggins v. Tripp,* 253 N.C. 171, 116 S.E. 2d 355. No error appearing in the record proper, the judgment of the court below will be affirmed and this appeal dismissed.

Appeal dismissed.

J. A. STAFFORD, ADMINISTRATOR OF GEORGE PROCTOR v. WESLEY GRIFFIN AND CORDELLA GRIFFIN.

(Filed 18 September 1963.)

Negligence § 24a—

Evidence that defendant left his passenger sitting in defendant's car on a cold night while defendant went into a house, that defendant had a five gallon can of kerosene with an uncovered two inch hole in its top sitting on the floor in the back, that the passenger was a cigarette smoker, that the car was discovered afire some thirty to forty-five minutes after defendant left it, and that the passenger died in the fire, *held* insufficient to be submitted to the jury on the issue of negligence in an action for wrongful death.

APPEAL by plaintiff from *Peel, J.,* March, 1963 Term, PASQUOTANK Superior Court.

The personal representative of George Proctor sued to recover for the death of his intestate allegedly caused by the negligent operation and use of a four-door Pontiac automobile by Wesley Griffin, agent of the owner, Cordella Griffin.

The defendants admit the agency, ownership, and use of the vehicle. They denied negligence and conditionally pleaded intestate's contributory negligence in starting the fire.

The plaintiff's evidence tended to show that on the night of February 7, 1959, the defendant, Wesley Griffin, purchased five gallons of kerosene from Jones's Store. He furnished the container which was a round, five-gallon can, and "was the type of can used for cylinder oil." The opening in the top was about two inches in diameter. In addition there was an air hole, also in the top, about

the size of an ice pick. Wesley Griffin was in the habit of using this same can for the same purpose in the same automobile on numerous prior occasions. Apparently there was no cap or cover over the two-inch opening.

On the occasion involved, the can was placed on the floor of the back seat, the upholstery of which was frayed. The attendant at the store testified there was no kerosene on the seat but there was odor of kerosene in the vehicle.

As Wesley started home he overtook plaintiff's intestate going in the same direction on foot. Intestate, by invitation or by request, became a passenger in the Pontiac. He and the driver passed a short distance beyond the side road to intestate's home, then stopped at the home of Robert Fearing. Wesley went in the house, leaving the intestate in the Pontiac. The night was cold. After about 30 to 45 minutes one of the Fearing children saw the Pontiac on fire. When Wesley got to the burning vehicle the heat was so intense he was unable to open any of the doors. The intestate was burned to death. He smoked cigarettes, "fairly regularly."

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

John H. Hall, John A. Wilkinson for plaintiff appellant.
LeRoy, Wells & Shaw by H. J. LeRoy for defendants, appellees.

PER CURIAM. The plaintiff urgently contends the trial court committed error in holding the evidence insufficient to survive the motion for nonsuit. Especially he argues the defendant Wesley Griffin was negligent in inviting intestate into a fire trap. While the evidence disclosed the presence of a can of kerosene with a two-inch opening at the top, the evidence likewise showed the same container had been used in the same vehicle in the same manner for months without mishap.

The night was cold. Nothing in the evidence suggests the fire originated because of any defect in the vehicle. It originated after defendant had been away from it 30 to 45 minutes. The presence of a can of kerosene and a frequent smoker enclosed in a cold automobile for half an hour suggest somewhat strongly the cause of the fire. There was no explosion. Reason does not appear why the unfortunate occupant was unable to open one of the four doors and save himself. There is mystery about the fire but evidence of actionable negligence on the part of the defendants is lacking.

The judgment of nonsuit is
Affirmed.

STATE OF NORTH CAROLINA v. CHARLES ALLEN.

(Filed 18 September 1963.)

Perjury § 5—

Testimony of two or more witnesses as to conflicting statements made by defendant while under oath in courts of competent jurisdiction, but without evidence that the statement upon which the bill of indictment was predicated was the false testimony, is insufficient to be submitted to the jury in a prosecution for perjury.

APPEAL by the defendant from *Pless, J.*, March 1963 Criminal Session of BUNCOMBE.

The defendant was convicted of perjury. This appeal challenges the sufficiency of the evidence to sustain the conviction.

The bill of indictment charged that on February 11, 1963 in the Superior Court of Buncombe County the defendant falsely asserted upon oath in the case of *State v. Earl Chandler* that he was the only person who had broken open and stolen money from certain pay telephones on January 23, 1963, and that he was alone on the occasion. The evidence tended to show the following facts:

On January 26, 1963 the defendant, Jeter Allen, and Earl Chandler were tried in the Asheville Police Court upon charges of malicious damage to the pay telephones described in the bill of indictment in this case and of stealing money from them. Defendant and Jeter Allen entered pleas of guilty; Chandler plead not guilty. In the case against Chandler, defendant was sworn as a witness for the State and testified that he, Jeter Allen, and Chandler broke into four telephones and removed money from them. He swore that Chandler was the one who actually broke open the telephones. Jeter Allen testified that Chandler was with them and drove the car. Chandler was convicted and appealed to the Superior Court. Upon the trial in the Superior Court defendant was again sworn as a State's witness. There he testified that he had been intoxicated when he robbed the telephones and that he did not remember whether anybody else was with him. The police officer who arrested defendant on the night of January 23rd and the detective who questioned him both testified that defendant was not drunk.

In an attempted explanation of his conflicting testimony in the two trials, defendant swore he had testified against Chandler in the Police Court because detectives had threatened to indict him for the possession of burglary tools if he did not.

The only evidence which ever connected Chandler with the crime on January 23rd was the testimony of the defendant and Jeter Allen in the Police Court. Jeter Allen did not testify in the Superior Court.

The verdict was guilty as charged. From the sentence imposed, defendant appealed.

T. W. Bruton, Attorney General, James F. Bullock Assistant Attorney General for the State.

Williams, Williams and Morris by James M. Golding for defendant appellant.

PER CURIAM. Even if we conceded that the variance between the bill of indictment and the proof is not fatal, the evidence in this case does not meet the legal requirements for a conviction of perjury. In a prosecution for perjury the falsity of the oath must be established by the testimony of two witnesses, or by one witness and corroborating circumstances. *State v. Sailor,* 240 N.C. 113, 81 S.E. 2d 191.

All the evidence tends to show that the defendant, under oath and in a court of competent jurisdiction, made conflicting statements about a matter material to the point in question. While more than two witnesses testified as to these conflicting statements, the State offered no evidence tending to show which statement was false. Therefore, the motion for nonsuit at the close of all the evidence should have been sustained. The Attorney General concedes that this case is indistinguishable from *State v. Sailor, supra.*

The judgment below is

Reversed.

MILDRED MARIE PURIFOY RIGGS AND HUSBAND, ERNEST LEE RIGGS, v. LINWOOD EARL ANDERSON AND WIFE, JUERNE ANDERSON.

(Filed 18 September 1963.)

Frauds, Statute of, §§ 3, 62—

Nonsuit is properly entered in an action to compel the conveyance of land by some of the tenants in common to plaintiff tenants in accordance with an alleged parol agreement, the defense of the statute of frauds being raised by a general denial of the parol agreement.

APPEAL by plaintiffs from *Burgwyn, E.J.,* January 1963 Session of PAMLICO.

Action to recover damages for breach of contract to sell land.

The allegations of the complaint and the evidence introduced in support thereof are to the following effect: Plaintiffs and defendants herein (and others) were tenants in common and parties to a special proceeding for partition of land. Plaintiffs and defendants were petitioners and respondents, respectively, in the partition proceeding. The special proceeding, on appeal from a judgment of the clerk, was calendared for trial at the January 1960 Term of Pamlico Superior Court. Before it was reached for trial at that term there was a conference between counsel for defendants, counsel for plaintiffs, and one of the plaintiffs. After the conference counsel for defendants stated in open court that the proceeding would not be for trial, that his clients would accept the sum of $2500 for their interest in the land and would execute a deed to plaintiffs upon payment of that sum. The plaintiff who was present and his counsel assented. The trial of the partition proceeding was continued. Thereafter defendants refused to execute a deed to plaintiffs for their interest in the land, and refused to accept the $2500 which was tendered to them. Plaintiffs were damaged by reason of the breach of the agreement; they had purchasers for the land and the timber thereon and lost $5000 in profits which they would have made from a resale.

Defendants, answering, denied that there was any agreement, denied that their attorney had any authority to make a contract for sale of their interest, and averred that the offer made by their attorney was conditioned upon a later approval by them. Defendants' evidence tends to support the allegations of the answer.

At the close of all the evidence the court sustained defendants' motion for nonsuit. Plaintiffs appeal.

Charles L. Abernethy, Jr., for plaintiffs.
Cecil D. May for defendants.

PER CURIAM. The court did not err in nonsuiting plaintiffs. No memorandum or other instrument of writing containing the terms of the alleged offer and acceptance were signed by the parties or their attorneys or placed upon the minutes of the court, so far as the record on appeal discloses. Defendants accepted no part of the money tendered. A wholly unexecuted parol contract to sell land is void. *Carpenter v. Yancey*, 231 N.C. 160, 56 S.E. 2d 396; *Kluttz v. Allison*, 214 N.C. 379, 199 S.E. 395. A defense of the statute of frauds may be taken advantage of by general denial. *Humphrey v. Faison*, 247 N.C.

127, 100 S.E. 2d 524; 2 Strong: N. C. Index, Frauds, Statute of, s. 3, p. 389.

Affirmed.

DOROTHY JANE ROCK v. SHERMAN T. ROCK.

(Filed 18 September 1963.)

Divorce and Alimony § 18—

While a change of condition is necessary to support an order modifying a prior order for the support of children and for permanent alimony, an order for subsistence *pendente lite* may be modified at any time before the trial on application of either party without a finding of a material change of condition. G.S. 50-16.

APPEAL by defendant from *Hubbard, J.*, June Session 1963 of CARTERET.

This action was instituted on 7 October 1961 in the Superior Court of Carteret County for alimony without divorce, for the custody of Nancy Jane Rock, who was born of the marriage between the plaintiff and the defendant on 28 May 1960, the parties having been married on 7 May 1959, for the support of said child and for counsel fees.

On 25 October 1961 an order *pendente lite* was entered directing the defendant to pay for the support of his wife and child the sum of $125.00 a month and to pay counsel fees for plaintiff.

A motion in the cause was filed on or about 19 February 1963 requesting an increase in the allowance and advising the court that it was impossible for the plaintiff to maintain herself and child on the previous allowance, which amount had been paid as required by the original order.

The matter came on for hearing at the May Civil Session 1963 of the Superior Court of Carteret County upon the verified motion of the plaintiff and the affidavit of Kathryn Riefenach and the oral testimony of the defendant. The parties agreed the court might enter judgment in or out of term. The court found the facts, and based thereon concluded as a matter of law that the order theretofore entered on 25 October 1961 should be modified. The court entered judgment on 6 June 1963.

The court thereupon in its sole discretion increased the alimony *pendente lite* for the support of plaintiff and the minor child born of

the marriage, Nancy Jane Rock, to $175.00 per month, and awarded plaintiff's counsel a fee of $150.00.

The defendant excepted and appealed to the Supreme Court, assigning error.

A. D. Ward for plaintiff appellee.
Wheatly & Bennett for defendant appellant.

PER CURIAM. The facts found by the judge are set out in the order and are sufficient to support it. There was evidence at the hearing tending to support the findings of fact.

All assignments of error have been abandoned except Nos. 8 and 11 which challenge the power of the court to enter an order modifying the previous order unless predicated upon a finding of a material change in the circumstances of the parties.

It is conceded by the appellee that a change of condition and circumstances must be established before an order for the support of children and permanent alimony can be modified. However, the amount the defendant is required to pay for the support of his child and for reasonable subsistence of the plaintiff *pendente lite* and for compensation to her counsel, is determinable by the judge in the exercise of his sound discretion. And in the absence of an abuse of discretion, his decision is not reviewable. *Tiedemann v. Tiedemann,* 204 N.C. 682, 169 S.E. 422; *Wright v. Wright,* 216 N.C. 693, 6 S.E. 2d 555.

An order for subsistence *pendente lite* may be modified at any time before the trial on application of either party. G.S. 50-16.

The order entered below is
Affirmed.

ADDIE ELIZABETH ALLEN v. M. D. LANE AND WIFE, ROVINE P. LANE, AND CHARLES P. GAYLOR, TRUSTEE, AND M. D. LANE, ADMINISTRATOR OF W. P. LANE.

(Filed 18 September 1963.)

APPEAL by plaintiff from *Hubbard, J.,* February Civil Session 1963 of CRAVEN.

This action was instituted on 22 December 1962 in the Superior Court of Craven County.

The complaint alleges that on 1 January 1948, M. D. Lane and wife, Rovine P. Lane, conveyed to Addie E. Allen, widow, James M. Allen, and Jacob B. Allen a tract of land containing 220 acres, which conveyance is duly recorded in the office of the Register of Deeds of Craven County in Book 418 at page 380; that on the same day, Addie E. Allen, widow, Jacob B. Allen, and James M. Allen (with the joinder of his wife, Rosa Allen) executed a deed of trust to Charles P. Gaylor, trustee, conveying the above tract of land, to secure the purchase price thereof in the sum of $9,000.00, and executed 15 notes in the sum of $600.00 each, the first note being payable on 15 October 1948 and one note payable on the 15th of October of each year thereafter through 15 October 1962, which deed of trust was recorded in the office of the Register of Deeds of Craven County in Book 418 at page 383.

On 26 March 1948, Addie E. Allen executed a warranty deed to Jacob B. Allen and James M. Allen for the premises involved, and after the description in said deed inserted the following: "Excepting and reserving unto the party of the first part a life estate in the said property." This deed was recorded in Book 418 at page 387 in the office of the Register of Deeds in Craven County.

At the February Term 1962 of the Superior Court of Craven County it was agreed that Jacob B. Allen, James M. Allen and wife, Rosa Allen, the plaintiffs in the pending action, were indebted to the defendants M. D. Lane and wife, Rovine P. Lane, in the sum of $9,930.94 with interest at six per cent from 15 October 1958 until paid. The amounts to be paid and the order in which they were to be paid if and when the aforesaid deed of trust was foreclosed were set out in a consent judgment and entered of record at the above term of court.

At the December Session 1962 of the Superior Court of Craven County the matter came on for hearing before Mintz, J. on motion to continue a temporary restraining order to prevent the consummation of the foreclosure of the purchase money deed of trust referred to hereinabove. This judgment reveals that the trustee had been restrained by temporary restraining orders on four previous occasions, each of which had been theretofore dissolved. The temporary restraining order in effect at the time of the hearing was dissolved by Mintz, J. on 5 December 1962, and James P. Gaylor was directed to consummate the foreclosure sale upon payment of the bid price of $27,100.00, and the court permanently enjoined the plaintiffs in that action from the institution of any further legal actions or proceedings relative to the foreclosure of said deed of trust, either directly or indirectly.

Seventeen days after the entry of the foregoing judgment, the present action was instituted in the name of the plaintiff in this purported action, praying for a restraining order to prevent the consummation of the aforesaid foreclosure. Judge Hubbard, by consent of the parties, heard the matter on its merits without a jury at the February Civil Session 1963, and on 18 February 1963 sustained a demurrer *ore tenus* on the ground that the complaint did not state facts sufficient to constitute a cause of action, dismissed the action and taxed the plaintiff with the costs.

Charles L. Abernethy, Jr., for plaintiff appellant.
Barden, Stith & McCotter for defendant appellees.

PER CURIAM. Various and sundry papers in connection with this purported appeal have been filed with the Clerk of this Court. However, no case on appeal has been served, neither has the record proper been certified to this Court by the Clerk of the Superior Court of Craven County.

A careful review of the various and sundry papers filed in this purported appeal fails to reveal any merit in the plaintiff's contentions. In fact, no justiciable question is presented.

Appeal dismissed.

JOHN QUINCY WHITE, JR. v. MARY OWENS RUCKER, AND ALEX RUDOLPH PERRY, AND JOSEPH ISREAL PERRY.

(Filed 18 September 1963.)

APPEAL by plaintiff from *Peel, J.*, March Session 1963 of PERQUIMANS.

This action grows out of collisions on U. S. Highway #17 about 1:55 a.m. on Sunday, October 29, 1961. Three vehicles were involved: (1) a 1956 Ford owned and operated by plaintiff; (2) a 1951 Chevrolet owned and operated by defendant Rucker; and (3) a 1957 Ford owned by defendant Joseph Isreal Perry as a family purpose car and operated with his consent by his minor son, defendant Alex Rudolph Perry.

Each vehicle had left Elizabeth City and was proceeding south on #17 toward Hertford. The collisions occurred some five or six miles

south of Elizabeth City in front of the lighted area (on the east side of #17) occupied by the "all night" service station and restaurant known as Boone's Truck Stop.

Approaching Boone's Truck Stop, the cars were proceeding in the west lane (the right lane for southbound traffic) in this order: (1) the Rucker car, (2) plaintiff's car, and (3) the Perry car. The Rucker car turned left and was crossing the east lane of #17 to enter the Boone's Truck Stop premises. Plaintiff attempted to overtake and pass the Rucker car. The right front of plaintiff's car and the left rear of the Rucker car collided. The Rucker car left the highway and came to rest in a drainage ditch. Plaintiff's car remained in the east lane of #17. Perry had pulled out behind plaintiff into the east lane for the purpose of overtaking and passing the Rucker car. Shortly ("a matter of seconds") after said first collision, the left of the Perry car collided with the right side of plaintiff's car.

Plaintiff alleged his car was damaged in the amount of $700.00 on account of the joint negligence of defendants. Defendant Rucker denied negligence and pleaded contributory negligence. Defendants Perry denied negligence and pleaded contributory negligence. Defendant Joseph Isreal Perry alleged a counterclaim for $500.00 for damages to his car.

Issues raised by the pleadings were submitted to the jury. The jury, answering the first issue "No," failed to find plaintiff's car was damaged by the actionable negligence of defendant Rucker. Answering both the fourth and fifth issues "Yes," the jury found (1) that plaintiff's car was damaged by the actionable negligence of defendants Perry and (2) that plaintiff, by his own negligence, contributed to his own damage as alleged by defendants Perry. In accordance with the verdict, judgment was entered "that the plaintiff recover nothing of the defendants and that the defendants Perry recover nothing of the plaintiff" and that the costs be taxed against plaintiff. Plaintiff excepted and appealed.

John T. Chaffin for plaintiff appellant.
Russell E. Twiford for defendant appellee Rucker.
LeRoy, Wells & Shaw for defendant appellees Perry.

PER CURIAM. The crucial (factual) questions were for determination by the jury. We find nothing sufficient to indicate the jury failed to understand and apply the pertinent principles of law.

We have considered each of plaintiff's thirty-eight assignments of error. Conceding technical error in certain respects, a careful review

of the evidence and charge leaves the impression there was no error sufficient to amount to a denial of a substantial right or to constitute a sound basis for awarding a new trial.

No error.

STATE v. WILBERT GAINES AND EDWIN FRENCH ANDREWS.

(Filed 25 September 1963.)

1. Criminal Law §§ 46, 101—

While flight of an accused person is a circumstance to be considered with other facts and circumstances upon the question of an implied admission of guilt, it is insufficient, standing alone, to warrant the submission of the issue of guilt to the jury.

2. Criminal Law § 9—

While all who are present at the place of a crime and are aiding, abetting, assisting, or advising in its commission or who are present for such purpose to the knowledge of the actual perpetrator of the crime, are principals and equally guilty, mere presence of a by-stander without encouragement to the perpetrator by word or deed or conveying to the perpetrator in any manner the belief that he was standing by to lend assistance if necessary, is insufficient to constitute the by-stander an aider or abettor.

3. Criminal Law § 85—

When the State introduces evidence of statements tending to exculpate defendant and such statements are not contradicted or shown to be false by any fact or circumstance in evidence, the State is bound by the statements.

4. Criminal Law § 101—

Circumstantial evidence which raises a mere suspicion or conjecture of guilt is insufficient to withstand nonsuit.

5. Larceny § 7— Evidence held insufficient to be submitted to the jury on question of defendants' guilt as aiders or abettors.

The State's evidence tended to show that defendants entered a store with the perpetrator of the offense, stood by when the perpetrator reached over the counter and removed a tray of diamond rings, that all three fled when the clerk, after accosting them and telling them they had better put the rings back, told another clerk to call the police, and that a little more than half an hour later they were apprehended in a car driven by the perpetrator. The State also introduced testimony of declarations of the perpetrator and defendants to the effect that neither defendant knew of the perpetrator's intent. There was no evidence that either defendant said anything that would give encouragement to the perpetrator, or had

ever had the rings in his possession. *Held:* The evidence was insufficient to be submitted to the jury on the issue of defendants' guilt as aiders and abettors.

APPEAL by Wilbert Gaines and Edwin French Andrews from *McLean, J.*, January Session 1963 of GASTON.

Criminal prosecution on bill of indictment charging Billy Hill, Wilbert Gaines, Edwin French Andrews and Arthur James Hill with larceny on December 31, 1962, of "20 diamond rings of the value of over $200 dollars, of the goods, chattels and moneys of one Ken Dellinger, T/A Dellinger's Jewelry Store." Billy Hill pleaded guilty. Arthur James Hill, Gaines and Andrews pleaded not guilty.

The only evidence was that offered by the State. At the conclusion thereof, each defendant on trial moved for judgment as of nonsuit. The motion of Arthur James Hill was allowed and as to him the action was dismissed. The court overruled the motions of Gaines and Andrews. As to each, Gaines and Andrews, the jury returned a verdict of guilty; and, as to each, judgment imposing a prison sentence was pronounced. Each excepted and appealed, assigning as error the overruling of his motion for judgment as of nonsuit.

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

Mullen, Holland & Cooke and Amon Butler for defendant appellants.

BOBBITT, J. There was evidence tending to show the facts narrated below.

On December 31, 1962, about 2:00 p.m., Billy Hill, Gaines and Andrews entered Dellinger's Jewelry Store, located on East Main Street, Cherryville, N. C. Mrs. Dellinger was waiting on a customer and Mr. Davis, "the watchmaker," was waiting on another customer. Mrs. Dellinger was nearer the front of the "fairly long" store.

Mrs. Dellinger saw Billy Hill reach over "the first counter after you come inside the front door," open a sliding door and remove a tray or box of diamonds. Billy Hill, who was wearing a long coat, then "turned around" and "was facing the other boys." Mrs. Dellinger left her customer, walked toward the three boys and said: "Now, you boys have got a tray of diamond rings, and the best thing you can do is give them back to me." Billy Hill opened up his coat and said: "I don't have any rings." Mrs. Dellinger turned and said to Davis: "Call Yates McGinnis." (Yates McGinnis was the Chief of Police of

Cherryville.) Thereupon, they ("the three colored boys") "ran out the door just as fast as they could across the street." Although pursued by Mrs. Dellinger, Davis and an unidentified man, they reached and got in a Chevrolet car, parked on a nearby side street, which "pulled off" and drove away.

Davis got the license number, B 2133. He gave the information to McGinnis who "alerted" by radio "all nearby departments" to be on the lookout for a black 1960 Chevrolet Impala with license number B 2133.

The described car was observed and stopped by a member of the Gaston County Rural Police Department about 2:35 p.m. Billy Hill was driving the car. The other occupants were Arthur James Hill, Gaines and Andrews. There was no evidence as to where the occupants other than Billy Hill were seated in the car. This officer (and another who arrived shortly after the described car was stopped) found "a blue box of rings in the car on top of the glove compartment, up under the dash." The box "was closed." (This "box of rings" was identified by Mrs. Dellinger as the "tray of rings" Billy Hill had removed from the counter.) These officers also found on the front seat "one white ring box and some money with a money clip on it." In searching the (four) occupants of the car, the officers "didn't find any other jewelry or anything" and "found no weapons except two (2) ordinary pocketknives." They arrested all four occupants of the car, took them to the Rural Police office in Gastonia and thereafter Ed Groves, Captain of Detectives of the Gaston County Rural Police, after questioning the four boys, took them to Cherryville and turned them over to Chief McGinnis.

With further reference to what occurred in the store, Mrs. Dellinger testified she did not see Gaines or Andrews "do anything to encourage or entice or assist Billy Hill in taking the diamonds" and that she "did not see a weapon of any kind." While she *concluded* Billy Hill must have passed the box to Gaines or Andrews, she testified as follows: "I actually didn't see the box passed, because I couldn't see for the coat and I don't know whether the box was passed."

With further reference to what occurred when the four occupants of the car were stopped and arrested and thereafter: Each of the arresting officers testified Billy Hill stated the money on the front seat in the clip was his (Billy Hill's) money. Later, the four boys were questioned by Captain Groves. Captain Groves testified in part on direct examination as follows: "Arthur Hill said he didn't have anything to do with it. I first talked to Billy Hill, and he stated that he had got the diamond rings in Cherryville; the other three (3) had

nothing to do with it; they stated that the two (2) of them that went in the store with Billy Hill, they had gone in—that he had gone in to buy a ring for his girl friend, and they didn't know that he was going to steal anything. No, sir, they stuck to their story. They never said anything to the contrary." On cross-examination, Captain Groves testified Billy Hill stated that the car he was driving belonged to his father; that he (Billy Hill) went into the store to buy a ring for his girl friend; that "(t)he other two (2) boys had nothing to do with it"; and that "(t)hey (Gaines and Andrews) had no idea what he (Billy Hill) intended to do."

There was evidence Gaines and Andrews walked into the store with Billy Hill; that they were in the store when Billy Hill stole the box of diamonds; that they, along with Billy Hill, ran from the store when Davis was directed to call the Chief of Police; and that they left Cherryville in a Chevrolet car operated by Billy Hill and owned by Billy Hill's father.

There is no evidence Gaines or Andrews at any time had possession of any part of the diamonds or that they, by word or deed, aided and abetted Billy Hill in the theft of the box of diamonds. In short, the evidence tends to show that Gaines and Andrews were present when Billy Hill stole the box of diamonds and that they accompanied him in his flight from the scene of the crime.

The State offered in evidence the statements made by Billy Hill, Gaines and Andrews to the effect that Gaines and Andrews had nothing to do with the theft and had no knowledge that Billy Hill entered the store with intent to steal.

While the flight of an accused person may be admitted as a circumstance tending to show guilt, "(i)t does not create a presumption of guilt, nor is it sufficient standing alone, but it may be considered in connection with other facts in determining whether the combined circumstances amount to an admission." Stansbury, North Carolina Evidence, Second Edition, § 178; Strong, N. C. Index, Volume 1, Criminal Law § 46.

Decision turns on the application of these legal principles:

1. "All who are present at the place of a crime and are either aiding, abetting, assisting, or advising in its commission, or are present for such purpose to the knowledge of the actual perpetrator, are principals and equally guilty. (Citations) An aider and abetter is one who advises, counsels, procures, or encourages another to commit a crime. (Citations) To render one who does not actually participate in the commission of a crime guilty of the offense committed, there must be some evidence tending to show that he, by word or deed,

gave active encouragement to the perpetrator of the crime or by his conduct made it known to such perpetrator that he was standing by to lend assistance when and if it should become necessary. (Citation)" *S. v. Ham*, 238 N.C. 94, 97, 76 S.E. 2d 346; *S. v. Horner*, 248 N.C. 342, 350, 103 S.E. 2d 694; *S. v. Hargett*, 255 N.C. 412, 415, 121 S.E. 2d 589.

2. "When the State introduces in evidence exculpatory statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by these statements." *S. v. Carter*, 254 N.C. 475, 479, 119 S.E. 2d 461, and cases cited. Here, the statements of Billy Hill, Gaines and Andrews, offered in evidence by the State, tend to exculpate Gaines and Andrews.

While the circumstances may raise a suspicion or conjecture of the guilt of Gaines and Andrews, this is insufficient to withstand their motions for judgments as of nonsuit. Strong, N. C. Index, Volume 1, Criminal Law § 101. In our view, when considered in the light of the legal principles set forth above, the evidence was insufficient to support a verdict of guilty as to Gaines or Andrews and their motions for judgment as of nonsuit should have been allowed. Hence, the judgments of the court below are reversed and Gaines and Andrews are entitled to be discharged. It is so ordered.

Reversed.

IN THE MATTER OF THE WILL OF BRISCOE TAYLOR, DECEASED.

(Filed 25 September 1963.)

1. Evidence § 57—

The fact that the answer of a witness to a competent question is not responsive to the question does not in itself render the answer inadmissible, since if the answer contains relevant and competent statements it is competent notwithstanding the particular matter was not called for by the question, while if a unresponsive answer contains irrelevant facts they may be stricken on objection.

2. Wills § 18—

In response to a request for his opinion as to whether testator at the time of the execution of the will possessed sufficient mental capacity to know what property he had, who his relatives were, and whether he was capable of understanding the consequences of the disposition of his property by will, caveator as a witness replied that testator really did not

know what he was doing at that time, that he was sick and weak. *Held:* The answer was improperly stricken even though it was not responsive to the question, since the answer also contains relevant and competent matter bearing upon the issue of the mental capacity of testator.

3. **Trials § 33—**

An inadvertence in charging that a party's evidence tended to show certain facts when such party's evidence tended to show the contrary, must be held for prejudicial error notwithstanding that the inadvertence was due to a slip of the tongue or that the charge was incorrectly reported.

4. **Appeal and Error § 35—**

The Supreme Court is bound by the record as certified.

APPEAL by caveators from *Brock, Special Judge,* May Civil Session 1963 of BUNCOMBE.

This is a caveat proceeding. Briscoe Taylor, a citizen and resident of Buncombe County, North Carolina, died 26 October 1961 leaving a paper writing purporting to be his last will and testament. His next of kin are three sisters, two of whom live in Buncombe County and are the caveators. The other sister, who lives in California, has been given due and timely notice of the proceedings.

On 7 November 1961, George Crook, the propounder, executor and sole beneficiary under the purported will, presented said paper writing to the Clerk of the Superior Court of Buncombe County, but did not offer it for probate. After the expiration of some seven months, one of Briscoe Taylor's sisters offered the paper for probate in order that she might file a caveat thereto.

The Clerk of the Superior Court of Buncombe County issued citations to the interested parties, notifying them that a caveat had been filed and the proceeding transferred to the Superior Court of Buncombe County for trial.

The evidence offered by George Crook tends to show that Briscoe Taylor requested him to have Mr. Chester Cogburn, an attorney, draft the will; that it was prepared and dated on 16 October 1961. Briscoe Taylor, who had been quite ill for sometime, entered the Veterans' Hospital at Oteen, North Carolina, on 19 October 1961. The paper writing in question was executed on the same day he entered the hospital where he died of cancer one week later.

The caveators allege and contend that on 19 October 1961 Briscoe Taylor lacked the mental capacity to make a will, and that the propounder exerted undue influence in the procurement of the execution of the purported will.

Issues were answered in favor of the propounder and judgment was entered on the verdict.

The caveators appeal, assigning error.

Don C. Young for caveator appellants.
Lee, Lee & Cogburn for propounder appellee.

DENNY, C.J. Mrs. Florence Smith, a sister of Briscoe Taylor, testified that for three weeks before her brother entered the Veterans' Hospital she cared for him at his home from early morning until about 6:00 or 7:00 in the evening, then her niece, Mae Erwin, took over.

This witness further testified: "Based upon my conversations and my observations, I have an opinion satisfactory to myself as to whether Briscoe Taylor on October 19th to October 26th, 1961, possessed sufficient mental capacity to know what property he had, who his relatives were, what claims they had upon him, and whether he was capable of disposing of his property by will, and of understanding the consequences and effect of so doing."

"Q. 'What is that opinion, and what do you base it upon?'

"A. 'He really didn't know what he was doing at that time. He was sick and weak.'

"Objection; motion to strike; sustained; motion allowed. That is a conclusion; that is for the jury to determine."

Exception was noted to this ruling of the court and is the basis for appellants' assignment of error No. 2.

In the case of *In re Will of Tatum*, 233 N.C. 723, 65 S.E. 2d 351, the witness was asked a question similar to the one asked the witness in the case at bar. After stating that she had an opinion, she was then requested to state her opinion, and she said: "In my opinion, I feel that he knew what he was doing, as he always did. There is not a doubt in my mind that he didn't know what he was doing."

"Motion to strike as not being responsive.

"Motion allowed."

From an adverse verdict the propounders appealed. This Court held the exclusion of the foregoing evidence was error. The Court said: "Whether the answers were responsive to the questions is not controlling. The determinative question before the court below was whether the answers were relevant and competent as bearing upon the issue of mental capacity of the testator. If the answers furnished relevant facts, they were nonetheless admissible * * * [although] they were not specifically asked for. Silence may not be imposed to eliminate relevant, pertinent testimony simply because it is not specifically re-

quested. This rule is rooted in the fundamental tenets of natural justice and is supported by common sense. Its universal application can do no harm, for if an unresponsive answer produces irrelevant facts, they may be stricken out and withdrawn from the jury. See *Huffman v. Lumber Co.*, 169 N.C. 259, 85 S.E. 148; *Hodges v. Wilson*, 165 N.C. 323, 81 S.E. 340."

The appellants in this case further assign as error that portion of the charge given to the jury on the second issue as hereinafter set out in parentheses: " * * * The burden of proof rests upon the Caveators on this issue to satisfy you by the greater weight of the evidence that at the time Briscoe Taylor signed and executed Propounder's Exhibit I [the purported will], he was incapable, by reason of his mental incapacity, to know and comprehend the nature, character and extent of his property, who the natural objects of his bounty were, how he was disposing of his property, and of understanding the effect and consequences of the disposition of that property, and the effect the disposition would have on his estate. (Upon that issue, the Caveators have offered evidence which tends to show by the opinion of certain witnesses that at the time of the execution of this instrument, Briscoe Taylor, in the opinion of the witnesses, did have sufficient mental capacity)."

The evidence of the caveators does not support that portion of the charge to which they except; in fact, the evidence is directly contrary thereto. This reported instruction of the court may not be accurate. Even so, we are bound by the record as certified to us. *Redd v. Mecklenburg Nurseries*, 241 N.C. 385, 85 S.E. 2d 311; *Respass v. Bonner*, 237 N.C. 310, 74 S.E. 2d 721; *Grandy v. Walker*, 234 N.C. 734, 68 S.E. 2d 807; *Dellinger v. Clark*, 234 N.C. 419, 67 S.E. 2d 448; Strong's North Carolina Index, Appeal and Error, section 35.

Both of the foregoing assignments of error are sustained and the caveators are entitled to a new trial.

New trial.

STATE OF NORTH CAROLINA v. GEORGE MITCHELL.

(Filed 25 September 1963.)

1. Intoxicating Liquor §§ 13b, c, d—

Evidence tending to show that an officer followed an automobile into a driveway, had his headlights shining on the car, saw a person sitting in

the car, and saw defendant get out of the car on its left side, saw through the back window of the car jars of clear liquid, searched the car and found 30 gallons of nontaxpaid whiskey therein, and that defendant fled, *is held* sufficient to overrule nonsuit on the charges of possession of alcoholic beverages upon which the Federal and State taxes had not been paid, G.S. 18-48, possession of such liquor for the purpose of sale, G.S. 18-50, and with the unlawful transportation of such liquor for the purpose of sale, G.S. 18-2.

2. Indictment and Warrant § 5—

The provisions of G.S. 9-27 are directory and not mandatory, and the absence of an endorsement upon the back of an indictment indicating that witnesses were duly examined is not sufficient to overcome the presumption of the validity of the indictment arising from its return by the grand jury as "a true bill," and, in the absence of a motion to quash or motion in arrest of judgment, supported by evidence, an assignment of error to the indictment on this ground will not be sustained.

3. Criminal Law § 32—

Defendant's plea of not guilty controverts and puts in issue the existence of every fact essential to constitute the offenses charged in the indictment, and places the burden upon the State to prove beyond a reasonable doubt each of the essential elements of the offenses.

4. Criminal Law § 108—

The court may not intimate in its charge that any controverted fact had or had not been established. G.S. 1-180.

5. Intoxicating Liquor § 15—

Upon defendant's plea of not guilty to charges of possession of alcoholic beverages upon which the Federal and State taxes had not been paid, and unlawful possession and transportation of such beverages for the purpose of sale, it is error for the court to charge the jury that defendant did not challenge whether the liquor was nontaxpaid or the question of who had it for what purpose, but simply denied that he was the driver of the car in which the patrolman found the whiskey being transported, since the burden remains upon the State, upon defendant's plea of not guilty, to prove each essential element of the offenses charged.

APPEAL by defendant from *Mintz, J.*, March 1963 Session of JONES.

Criminal prosecution on an indictment charging defendant in the first count on 21 July 1962 with unlawfully having in his possession alcoholic beverages upon which the taxes imposed by the laws of the Congress of the United States and by the laws of this State have not been paid; in the second count on said date with the unlawful possession of such alcoholic beverages for the purpose of sale; and in the third count on said date with the unlawful transportation for the purpose of sale of such alcoholic beverages.

Plea: Not guilty. Verdict: Guilty as charged.

From a judgment of imprisonment, suspended upon payment of a $500 fine and costs, defendant appeals.

Attorney General T. W. Bruton and Assistant Attorney General James F. Bullock for the State.

Donald P. Brock for defendant appellant.

PARKER, J. The State's evidence shows these facts: About 2:00 a.m. on 21 July 1962 B. O. Mercer, a State highway patrolman, saw a Ford automobile traveling south on Highway 17 turn on Highway 58, and proceed toward Trenton ahead of him. This automobile continually increased its speed until it reached 90 miles an hour near Oliver's Crossroads, when it slowed down and headed into a driveway. Mercer pulled immediately to the side of this automobile with his headlights shining in the automobile. A Negro was sitting in it. When Mercer got out of his patrol car and was standing by the door, the defendant George Mitchell got out of the left side of the Ford automobile. Mercer's headlights were shining on him. The defendant started toward Mercer, and then turned and ran around a house. Mercer saw through the back window of the Ford automobile jars of a clear liquid. The Ford automobile was searched by Mercer and the sheriff, and they found in it 30 gallons of whiskey in jugs and jars. No tax stamps were on any of the jugs and jars containing the 30 gallons of whisky. Mercer did not see the defendant again until his lawyer about a month later brought him into the sheriff's office, when the defendant gave bond. Mercer had a warrant issued against defendant on 8 or 9 August 1962.

Defendant offered no evidence.

There is no merit to defendant's assignment of error that the court erred in denying his motion for judgment of nonsuit. The State's evidence was amply sufficient to carry the case to the jury on all three counts in the indictment. G.S. 18-48; G.S. 18-50; G.S. 18-2; *S. v. Hill*, 236 N.C. 704, 73 S.E. 2d 894; *S. v. Guffey*, 252 N.C. 60, 112 S.E. 2d 734.

Defendant assigns as error that the "indictment on which the defendant was tried shows on its face that no witnesses were examined and therefore no basis for finding a true bill." This assignment of error is supported by his Exception #2, which appears below the copy of the indictment in the record without any indication of what he is excepting to, except as stated in his assignment of error. The indict-

ment, as it appears in the record, shows no mark beside the names of the witnesses written on the back of the indictment.

Defendant entered a plea of not guilty. He neither made a motion to quash the indictment nor that judgment on the conviction be arrested on the ground that the indictment was fatally defective for that it did not appear by an endorsement of the foreman of the grand jury that any person whose name appeared on the back of the indictment had been sworn and had testified before the grand jury. No evidence was offered by defendant that no witnesses were examined by the grand jury before it returned the indictment "a true bill." *S. v. Sultan*, 142 N.C. 569, 54 S.E. 841; *S. v. Davis*, 203 N.C. 47, 164 S.E. 732.

The provisions of G.S. 9-27 with respect to the foreman of the grand jury are directory and not mandatory. *S. v. Avant*, 202 N.C. 680, 163 S.E. 806. The mere absence of such an endorsement is not sufficient to overcome the presumption of the validity of the indictment arising from its return by the grand jury as "a true bill." *S. v. Lancaster*, 210 N.C. 584, 187 S.E. 802; *S. v. Lanier*, 90 N.C. 714. If this omission had been brought to the attention of the trial judge in apt time, it would doubtless have resulted in a correction of the omission, as was done in *S. v. Avant, supra*, and *S. v. Davis, supra*. This assignment of error is overruled.

Defendant assigns as error this part of the charge: "He [the defendant] doesn't challenge the question of whether or not it is tax-paid whiskey or non-tax-paid. He doesn't challenge the question of who had it for what purpose. He simply denies that he was the driver of the car and simply challenges the statement by the Patrolman that he was driving."

Defendant's plea of not guilty controverts and puts in issue the existence of every fact essential to constitute the offenses charged in the indictment, *S. v. Cooper*, 256 N.C. 372, 381, 124 S.E. 2d 91, 97, and cast upon the State the burden of proving beyond a reasonable doubt all the essential elements of the offenses charged in the three counts of the indictment. On the first count: (1) Possession of alcoholic beverages; (2) the Federal or State tax had not been paid, G.S. 18-48; (3) alcoholic content exceeding 14% by volume, G.S. 18-60. On the second count, the same things plus the fact that his possession was for the purpose of sale, G.S. 18-50. On the third count, the transportation of such alcoholic beverages for the purpose of sale, G.S. 18-2. *S. v. Pitt*, 248 N.C. 57, 102 S.E. 2d 410.

"Proof must be made without intimation or suggestion from the court that the controverted facts have or have not been established.

G.S. 1-180. The assumption by the court that any fact controverted by a plea of not guilty has been established is prejudicial error." *S. v. Swaringen,* 249 N.C. 38, 105 S.E. 2d 99.

A reading of the challenged part of the charge leads to the unescapable conclusion that the only controverted fact which was left to the jury to determine was whether defendant was the driver of the Ford automobile which the State's evidence shows contained 30 gallons of non-tax-paid whisky. This expression of opinion or assumption by the trial court that all the essential elements of the offenses charged in the three counts, which were controverted and put in issue by defendant's plea of not guilty, were not challenged and not denied by the defendant, except who was driving the Ford automobile which the State's evidence shows contained 30 gallons of non-tax-paid whisky, is prejudicial error. Certainly, in respect to the first two counts in the indictment, if not also in the third count, who was the driver of the Ford automobile was not an essential element of the offenses charged. This expression of opinion or assumption by the able and fair trial judge was, we are confident, unintentional, but its effect upon the defendant was disastrous, and entitles him to a

New trial.

MADGE BARLOWE ROBERTS AND HUSBAND, W. M. ROBERTS v. FRANK W. BARLOWE AND WIFE, JERRY BARLOWE

(Filed 25 September 1963.)

1. Partition § 1—

Proceedings for partition are equitable in nature, and in a suit for partition a court of equity has power to adjust all equities between the parties with respect to the property.

2. Partition § 8—

Where respondent admits petitioner's allegation of tenancy in common and that the land should be sold for partition, but asserts claims against petitioner for payments by respondent of obligations of petitioner and liens against the land, judgment on the pleadings decreeing sale is proper, but respondent is entitled as a matter of right to have his claims determined before an order for distribution of the proceeds of the sale is entered.

APPEAL by defendants from *Riddle, S.J.,* June 3, 1963, Civil Session of GASTON.

Special proceeding for sale of lands for partition.

The petition alleges and the answer admits that feme plaintiff and male defendant were formerly wife and husband and owned the lands described in the petition as tenants by the entirety, they were divorced in 1956 and are now tenants in common, and said lands should be sold for partition.

The answer alleges that male defendant is entitled to reimbursement from feme plaintiff's share of the proceeds of the sale (1) $2000 for unauthorized purchases by her prior to the divorce on his credit, which sum he has paid and which she is obligated to repay, and (2) a $4000 debt, which was secured by a deed of trust and which was a lien on said lands at the time of the divorce, he having since paid this obligation. The answer further alleges that there is an unpaid indebtedness of $2000, secured by a deed of trust on said lands executed by the plaintiffs and defendants, that the indebtedness was incurred entirely for the benefit of feme plaintiff and should be paid and discharged from her share of the proceeds of the sale for partition.

Plaintiffs deny any obligation to pay the items referred to in the answer, and deny that they are chargeable to feme plaintiff's share.

At the trial plaintiff moved for judgment on the pleadings. Without determining by jury trial or otherwise the validity or invalidity of male defendant's claims, the court entered judgment ordering a sale of the lands and appointing a commissioner to make the sale. Defendants appeal.

Hollowell & Stott for plaintiffs.
Mullen, Holland & Cooke for defendants.

PER CURIAM. Proceedings for partition are equitable in nature, and in a suit for partition a court of equity has power to adjust all equities between the parties with respect to the property to be partitioned. A sale for partition may be ordered and the rights of the parties adjusted from the proceeds of the sale. *Henson v. Henson,* 236 N.C. 429, 72 S.E. 2d 873. See also 14 Am. Jur., Cotenancy, ss. 43-46, pp. 109-113; 68 C.J.S., Partition, s. 136, pp. 212, 213.

Since the court below made no order affecting the distribution of the proceeds of the sale, the judgment directing a sale of the lands and appointing a commissioner will not be held erroneous. But the male defendant, having asserted his claims before an order of distribution was made, is entitled as a matter of right to have his claims determined before an order of distribution of the proceeds of the sale is entered. *Lewis, Ex Parte,* 42 N.C. 4.

Affirmed.

JETHRO MIDGETT, JR. v.
NORTH CAROLINA STATE HIGHWAY COMMISSION.

(Filed 9 October 1963.)

1. Waters and Water Courses § 1—

Lower lying parcels of land are servient to those on higher levels and the owner of each is required to receive and allow passage of the natural flow of surface water from the higher land and may not obstruct or interrupt the flow of surface water to the detriment or injury of the upper estates. The "common-enemy doctrine" has not been recognized in this State.

2. Same—

The principles which apply to surface waters from inland streams apply with equal force to overflow water from the ocean.

3. Same; *Eminent Domain* § 2—

The owner of land may recover damages as for a "taking" for a nuisance resulting from the construction of a highway at an elevation which prevents waters from the ocean periodically coming over the dunes in time of storm from being dissipated into the sound, and which thus diverts surface water onto the land to its damage. If such flooding is so extraordinary and unusual as to constitute an "Act of God" in the legal sense, no recovery can be had, but when the matter is controverted the question is ordinarily a matter for the jury.

4. Same—

In order to constitute a nuisance amounting to a "taking" of private property, the structure creating the nuisance must be permanent in nature, which is one which may not be readily altered at reasonable expense so as to obviate its harmful effects. But even if a structure be "permanent", its removal after damage does not abate the action, although its removal prior to the infliction of damage precludes action.

5. Eminent Domain § 11—

Allegations that defendant State Highway Commission constructed a highway at an elevation which prevented waters of the ocean flowing over the dunes in time of storm from being dissipated toward the sound, and thus caused such waters to inundate plaintiff's property, resulting in a depreciation in its value, *held* to state a cause of action to recover for the depreciation in value of the realty as for a "taking."

6. Eminent Domain §§ 1, 11—

Allegations that the State Highway Commission constructed a highway at an elevation which caused waters from the ocean flowing over the dunes in a storm to inundate plaintiff's land and damage personal property stored in plaintiff's buildings on the land *held* not to state a cause of action for damage to the personalty, since no "taking" of personalty can be predicated on the theory of permanent nuisance, and, further, the Highway Commission has no authority to appropriate personal property for public use. G.S. 136-19.

7. Same—

The requirement that compensation be paid for the taking of land or an interest therein under the power of eminent domain is self-executing, and therefore when no statute affords an adequate remedy under the particular fact situation, plaintiff may maintain an action at common law.

8. Same—

The owner of land may maintain an action at common law to recover for the depreciation in the value of land resulting from a nuisance created by the construction of a highway at an elevation which periodically diverts storm waters of the ocean across the land, there being no undertaking by defendant to condemn plaintiff's property under G.S. 115-85 or G.S. 40-12 et seq., or otherwise, and if G.S. 136-19 were applicable in such instance, plaintiff's right of action might be barred before it accrued.

APPEAL by plaintiff from *Peel, J.*, May 1963 Session of DARE.

Civil action to recover damages for property allegedly taken for public use as the direct result of the maintenance of a continuing nuisance.

The complaint, summarized in part and verbatim in part, contains the following allegations:

1. Plaintiff owns two lots in Nags Head Township, Dare County, situate on the west side of "Old State Highway #158," and on the lots are the following buildings: A two-story building used for business and as a dwelling, a storehouse, two cottages, a double garage, and a servants' quarters. On 7 March 1962 these buildings contained valuable personal property.

"2. That, sometime prior to the 22nd day of September 1959, defendant began the construction of a highway known as Highway #158 By-pass. As this construction proceeded, plaintiff noted that said highway, as being constructed, would constitute a dam which would prevent the waters of the ocean that, for many years, have come over the dunes in time of storm, from being dissipated toward the sound on the west side of the Outer Banks. That such dam constituted a continuing nuisance. Plaintiff protested and had protest made on his behalf against construction of said highway at the proposed elevation but such protests were in vain, the defendant proceeding to construct said new highway at a consistently high level above the surrounding terrain and just to the west of plaintiff's property, defendant completely ignoring protests of the plaintiff.

"3. That, on or about March 6-7, 1962, large quantities of water from the ocean came over the dune line, as it had many times in the past and, by reason of being blocked by the road, said ocean waters

inundated the property of the plaintiff depreciating the value of his property to his great loss in the amount of $13,600.00.

"4. That, by the construction of said road and resulting damage, plaintiff has been deprived of his property contrary to the provisions of Article I, Section 17, of the Constitution of North Carolina and the creation and maintenance of such highway has constituted such a nuisance as to substantially impair the value of plaintiff's property and such impairment is a taking, in a constitutional sense, within the principle of eminent domain.

"5. That the plaintiff has not been dispossessed of his property and defendant has not seized plaintiff's property but plaintiff's property has suffered an impairment of value by reason of the injury inflicted by the defendant, plaintiff by reason of the conduct of defendant having been deprived of his property without due process of law contrary to the Fifth Amendment to the Federal Constitution. The value of plaintiff's property has been effectively and appreciably impaired by the acts of the defendant in building said road or dam and such impairment constitutes a taking of plaintiff's land."

Defendant demurred. The demurrer was sustained and the action dismissed. Plaintiff appeals.

Frank B. Aycock, Jr., and Robert B. Lowry for plaintiff.
Attorney General Bruton, Assistant Attorney General Lewis, Trial Attorney McDaniel and Gerald F. White for defendant.

MOORE, J. The grounds for demurrer asserted by defendant are in substance: (1) The facts alleged do not constitute a taking of private property for public use in the constitutional sense and do not amount to a legally cognizable injury to property, but present an occurrence of incidental or consequential damage from flood waters against which, under the "common-enemy doctrine," a land owner may protect himself by constructing walls, dams, barriers or other structures without exposing himself to liability for resulting injury to a neighboring landowner; and (2) if there was a taking, an action in superior court may not be maintained therefor, the proper procedure being a proceeding pursuant to G.S. 136-19 and G.S., Ch. 40, art. 2.

— I —

North Carolina has not recognized and does not apply the "common-enemy doctrine" with reference to surface waters. 59 A. L. R. 2d.,

Anno: Surface Waters — Drainage — Etc., s. 5, p. 429. We follow the "Civil-Law Rule," which recognizes a natural servitude of natural drainage as between adjoining lands, so that the lower owner must accept the surface water which naturally drains onto his land but, on the other hand, the upper owner cannot change the natural drainage so as to increase the natural burden. *ibid;* also *Johnson v. Winston-Salem,* 239 N. C. 697, 81 S. E. 2d 153.

The common-enemy doctrine is sometimes called the "old common-law rule." 1 Lewis: Eminent Domain, 3d. Ed., s. 110, p. 148; *Deason v. Southern Ry. Co.,* 140 S. E. 575 (S. C. 1927). In its strict application, it is that surface waters are a common enemy and, as an incident to the right of a landowner to use his property as he pleases, he has an unqualified right by operations on his own land to fend off surface waters as he sees fit without regard to the consequences to other landowners, who have the duty and right to protect themselves as best they can. This rule in its original rigor was applied in many states during the pioneer period of settlement when the country was largely undeveloped and sparsely settled. 59 A. L. R. 2d 423-425.

While there is not complete uniformity in the modern application of the common-enemy doctrine in the states which recognize it, each state being influenced by its own peculiar geographical and climatic conditions, it has been generally modified to the point that there is only a very fine line of distinction between it and the civil-law rule. The tendency of the "common-enemy doctrine" jurisdictions has been to develop strict definitions of terms and to apply these definitions to factual circumstances. We review here briefly some of the definitions and their effect in application. (a) A *stream* is water flowing in a defined channel, a stream in fact as distinguished from mere surface drainage. The size of the stream is immaterial, and the flow need not be continuous. 1 Lewis: Eminent Domain, 3d. Ed. s. 70, p. 68; *Mader v. Mettenbrink,* 65 N. W. 2d 334 (Ned. 1954); *Everett v. Davis,* 115 P. 2d 821 (Cal. 1941); *Kroeger v. Twin Buttes R. Co.,* 114 P. 553 (Ariz. 1911). (b) *Surface waters* are those which accumulate from rains, melting snows or springs, diffuse themselves over the surface of the ground and seek a lower level by force of gravity without flowing in a defined channel. 93 C. J. S., Waters, s. 112, p. 799; 1 Lewis: Eminent Domain, 3d. Ed., s. 110, p. 145; *Mader v. Mettenbrink, supra; Magle v. Moore,* 104 P. 2d 785 (Cal. 1940). They become streams after being gathered into natural channels. *Everett v. Davis, supra.* (c) *Flood waters* are waters above the highest line of the ordinary flood of a stream, or waters which spread out from overflowing streams. 1 Lewis (*supra*), s. 111, p. 150. It is generally held

that overflow or flood waters become *surface waters* when they leave the main current never to return and spread out over lower ground; but if they form a continuous body with the water flowing in the ordinary channel, the current widening to the full width of the water, or if they depart from the stream presently to return or to run into another stream or lake, they are to be regarded as part of the stream and not as surface waters. 93 C. J. S., 801. (d) The *flood plane* of a live stream is the adjacent lands overflowed in times of high water, from which flood waters return to the channel of the stream at a lower point. A flood plane is a part of the channel and waters flowing therein are flood waters. *Mader v. Mettenbrink, supra.* (e) Waters *flowing* in a flood plane, and flood and surface waters which have gathered into and are *flowing* in a natural channel, seasonal stream, natural depression, arroyo, gully, canyon, ditch, swale, draw or ravine, may not be obstructed or diverted in such a way as to injure an upper or lower landowner. *Everett v. Davis, supra; Kroeger v. Twin Buttes R. Co., supra; Magle v. Moore, supra; McGill v. Card-Adams Co.,* 47 N. W. 2d 912 (Neb. 1951); *McClure v. City of Red Wing,* 9 N. W. 767 (Minn. 1881). (f) The right of the owner of riparian land to the *natural flow* of water in a stream along the land is an incorporeal hereditament and is an incident to and is annexed to the land as a part and parcel of it. *Union Falls Power Co. v. Marinette County,* 298 N. W. 598, 134 A. L. R. 958 (Wis. 1941); *Van Etten v. City of New York,* 124 N. E. 201 (N. Y. 1919); *McGill v. Card-Adams Co. supra; McClure v. City of Red Wing, supra.* One may not back water on another in such a way as to create a *nuisance.* "A private nuisance is anything done to the hurt or annoyance of the lands, tenements or hereditaments of another." *Deason v. Southern Ry. Co., supra.* (g) Where the damage from the obstruction or diversion of water is of such nature as to amount to a nuisance, either public or private, the party injured has his remedy. *Dickinson v. New England Power Co.,* 153 N. E. 458 (Mass. 1926).

In a common-enemy doctrine jurisdiction it would probably be required that the complaint describe the topography of the *locus in quo* and the configuration of its surface in more detail than the challenged complaint contains. It might be required that the pleading allege that when the storm-driven sea waters broke over the dune line they gathered in a natural channel, ravine or depression and flowed as a stream westwardly toward the Sound until obstructed by the barrier formed by the elevated highway across the stream. On the other hand, in a jurisdiction requiring liberal construction of pleadings, as ours

does *(Little v. Oil Corp.,* 249 N.C. 773, 776, 107 S.E. 2d 729), it might be maintained that the reasonable intendment of the pleadings as cast is that the waters flowed as a stream in a natural depression until impounded by the elevated highway and cast back upon plaintiff's land. It is common knowledge that waters naturally flow from higher to lower levels and tend to follow depressions and ravines.

We are not here concerned with the requirements of the common-enemy doctrine. We think the allegations of plaintiff's complaint, on this phase of the case, sufficient. The civil-law rule of this jurisdiction places less emphasis, than does the common-enemy doctrine, on the existence of well defined watercourses. Our rule embraces surface waters flowing and draining naturally from a higher to a lower level, and is stated thus: The law confers on the owner of each upper estate an easement or servitude in the lower estates for the drainage of surface water flowing in its natural course and manner without obstruction or interruption by the owners of the lower estates to the detriment or injury of the upper estates. Each of the lower parcels along the drainway is servient to those on higher levels in the sense that each is required to receive and allow passage of the natural flow of surface water from higher land. *Johnson v. Winston-Salem, supra.* See also: *Braswell v. Highway Commission,* 250 N.C. 508, 108 S.E. 2d 912; *Young v. Asheville,* 241 N.C. 618, 86 S.E. 2d 408; *Bruton v. Light Co.,* 217 N.C. 1, 6 S.E. 2d 822; *Jones v. Kramer,* 133 N.C. 446, 45 S.E. 827.

No cases have come to our attention involving overflow waters from an ocean, sea or gulf, though we have made an exhaustive search. However, we discern no reason why the principles which apply to surface waters from inland streams should not with equal force apply to overflow waters from the ocean. The circumstances in the instant case are closely parallel to those in the cases involving the inundation of lands lying between a river and the levees constructed along the river for flood control. In some cases "where a levee is so constructed as to leave property between the levee and the river such property is deemed taken for levee purposes and must be paid for." 5 Nichols on Eminent Domain, 3d. Ed., S. 16.105, p. 77, and cases cited. "If the land was previously subject to inundation and after the construction of a levee was still subject to inundation it has been held that the owner was not entitled to recover for the damages caused thereby unless the inundation after the erection of the flood-control structures was greater in extent that it had previously been. In the latter case the recovery was limited to the difference between the total damages suffered after such construction and the damages which would have

been suffered in any event under normal conditions." *ibid,* pp. 81, 82. In a case such as the one at bar it is for the jury to determine whether there has been any damage to plaintiff's land by construction of the elevated highway in excess of that which would have been suffered had such highway not been constructed and, if so, the extent of such excess damage to the value of the land. However, this should be considered by the jury in conjunction with the general rule as to the measure of damages. *Clinard v. Kernersville,* 215 N.C. 745, 3 S.E. 2d 267.

Of course, the plaintiff is not entitled to maintain the action unless the facts alleged constitute a cognizable cause of action. An Act of God is not a sufficient predicate for an action for damages. The term "Act of God," in its legal sense, applies only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them. *Law v. Gulf States Steel Co.,* 156 S. 835 (Ala. 1934). The builder of an obstruction of surface waters is not bound to anticipate unprecedented storms or rainfalls, and is not liable for damages resulting from extraordinary storms and floods. *Bruton v. Light Co., supra; Taylor v. Chesapeake & O. R. Co.,* 100 S.E. 218, 7 A. L. R. 112 (W. Va. 1919). The owner of a barrier to surface water is not bound to provide against floods of which the usual course of nature affords no premonition. An extraordinary flood is one the coming of which is not to be anticipated from the natural course of nature. An ordinary flood is one, the repetition of which, although at uncertain intervals, can be anticipated. The fact that similar floods had occurred has been held to tend strongly to show that they are not so extraordinary and unusual that they might not have been reasonably expected to occur. 93 C. J. S., Waters, s. 20c, pp. 629-631; 1 Lewis: Eminent Domain, 3d. Ed., s. 113, p. 159. Where the matter is controverted, it is ordinarily a question for the jury and the burden is on plaintiff to show that the storm or flood was such as might reasonably have been anticipated and not an Act of God. Plaintiff alleges "That, on or about March 6-7, 1962, large quantities of water from the ocean came over the dune line, as it had many times in the past. . . ." In our opinion this is sufficient pleading of a flood which might have been anticipated.

Unless made so by statute, a governmental agency is not liable for the torts and wrongs of its employees and agents in the performance of its duties for the public benefit. *Eller v. Board of Education,* 242 N.C. 584, 89 S.E. 2d 144; *Sandlin v. Wilmington,* 185 N.C. 257, 116 S.E. 733; *Price v. Trustees,* 172 N.C. 84, 89 S.E. 1066. But if a govern-

mental agency maintains a nuisance, permanent in nature, causing damage to and diminution in the value of land, the nuisance is regarded and dealt with as an appropriation of property to the extent of the injury inflicted. *Eller v. Board of Education, supra; Sandlin v. Wilmington, supra.* The right to have water flow in the direction provided by nature is a property right, and if such right of a landowner is materially interfered with so that his land is flooded by the manner in which a highway is constructed, it is a nuisance and a taking of property for public use for which compensation must be paid. *Braswell v. Highway Commission, supra;* 18 Am. Jur., Eminent Domain, s. 134, pp. 759, 760; 5 Nichols on Eminent Domain, 3d. Ed., s. 16.105, p. 78; 1 Lewis: Eminent Domain, 3d. Ed., ss. 109, 112, pp. 144, 151; *Manigault v. Springs,* 199 U.S. 473 (1905); *Jacobs v. United States,* 290 U.S. 13 (1933).

A nuisance maintained by a governmental agency impairing private property is a taking in the constitutional sense. *Raleigh v. Edwards,* 235 N.C. 671, 71 S.E. 2d 396. There need not be a seizure of the property or dispossession of the owners; it is a taking if the value is substantially impaired. *McKinney v. High Point,* 237 N.C. 66, 74 S.E. 2d 440. Permanent liability to intermittent, but inevitably recurring, overflows constitutes a taking. 18 Am. Jur., Eminent Domain, s. 134, pp. 759, 760. In order to create an enforceable liability against the government it is, at least, necessary that the overflow of water be such as was reasonably to have been anticipated by the government, to be the *direct* result of the structure established and maintained by the government, and constitute an actual permanent invasion of the land, or a right appurtenant thereto, amounting to an appropriation of and not merely an injury to the property. *Sanguinetti v. United States,* 264 U.S. 146 (1924). To constitute a permanent invasion of property rights and an impairment of the value thereof the obstruction or structure need not be permanent in fact, but it must be permanent in nature. A permanent structure is one which may not be readily altered at reasonable expense so as to remedy its harmful effect, or one of a durable character evidently intended to last indefinitely and costing practically as much to alter or remove as to build in the first place. *Inmon v. Chesapeake & O. Ry. Co.,* 158 S.W. 2d 147 (Ky. 1942). A segment of an improved highway is a structure of permanent nature. For examples of temporary obstructions see *Phillips v. Chesson,* 231 N.C. 566, 58 S.E. 2d 343; *Jones v. Kramer, supra.* The removal of the permanent structure during the pendency of the action and after direct damage has resulted from its construction and maintenance would not abate the action or prevent

the recovery of permanent damages. *Pernell v. Henderson,* 220 N.C. 79, 16 S.E. 2d 449. Once the cause of action has occurred by the infliction of damage to the property, the taking is a *fait accompli.* This is true because the government had the authority to invade the property rights of the landowner and to appropriate them to public use in the first instance, and the owner had no right to abate the nuisance. His only remedy is a single action for permanent damage to his property by reason of the taking. The government has an easement to continue the obstruction permanently, and whether it will continue to maintain the obstruction, alter it, or remove it altogether is optional with the government. *Braswell v. Highway Commission, supra; Phillips v. Chesson, supra; Bruton v. Light Co., supra; Greenville v. Highway Commission,* 196 N.C. 226, 145 S.E. 31; *Beach v. Railroad Co.,* 120 N.C. 498, 26 S.E. 703. However, there can be no recovery of damages before they occur, and if the obstruction is removed before the incidence of damage no action will lie. *Raleigh v. Edwards, supra.*

When the complaint is tested by application of the foregoing principles we are of the opinion, and so hold, that it states a legally cognizable cause of action for damages by reason of the appropriation of land for public use. The allegations of damage to personal property, however, are not sustained. Under the circumstances of this case and the permanent nuisance theory upon which it is maintained an action for the "taking" of movable personal property may not be upheld. There is no permanent nuisance with respect to such property and the damage thereto is regarded as incidental and not direct. Furthermore, the Highway Commission has no authority to appropriate personal property for public use. G.S. 136-19. "No allowance can be made for personal property, as distinguished from fixtures, located on the condemned premises. . . ." 29 C. J. S., Eminent Domain, s. 175a(1), p. 1045. Under the facts alleged, any injury to personal property is *damnum absque injuria.* See *Williams v. Highway Commission,* 252 N.C. 141, 113 S.E. 2d 263; *Pemberton v. Greensboro,* 208 N.C. 466, 181 S.E. 258.

— II —

We hold that the present action may be maintained and plaintiff is not restricted to the procedures set out in G.S. 136-19 and G.S., Ch. 40, art. 2.

Our Constitution, Article I, section 17, guarantees payment of compensation for property taken by sovereign authority. *Braswell v.*

Highway Commission, supra; DeBruhl v. Highway Commission, 247 N.C. 671, 102 S.E. 2d 229; *Ivester v. Winston-Salem,* 215 N.C. 1, 1 S.E. 2d 88. The statutory remedy for the recovery of damages to private property taken for public service is ordinarily exclusive, and when the statutory procedure is available, the owner, failing to pursue the statutory procedure, may not institute an action in superior court to recover his damages. *Harwood v. Concord,* 201 N.C. 781, 161 S.E. 534. But there is an exception to this rule. A constitutional prohibition against taking or damaging private property for public use without just compensation is self-executing, and neither requires any law for its enforcement nor is susceptible of impairment by legislation. And where the Constitution points out no remedy and no statute affords an adequate remedy under a particular fact situation, the common law will furnish the appropriate action for adequate redress of such grievance. *Sale v. Highway Commission,* 242 N.C. 612, 89 S.E. 2d 290.

The instant case is indistinguishable from *Eller v. Board of Education, supra,* with respect to facts controlling procedure. There the action, instituted originally in superior court, was held to be procedurally proper. The complaint alleged that defendant, in constructing a school building, pushed quantities of dirt, rock and stone into a branch which formed the boundary between the school lot and plaintiffs' land, thereby impeding the flow of the water in the branch and causing it to back up on plaintiffs' property, and that defendant's septic tank polluted and contaminated the waters of the branch, plaintiffs' spring, and the waters backed onto plaintiffs' premises, and their property was rendered uninhabitable. It was held, in substance, that the facts alleged constituted a nuisance amounting to an appropriation of plaintiffs' property and entitling them to compensation. With respect to the procedure involved this Court said: "Defendant further contends that plaintiffs' sole remedy is by petition before the clerk, under G.S. 40-12. Defendant has not undertaken to condemn plaintiffs' property under G.S. 115-85, under G.S. 40-12 *et seq.,* or otherwise; nor has it taken possession thereof for school purposes. It does not claim plaintiffs' land. Presumably, it had no intention to 'take' or pay for plaintiffs' land or any rights therein. G.S. 40-12 *et seq.,* with provisions for commissioners, appraisal, viewing the premises, etc., are applicable only to instances where the condemnor acquires title and right to possession of specific land. They have no application here."

There is another consideration which seems to render the proceeding before the clerk inapposite here. G.S. 136-19 (the pertinent por-

tion of which has been rewritten, revised and codified as G.S. 136-103 *et seq.*), provides that the landowner must file his proceeding for compensation within six months after notice of completion of the highway project is posted, or, if no such notice is posted, within twelve months of the actual completion of the project. This provision would make a recovery by the plaintiff in the instant case impossible. Where there has been a taking of property by the construction and maintenance of a nuisance, the right of action does not accrue until damage has occurred. *Raleigh v. Edwards, supra; McDaniel v. Greenville-Carolina Power Co.*, 78 S.E. 980, 6 A. L. R. 1321 (S.C. 1913). And ordinarily the applicable statute of limitations begins to run against the landowner at the time the first damage arises from the nuisance. *McCary v. McLendon*, 70 S. 715 (Ala. 1915). In the case at bar it appears that Highway 158 By-pass was constructed in 1959. The first damage occurred in March 1962. If G.S. 136-19 should be plaintiff's exclusive remedy and its provisions strictly applied, his cause of action would have been barred before it accrued.

The judgment below is

Reversed.

PALMER NIXON, EXECUTOR OF CHARLIE NIXON, DECEASED, LETTIE N. BUNCH AND ADELE NIXON v. QUEEN ESTHER NIXON, CARL NIXON AND WIFE, SAVANNAH NIXON.

(Filed 9 October 1963.)

1. **Trial § 21—**

On motion for nonsuit, the evidence is to be considered in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn therefrom.

2. **Trial § 22—**

Discrepancies and contradictions, even in plaintiff's evidence, do not justify nonsuit.

3. **Fraud § 2.1—**

The distinction between fraud in the *factum* and fraud in the treaty is dependent in a measure on the attendant facts and circumstances; fraud in the *factum* arises when a person is induced to execute an instrument different than the one intended so that the instrument intended to be executed and the instrument actually executed are not the same, while fraud in the treaty is based upon misrepresentations knowingly made with fraudulent intent which induce a person to execute an instrument which he otherwise would not have done.

4. Cancellation and Rescission of Instruments § 2—

Evidence tending to show that the owner of an interest in land was induced to execute a deed conveying his interest to two of his children by the false representation of another child that the instrument signed was a paper necessary to be executed to prevent him from losing his social security payments, that he received no consideration for the deed and that he did not know that the instrument he was executing was a deed, *is held* sufficient to raise the issue of fraud for the determination of the jury.

5. Same; Fraud § 2.1—

The grantees are not entitled to nonsuit in an action to annul a deed for fraud on the ground that they did not make or participate in the making of the misrepresentations inducing the execution of the instrument when the evidence tends to show that they paid no consideration and that the execution of the deed was procured by fraud, regardless of whether the fraud was fraud in the *factum* or fraud in the treaty, since if the instrument was procured by fraud in the *factum* it is a nullity even in the hands of innocent third parties, and if the fraud was fraud in the treaty a volunteer takes same tainted with the fraud.

APPEAL by plaintiffs from *Fountain, J.*, April 1963 Session of HERTFORD.

The amended complaint alleges two causes of action: The first is to annul a deed of conveyance on the ground of alleged fraud; the second is to recover damages in the sum of $15,000 by reason of alleged fraud in procuring a deed of conveyance.

Charlie Nixon, a widower 80 years old, commenced this action against his daughter Queen Esther Nixon and his son Carl Nixon and wife by the issuance of summons on 2 April 1962. On the same day he procured an order from the clerk of the superior court to examine the defendants for the purpose of obtaining information necessary to prepare his complaint. The examination was held, and he filed his complaint on 26 April 1962. Defendants' answer was filed on 12 May 1962. Charlie Nixon died testate on 17 June 1962, and his son Palmer Nixon qualified as his executor on 27 June 1962. Plaintiffs Lettie N. Bunch and Adele Nixon are devisees in his will. By order of court the present plaintiffs were made parties plaintiff, and were allowed to file an amended complaint, which they did on 14 November 1962. Three days later defendants filed an answer to the amended complaint.

Plaintiffs offered in evidence for the purpose of attack a deed executed on 4 January 1962 by Charlie Nixon before a notary public, and duly registered on 8 January 1962, conveying to Queen Esther Nixon and Carl Nixon in fee 49.80 acres of land therein described by metes and bounds, expressly excepting therefrom two described

acres, which were devised in the Third Item of the Will of Candy Nixon to Leon Nixon. The deed recites a consideration of ten dollars and other good and valuable considerations, and has covenants to the effect that the grantor is seized of the premises in fee, and has a right to convey the same in fee simple. The complaint alleges that Charlie Nixon owned in fee the real estate conveyed by this deed. The amended complaint alleges he was the owner of a one-half undivided interest in this real estate, and plaintiffs' oral evidence is to that effect.

In January 1962 Charlie Nixon went to W. H. Roberson, assistant secretary and treasurer of Roanoke Production Credit Association, to obtain a loan to make a crop during the year. The Association agreed to make him a loan of $1,300 to be secured by a crop lien and chattel mortgage and a deed of trust upon his one-half interest in the real estate described in the deed offered by plaintiffs for attack. Palmer Nixon was made a party to the loan, because he was farming a part of the land that year. Charlie Nixon and Palmer Nixon executed the crop lien and chattel mortgage on 6 February 1962, and Charlie Nixon executed the deed of trust on the same date. Both instruments were recorded.

On 4 January 1962 Queen Esther Nixon and Carl Nixon were living with their father Charlie Nixon in his home on his land described in the deed to defendants. They had lived with him since his wife's death in 1959, farming with him, and cooking and washing for him. On 7 February 1962 Palmer Nixon, son of Charlie Nixon and afterwards his executor, who lived in the town of Ahoskie, heard of the deed his father had executed to the defendants, and that afternoon he went to his father's home. Upon his arrival he found his father, the defendants, and one Joseph Lee in the home. While there he heard his father say his land had been conveyed to the defendants, that he knew nothing about it, and had not conveyed any land to them. Queen Esther Nixon told her father she knew nothing about it. Carl Nixon made a similar statement. Charlie Nixon asked Queen Esther Nixon to go to the register of deeds' office and have it signed off the record. She called Joseph Lee into another room, talked awhile, came back, and said, "I don't know anything about it and I am not going anywhere to sign anything."

Lettie N. Bunch, a daughter of Charlie Nixon and a sister of the defendants, lives in the town of Windsor. On 8 March 1962 she learned about this deed and went that same day to her father's home. She testified as follows:

> "I went in and I saw Queen Esther and Carl and I asked Queen Esther what paper was that that they had made out to

take my daddy's home, and she said she did not know anything about it. My father was there and he said that Clara Watford had come to him, and asked him didn't he know he was losing his social security and he had to pay $78.00 for social security, and she had a paper for him to sign and if not he would lose his social security. I asked Queen Esther was she not going to sign papa's land back to him and she said 'No.' and I asked her why and she said 'because he put me out the door.' I asked what she meant by putting her out the door and she said because he rented the farm to Palmer. I told her that was not putting her out the door; aren't you going to sign it, and she said she was not going to sign. Then my father caught me by the arm and said, 'Come on, I am going to Ahoskie and I am going to put the law.' Carl said, 'That little Ford out there is all you have and you get in that and you get out of here.' "

In March 1962 W. H. Roberson rechecked the records in the register of deeds' office, and found that Charlie Nixon's deed to defendants had been recorded before Charlie Nixon's deed of trust to the Credit Association. In consequence of this discovery, he went to Charlie Nixon's home on 21 March 1962. Charlie Nixon, the defendants, and Palmer Nixon were there. Roberson testified on direct examination as follows:

"I asked Charlie did he remember conveying the farm to Queen Esther and Carl, and he said no, he did not know anything about it, and then I asked Carl and asked Queen Esther if they knew anything about it, and they said no. Then I asked Queen Esther if she would go by the office and sign a good deed of trust on his interest, so that he could continue getting the money and finish his farming operations, and she said, no, she was not going to sign anything; because he tried to get them off of the farm the year before; had tried to get she and Carl off the farm, and that she was not going to sign anything. I said to her, 'If he tried to get you off the farm the year before, does it not seem silly that he would turn around and give you a deed to the farm for his one-half interest in the farm?' Queen Esther and Carl said they did not know anything about it."

On 9 March 1962 Palmer Nixon, Charlie Nixon, W. H. Roberson, and the defendants were in a room in Charlie Nixon's home. Palmer Nixon testified:

"Mr. Roberson questioned them about the loan that my daddy had purchased through him for farming and he told them my

daddy came to him to find out about his land having been conveyed away from him and he did not know it was being conveyed and the only thing he knew was that Clara Watford came to him. He told Queen Esther and Carl in the presence of all of us that Clara Watford had come to him with some social security papers and asked him if he knowed he was going to lose his social security and he told her 'no,' and she said, 'you are and you are going to lose it if you don't pay $78.00 to the Social Security office and sign these papers that I have, and if you don't do that you won't get any more social security.'

"When my father said that statement to her about Clara Watford, she said she did not know anything about it at all; she did not have anything to do with it and was not going anywhere to sign anything. Carl Nixon said to my father in this conversation that he did not know anything about it and he wouldn't sign anything concerning it."

Plaintiffs offered in evidence a part of the testimony of Queen Esther Nixon given during her examination in the proceeding to obtain information for the purpose of preparing the original complaint. The relevant part of her testimony, after she identified the deed from Charlie Nixon to defendants, is:

"I first saw that deed after he (Charlie Nixon) signed it. I was at my home. Estelle and him was the one that had it. Estelle is my sister. I saw the deed the same day it was written. He and Estelle had it written. I didn't. I knew it was going to be prepared. He had spoken about it. I did not pay anything for the land. Estelle Ruffin lives in New York now."

Plaintiffs offered in evidence a part of the testimony of Carl Nixon given in the same proceeding. The pertinent part of his testimony, after the deed from Charlie Nixon to defendants was shown to him, is:

"I know about that deed. The only thing I know about it I hear him say once before in the house that he was going to deed 'Baby,' Queen Esther, some land or something to keep the rest of the children off of it. That's been a right good little while ago. Almost a year or two, two or three years. Sometime about the 4th of January, Clara Watford and other sister came to my home. They took my father and carried him to Ahoskie away from the house. I could not say for certain. Queen Esther and I did not go. I knew about the preparation of the deed and had nothing to do with its being prepared. I haven't paid him a cent for no deed at all."

Queen Esther Nixon, Carl Nixon, Palmer Nixon, Adele Nixon, Lettie N. Bunch, Estelle Ruffin, and Clara Watford are brothers and sisters and children of Charlie Nixon.

Lettie N. Bunch identified her father's signature on the deed offered in evidence by plaintiffs for the purpose of attack, and also identified as signed by her father two checks, one dated 6 November 1961 payable to Clara Watford in the amount of $78, and the other dated November 10, 1961 payable to Clara Watford in the sum of $41.13.

In 1962 the land described in the deed from Charlie Nixon to defendants had allotments of 3.1 acres of tobacco, of 8.6 acres of peanuts, and of 4.5 acres of cotton. The fair market value on 4 January 1962 of a one-half undivided interest in this land was $18,000.

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

Cherry & Cherry and Pritchett & Cooke by J. A. Pritchett for plaintiff appellants.

Jones, Jones & Jones and Leroy, Wells & Shaw by Charles C. Shaw, Jr., for defendant appellees.

PARKER, J. It is hornbook law that when a motion for judgment of nonsuit is made, the plaintiff is entitled to have his evidence considered in the light most favorable to him, and he is entitled to the benefit of every reasonable inference to be drawn therefrom. *Bridges v. Graham,* 246 N.C. 371, 98 S.E. 2d 492. "Discrepancies and contradictions, even in plaintiff's evidence, are for the twelve and not for the court," *Barlow v. Bus Lines,* 229 N.C. 382, 49 S.E. 2d 793, and do not justify a nonsuit. *Keaton v. Taxi Co.,* 241 N.C. 589, 86 S.E. 2d 93.

Considering plaintiffs' evidence according to the rule, it would permit a jury to find that Charlie Nixon, a man 80 years old, had social security, that his daughter Clara Watford came to him with some papers and asked him if he knew he was going to lose his social security, and he told her "no," and she said to him, "you are and you are going to lose it if you don't pay $78.00 to the social security office and sign these papers that I have, and if you don't do that you won't get any more social security"; that these were misrepresentations of material facts made by Clara Watford, with knowledge of their falsity or with a reckless disregard of their truth or falsity, with a fraudulent intent that they should deceive Charlie Nixon and be relied upon by him; that under the circumstances such representations were of a character to induce action by a person 80 years old; that Charlie

Nixon reasonably relied upon the representations, and acted upon them to his injury by executing and delivering a deed of conveyance of his real estate with a reasonable market value of $18,000 to his children Queen Esther Nixon and Carl Nixon, who paid him nothing for his land; that Charlie Nixon received nothing for the conveyance of his land; that Charlie Nixon, by reason of the wilful misrepresentation of the contents of the instrument, did not know that he was executing a deed to his real estate, but intended to execute a paper writing to prevent his losing his social security payments; and that Queen Esther Nixon and Carl Nixon knew beforehand of the preparation of this deed.

"The line of demarcation between fraud in the *factum* and fraud in the treaty is frequently obscure and in a measure dependent upon the attendant facts and circumstances." *Parker v. Thomas,* 192 N.C. 798, 136 S.E. 118, where certain well-recognized indicia of fraud in the treaty and of fraud in the *factum* are stated.

It seems indubitable that if Charlie Nixon had lived to testify in the action he instituted, the record would contain clearer and fuller testimony as to the attendant facts and circumstances in respect to the execution of the deed by him to defendants. We lack in the evidence any testimony by the draftsman of the deed, and by the notary public who took his acknowledgment of the deed.

Considering the frequent obscurity of the line of demarcation between fraud in the *factum* and fraud in the treaty, it seems that plaintiffs' evidence tends to show fraud in the *factum* arising from a want of identity or a disparity between the instrument executed and the one intended to be executed, or if it does not show fraud in the *factum*, it at least tends to show fraud in the treaty in that there were misrepresentations as to the contents of the instrument and Charlie Nixon signed the identical instrument which he intended to sign. *Griffin v. Lumber Co.,* 140 N.C. 514, 53 S.E. 307; *Furst v. Merritt,* 190 N.C. 397, 130 S.E. 40; *Parker v. Thomas, supra; Mills v. Lynch,* 259 N.C. 359, 130 S.E. 2d 541. If the deed was procured by fraud in the *factum* or by fraud in the treaty, the judgment of compulsory nonsuit was improvidently entered.

The execution of a deed procured by fraud in the *factum* cannot be said to be the deed of the maker at all. "No title passes under such an instrument—it is void—and no rights may be acquired thereunder even by innocent third parties* * *." *Furst v. Merritt, supra; Medlin v. Buford,* 115 N.C. 260, 20 S.E. 463.

Parol evidence is competent to show the actual consideration for a deed or the lack of consideration. *Barbee v. Barbee,* 108 N.C. 581,

13 S.E. 215; *Pate v. Gaitley,* 183 N.C. 262, 111 S.E. 339; *Willis v. Willis,* 242 N.C. 597, 89 S.E. 2d 152. Plaintiffs' evidence tends to show not only false representations, but also a total lack of consideration for the deed. *Garris v. Scott,* 246 N.C. 568, 99 S.E. 2d 750.

Defendants contend, *inter alia,* that there is no evidence that they participated in the false representations, or that they requested or persuaded their father to execute the deed, and, therefore, that the judgment of nonsuit should be affirmed. With this contention we do not agree.

"A person may be charged with fraud, although he is not a party to the transaction into which the complainant is induced, by the misrepresentation, to enter. To render one liable in an action of deceit, no privity of contract between the plaintiff and defendant need be shown* * *. In this respect, the action differs from one on a warranty." 23 Am. Jur., Fraud and Deceit, sec. 187.

It is clear that when the execution of a deed is procured by fraud in the treaty, the grantor is entitled to appropriate relief in a court of equity as against the author of the fraud, as to any interest derived by him from the deed. *Furst v. Merritt, supra.* A transaction is not purged of fraud by a showing that it was brought about by a third person. And in case of fraud in the treaty appropriate and adequate relief will be afforded in a court of equity, not only against the principal, where he is grantee in the deed, but also against persons who were or have become beneficiaries of such fraud and wrong done the grantor in the deed, when they are volunteers or purchasers with notice, or when the deed has been procured by fraud of one who is acting in the transaction as agent of the grantee; otherwise fraud would, or could, place itself beyond the reach of the court, and an interest gained by one person by the fraud of another be held by him. *Harris v. Delamar,* 38 N.C. 219; *Tisdale v. Bailey,* 41 N.C. 358; *Beeson v. Smith,* 149 N.C. 142, 62 S.E. 888, *Ferrall v. Bradford,* 2 Fla. 508, 50 Am. Dec. 293; *Graham v. Burch,* 44 Minn. 33, 46 N.W. 148; *Jones v. Wolfe* (Tenn. Ch.), 42 S.W. 216, *Wynne v. Mason,* 72 *Miss.* 424, 18 So. 422; *Stone v. Walker,* 201 Ala. 130, 77 So. 554; *Porter v. O'Donovan,* 65 Ore. 1, 130 P. 393; 23 Am. Jur., Fraud and Deceit, sec. 187; Restatement of the Law of Restitution, Am. Law Institute, sec. 167. If the deed here was procured by fraud, and if the defendants claim the benefits of it as volunteers, they must take it tainted with the fraud. *Corbett v. Clute,* 137 N.C. 546, 551, 50 S.E. 216, 217.

The judgment of compulsory nonsuit is

Reversed.

W. C. WORSLEY, JR., EXECUTOR UNDER THE WILL OF WALTER CECIL WORSLEY, SR. v. PEARL S. WORSLEY, W. C. WORSLEY, JR., DAVID R. WORSLEY, GEORGE K. WORSLEY, DONALD A. WORSLEY, AND ERIS WORSLEY BURKS.

(Filed 9 October 1963.)

1. Wills § 33—

As a general rule, where there is a devise of realty in fee or a bequest of personalty unconditionally, a subsequent clause in the will expressing a wish, desire, or direction, for the disposition of the property after the death of the devisee or legatee will not limit the devise or bequest to a life estate, the statutory presumption being applicable to both personal and real property. G.S. 31-38.

2. Wills § 27—

The intent of a testator is to be ascertained, if possible, from a consideration of his will from its four corners, and such intent should be given effect unless contrary to some rule of law or at variance with public policy.

3. Same—

In construing a will every word and clause will be given effect if possible, and apparent conflicts reconciled, and irreconcilable repugnancies resolved by giving effect to the general prevailing purpose of testator.

4. Wills § 33— Under language of this will right of legatee to use or dispose of personalty was limited to her lifetime.

After devising his wife a life estate in his realty with remainder over to his children, testator bequeathed his wife "all or so much of my personal property * * * as she may desire to have and use or dispose of during her lifetime." The will further provided that all personalty not sold or disposed of during the wife's life should be divided equally among testator's children. *Held:* The statutory presumption of an absolute gift of the personalty is negatived by the express words of the testator limiting the use and disposition of the personalty by the wife to her lifetime, and such construction is necessary to give any effect to the subsequent language of the will disposing of such personalty after the wife's death.

APPEAL by defendants from *Mintz, J.*, April Civil Session 1963 of DUPLIN.

This is an action for a declaratory judgment, pursant to the provision of Chapter I, Article 26, of the General Statutes of North Carolina, for the construction of certain provisions in the last will and testament of Walter Cecil Worsley, Sr.

The testator, late of Duplin County, died on 6 April 1960, leaving a last will and testament which has been duly probated and recorded in the office of the Clerk of the Superior Court in said county.

The plaintiff is the duly qualified and acting executor of the estate of said testator.

The sole devisees and legatees in said will are the widow and children of the marriage, all of whom are parties to this action. Each of said parties is over 21 years of age and *sui juris*.

The pertinent parts of the will of the testator are as follows:

"2. I give and devise to my wife, Pearl S. Worsley, for and during the term of her natural life, all of my land and real estate, wherever located, together with all the rents, profits and income therefrom, during her life.

"3. I also give and bequeath to my wife, Pearl S. Worsley, all or so much of my personal property, of whatever consisting and wherever located, as she may desire to have and to use or dispose of during her lifetime. She is also to have the rents and income accruing from said personal property during her life, excepting only the rents and income from such of said property as shall have been sold or otherwise disposed of by her. All personal property not sold or disposed of under this item of this will shall be divided among my children, residuary legatees, as hereinafter specified.

"4. Subject to the life estate devised to my wife, Pearl S. Worsley, in item two hereof, I hereby give and devise all the lands and real estate owned by me at the time of my death to my children, namely: Mrs. Eris Burks, W. C. Worsley, Jr., Donald A. Worsley, George K. Worsley and David R. Worsley, share-and-share alike, in fee simple forever.

"5. Subject to the bequest to my wife, Pearl S. Worsley, in item three of this will, I give and bequeath to my children, Mrs. Eris Burks, W. C. Woorsley, Jr., Donald A. Worsley, George K. Worsley and David R. Worsley, all the residue of my personal property, share-and-share alike forever."

It was agreed by all the parties that the trial judge might hear the matter, without a jury, find the facts and render judgment thereon, and that judgment might be signed out of court and out of session.

Upon the findings of fact, the court held that "Pearl S. Worsley is the absolute owner of the entire personal estate owned by W. C. Worsley, Sr., at the time of his death and has the unrestricted power, including the testamentary power, to dispose of said personal property in any manner and for any purpose whatsoever."

The defendants appeal, assigning error.

Smith, Leach, Anderson & Dorsett for plaintiff appellee.

Robert L. Farmer for defendant appellants.

DENNY, C.J. The sole question for determination on this appeal is whether Pearl S. Worsley became the absolute owner of the personal estate of the testator, or did she take a life estate only, with the power of disposition under the provisions contained in Item 3 of said will.

It is provided in G.S. 31-38 as follows: "When real estate shall be devised to any person, the same shall be held and construed to be a devise in fee simple, unless such devise shall, in plain and express words, show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity."

The provisions of the above statute have been held to apply to the disposition by will of both personal and real property. *Heefner v. Thornton,* 216 N.C. 702, 6 S.E. 2d 506.

In *Barco v. Owens,* 212 N.C. 30, 192 S.E. 862, Stacy, C.J., speaking for the Court, said: "The general rule is, that where real estate is devised in fee, or personalty bequeathed unconditionally, a subsequent clause in the will expressing a wish, desire, or direction for its disposition after the death of the devisee or legatee will not defeat the devise or bequest, nor limit it to a life estate. (Citations omitted)"

In the last cited case, the testator bequeathed and devised to his wife, Annie W. Owens, certain real property, "together with all of my personal property of whatever kind and description, and wherever located, including all stocks, bonds, insurance, money, notes, or other choses in action, in fee simple forever with the conditions hereinafter stipulated."

In a subsequent item of the will, the testator expressed his wishes with respect to the disposition of the property he left her which might be in her possession at the time of her death. The wife did not carry out the expressed desires with respect to the disposition of the property devised and bequeathed to her. This Court held the widow of the testator acquired an absolute fee simple title in the real and personal property devised and bequeathed to her and the manner in which she disposed of the property in her will was upheld.

On the other hand, in the case of *Roberts v. Saunders,* 192 N.C. 191, 134 S.E. 451, the testator gave to his wife, Martha Roberts, all his estate, real and personal, except certain land which he devised to his daughter. A later item in the will read as follows: "All the rest of my property I give to my wife as above stated, during her widowhood; if she should marry, she would be entitled to a dower on the estate in form according to the laws of North Carolina."

Brogden, J., speaking for the Court, said: "While the second paragraph of the will gives an estate in fee simple, by statutory presumption, it will be observed that the testator does not actually state in express language that the property is given to his wife in fee simple. In the third paragraph of the will the testator says: 'I give to my wife as above stated, during her widowhood.' Hence the words 'as above stated' refer to the nature of the estate the testator intended to devise as distinguished from the statutory presumption. Then, too, the fact that the estate was reduced from a life estate to a dower interest, in the event of remarriage, is a manifest indication of the testator's purpose to devise his wife an estate of less dignity than a fee simple."

In the instant case, in Item 3 of the will, the testator gives to his wife, Pearl S. Worsley (who is the mother of the testator's five children named in Items 4 and 5 of the will, each of whom is over 21 years of age), "all or so much of my personal property * * * *as she may desire to have and to use or dispose of during her lifetime.*"

In this same item of the will, the testator, in clear and express language, reveals his intent to the effect that his personal property not sold or disposed of under this item of the will "shall be divided among my children, residuary legatees, as hereinafter specified."

As indicated in Item 3 of the will, the testator, subject to the bequest to his wife, in Item 5 bequeathed to his five children, by name, "all the residue of my personal property, share-and-share alike forever."

In the case of *Jordan v. Sigmon,* 194 N.C. 707, 140 S.E. 620, M. D. Sigmon bequeathed to his wife, Fannie Sigmon, all of his personal property of every kind, "including money, bank deposits, notes and other solvent credits, for the term of her natural life, with the privilege to use for her support, comfort and enjoyment any part thereof and in any way that she may desire. I also give and devise to my said wife the tract of land on which I now reside, containing 94 acres, more or less, for the term of her natural life, and at her death said lands shall go to my heirs at law as the statute provides." On appeal, there was no controversy over the real estate.

M. D. Sigmon died 8 January 1925, and his wife died, intestate, on 14 May 1925. There being no children born of this union and no issue surviving either, the next of kin of M. D. Sigmon, the appellants, claimed all the personal property owned by him at his death which was not used or consumed by his wife during the short interval of time she survived him.

This Court said: "It will be observed that there is no residuary clause in the will and no limitation over so far as the personal property is concerned. Under these conditions, a gift of personal property for life to the primary object of testator's bounty, with power to use 'in any way that she may desire' is generally construed to be an absolute gift of the property. *Holt v. Holt,* 114 N.C. 242, 18 S.E. 967; *McMichael v. Hunt,* 83 N.C. 344; *Foust v. Ireland,* 46 N.C. 184. Especially is this true where the property, by reason of its amount and kind, may reasonably be expected to be consumed during the life of the donee, or within a short time after the death of the testator."

The original record in this case discloses that the personal property bequeathed to Fannie Sigmon by her husband, M. D. Sigmon, had a value of only $1,200.00.

The factual situation in the instant case is quite different. The will of Walter Cecil Worsley, Sr., contains residuary clauses with respect to both real and personal property. Moreover, his widow, Pearl S. Worsley, is devised a life estate in real property valued at $189,986.04, together with the income therefrom during her life. The personal property bequeathed in Item 3 of the will consists of corporate bonds or stock valued at $104,278.68, proceeds from insurance in the sum of $5,000, and other personal property valued at $68,354.64, the total value of personal property bequeathed being $177,633.32. The total value of the testator's estate is valued at $367,619.36.

The intent of a testator is to be ascertained, if possible, from a consideration of his will from its four corners, and such intent should be given effect unless contrary to some rule of law or at variance with public policy. *Morris v. Morris,* 246 N.C. 314, 98 S.E. 2d 298; *Mewborn v. Mewborn,* 239 N.C. 284, 79 S.E. 2d 398; *Coppedge v. Coppedge,* 234 N.C. 173, 66 S.E. 2d 777; *House v. House,* 231 N.C. 218, 56 S.E. 2d 695; *Cannon v. Cannon,* 225 N.C. 611, 36 S.E. 2d 17.

"In construing a will every word and clause will be given effect if possible, and apparent conflicts reconciled, and irreconcilable repugnancies resolved by giving effect to the general prevailing purpose of testator." *Andrews v. Andrews,* 253 N.C. 139, 116 S.E. 2d 436.

In our opinion, when the will of the testator is considered from its four corners, the expressed intent of the testator negatives the statutory presumption that he gave his personal estate unconditionally to his wife. *Hampton v. West,* 212 N.C. 315, 193 S.E. 290. Therefore, we hold that it was the intent of the testator to give his wife a life estate in his personal property, with the power of disposition during her lifetime.

The conclusion we have reached will not jeopardize the right of the widow, Pearl S. Worsley, to have so much of the bequeathed personal property "as she may desire to have and to use or dispose of during her lifetime." It will, however, give effect to the residuary clauses in both Items 3 and 5 of the will with respect to the disposition of all personal property bequeathed but not consumed or disposed of by the testator's widow during her lifetime.

The judgment of the court below is

Reversed.

EUGENE M. JONES v. WAVERLY M. HESTER.

(Filed 9 October 1963.)

1. **Evidence § 15—**

Evidence of a circumstance surrounding the parties which is necessary to understand properly their conduct and motives, or to weigh the reasonableness of their contentions, is competent, and it is not required that it bear directly on the question in issue.

2. **Libel and Slander § 13—**

In an action by a manager of a store against the president and director of the corporation for libel in calling a stockholders' meeting to present evidence of the alleged dishonesty of plaintiff and a former co-manager of the corporation, it is competent to show upon the question of defendant's want of good faith that defendant, between the time of the call and the meeting, acquired the beneficial ownership of the co-manager's stock at one-third of its par value and released such co-manager from further responsibility.

3. **Libel and Slander § 8—**

The act of the president or manager of a corporation in making inquiry and bringing to the attention of the stockholders evidence of dishonesty of any employee, past or present, is qualifiedly privileged, and he is protected from liability for charges of dishonesty made by him in such instances when they are made in good faith, but the person defamed may defeat the defense of qualified privilege by alleging and proving malice, or that the publication was prompted by some improper or ulterior motive and was not made in good faith.

APPEAL by plaintiff from *Latham, S.J.*, February 4, 1963, Regular Civil Term POLK Superior Court.

The plaintiff instituted this civil action to recover actual and punitive damages arising upon a cause of action stated by him as follows:

"V. In 1959 and in 1960, until February, when plaintiff's employment by Ballenger's, Incorporated, was terminated, plaintiff was manager of the store operated by said Ballenger's, Incorporated, in Tryon, North Carolina, and continued to have and to enjoy the good reputation hereinabove set forth in paragraph III hereof.

"VI. On April 15, 1960, the defendant Waverly M. Hester, acting as an individual and not in his capacity as an officer or director of said Ballenger's, Incorporated, and *ultra vires* his powers, authority and duties as such, wrote, published and circulated of and concerning plaintiff as a businessman the following false, defamatory and libelous words:

" 'Subject to call and waiver of notice, there will be a stockholders meeting of Ballenger's, Incorporated, Tryon, N. C. in the office of W. M. Hester, President, on Tuesday afternoon at 3:00, April 19, 1960. The purpose of this meeting will be to present evidence of dishonesty on the part of some former employees at Ballenger's, Inc., and to call a $5,000.00 Surety Bond on Matt O'Shields and Eugene Jones.'

"VII. Defendant by said words 'some former employees' intended to and did refer to plaintiff and intended all who read said words to so understand them and the defendant further intended to and did charge the plaintiff with dishonesty, such charge being made by the defendant maliciously, wantonly and knowingly without justification, warrant or excuse.

"VIII. Defendant knew, at the time he circulated the written publication quoted in paragraph VI hereof, that the said charge of dishonesty made against plaintiff was untrue and without foundation."

The defendant, in addition to a general denial, entered the following further answer and defense:

". . . that the publication complained of in paragraph 6 of the complaint was sent by the defendant to the other stockholders of the company and to no one else; that the defendant, as an officer and stockholder of Ballenger's, Inc., and as Attorney in Fact for B. L. Ballenger, had an interest in the honesty and integrity of the employees of Ballenger's, Inc., both those who were then employed and those who had been formerly employed; and, as President of the Company, it was his duty to check on the honesty and integrity of the employees of the Company; that

> the other stockholders of the Company were also interested in the honesty and integrity of the employees of the Company, both those employees employed by the Company on April 15, 1960, and those employees formerly employed by the Company; that in sending the publication complained of, defendant was acting as President and stockholder of the corporation and Attorney in Fact for B. L. Ballenger, in the discharge of his duties in these capacities; . . . that said publication was made in the honest belief on the part of the defendant that the matters set forth therein were true; that, therefore, said publication is a privileged publication, and the defendant pleads the fact that it is a privileged publication in bar of plaintiff's right to recover; that the defendant in sending said publication was not activated by any ill will, malice or ill feeling toward the plaintiff, and did not at any time, and has not at any time, held any ill will, malice or ill feeling toward the plaintiff."

By reply, the plaintiff alleged the defendant, in making the charges of plaintiff's dishonesty, was not acting in good faith for that before making the charges he had completed a check of plaintiff's activities as manager of Ballenger's and had caused the bonding company to make an investigation which had been completed without disclosing any misconduct on the part of the plaintiff; that the defendant's act and conduct "were a deliberate, intentional and malicious attempt to harrass, oppress and injure the plaintiff. . . ."

The plaintiff offered in evidence a letter which the defendant wrote him on the day of, or perhaps after, the stockholders meeting on April 19. The following is a part of that letter:

> "P. S. The state manager of St. Paul Fire, Marine and Insurance Co. has spent one hour with me today and their bond adjustor, Mr. William D. Bittle, 215 New Medical Building, Asheville, N. C., telephone number Alpine 3-6537, will be glad to confer with you and your attorney at any time convenient to you both regarding a settlement of the bond held by Ballenger's, Inc., guaranteeing your honesty and integrity."

The plaintiff also offered in evidence the adverse examination of the defendant consisting of 64 pages of questions and answers, much of which the court excluded. In some instances the excluded answers appear and in others the defendant did not answer, or at least the answer is not recorded. At any event, the excluded answers were kept from the jury. The admissions tended to show that at the time the defendant transmitted the alleged libelous notice, the plaintiff and

O'Shields each owned capital stock in Ballenger's, Inc., of $15,000.00 par value. Both were under bond for the faithful discharge of their duties as co-managers. In the adverse examination the defendant was asked if the meeting was called with respect to O'Shields. If required to answer, the defendant would have said, "No, it was not called with respect to Mr. O'Shields. That was taken care of." Defendant was then asked whether he did not negotiate the purchase of the O'Shields stock in Ballenger's for $5,000.00 and cause it to be transferred to the Mountain Land Improvement Company in which he was interested. If required to answer, the defendant would have said, "That is the record that speaks for itself." The defendant negotiated the purchase of the O'Shields stock between the date of the call and the date of the stockholders meeting.

At the conclusion of the plaintiff's evidence, the court entered judgment of involuntary nonsuit from which the plaintiff appealed.

Robert N. Golding, W. Y. Wilkins, Jr., for plaintiff appellant.

McCown, Lavender & McFarland, by Wm. A. McFarland, and Hamrick & Jones, by Fred D. Hamrick, Jr., for defendant appellee.

HIGGINS, J. The plaintiff relied on the defendant's adverse examination to fill in the low places in his case. We have quoted in part and summarized in part admissions taken from the adverse examination, most of which were excluded by the court. However, the admissions in the pleadings, the evidence introduced, and that which was offered and excluded tended to show the following: Prior to February, 1958, the plaintiff and Matt O'Shields were comanagers of Ballenger's, Inc. Each owned $15,000 stock in the corporation. O'Shields was released as comanager in 1958. The plaintiff acted as sole manager thereafter. The defendant was president of the corporation.

On April 15, 1960, the defendant issued a call for a stockholders meeting "to present evidence of dishonesty on the part of some former employees of Ballenger's, Inc., and to call a $5,000 surety bond on Matt O'Shields and Eugene Jones." On the adverse examination the defendant was asked whether between April 15, 1960, the date of the notice calling the meeting, and April 19, 1960, the date of the meeting, he did not (on behalf of Mountain Land Company in which he was interested) purchase the Matt O'Shields stock for $5,000 with the understanding "it was to be a closed transaction and there would be no further demands on Matt O'Shields . . ." Answer: "That is the record that speaks for itself."

O'Shields and Jones were comanagers. Both were covered by a faithful performance bond. The conduct of both was to be investigated in the stockholders meeting. The defendant purchased the O'Shields stock for one-third of its par value between the call and the meeting and O'Shields was released from further responsibility. On the day of the stockholders meeting the defendant wrote the plaintiff that he, the defendant, had conferred with the manager and adjustor of the surety company, who, in turn, would confer with plaintiff and his attorney "regarding a settlement of the bond held by Ballenger's, Inc., guaranteeing your honesty and integrity." This evidence which appears to have been excluded may or may not be sufficient to permit the inference the president of Ballenger's, Inc., meant to charge O'Shields and plaintiff with dishonesty and a breach of their bond in order to influence them to sell their Ballenger's stock (not to the Ballenger corporation — but to another company in which the defendant was interested) for one-third of its par value.

In view of the tie-in between O'Shields and the plaintiff, the latter was entitled to place before the jury the defendant's admission that he arranged the purchase of the O'Shields stock and released O'Shields from further responsibility to Ballenger's. The rule governing the admissibility of such evidence was stated by Stacy, C.J., in *Farmers Federation v. Morris*, 223 N.C. 467, 27 S.E. 2d 80: "'It is not required that the evidence bear directly on the question in issue, and it is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known to properly understand their conduct or motives, or to weigh the reasonableness of their contentions.'" Citing *Bank v. Stack*, 179 N.C. 514, 103 S.E. 6.

"An extrajudicial act or declaration may be admitted into evidence where it tends to explain or show the character, motive, purpose or intent of the act or transaction in dispute." *People v. Frangadakis*, 7 Cal. Rpts. 776.

The defendant's admissions with respect to the O'Shields transaction may or may not aid the jury in determining whether in making the charge of dishonesty at the stockholders meeting, the defendant acted in good faith. The question is one of fact to be determined by the jury and not one of law to be decided by the court.

The president of a business corporation is charged with the duty of safeguarding the legitimate business interests of his company. Of course, it is his duty to make inquiry and to bring to the attention of the stockholders any evidence of dishonesty on the part of any employee, past or present — not excluding stockholders. A call of a stockholders meeting to present evidence of dishonesty places the

president in a position of qualified privilege, both in calling the meeting and in presenting the evidence. His position and the occasion were sufficient to protect him from liability if his charges were made in good faith. *Hartsfield v. Hines,* 200 N.C. 356, 157 S.E. 16.

If a publication is libelous or actionable *per se* the author may escape civil liability by pleading and showing privilege, either absolute or qualified. *Ponder v. Cobb,* 257 N.C. 281, 126 S.E. 2d 67. In order to defeat the defense of qualified privilege, the plaintiff may plead and prove malice, or that the publication was prompted by some improper or ulterior motive and not made in good faith. *Harrison v. Garrett,* 132 N.C. 172, 43 S.E. 594; *Gattis v. Kilgo,* 140 N.C. 106, 52 S.E. 249; *Riley v. Stone,* 174 N.C. 588, 94 S.E. 434; *Yancey v. Gillespie,* 242 N.C. 227, 87 S.E. 2d 210; *Chambers v. Leiser,* 43 Wash. 285, 86 P. 627.

The evidence admitted, together with that which was offered and improperly excluded, raised issues of fact which the court was not permitted to decide as a matter of law. Decision must be made in the manner provided for the settlement of disputed issues of fact — by submission to the jury.

The judgment of involuntary nonsuit entered in the court below is Reversed.

CLEARMAN I. FRISBEE v. FLOYD HARVEY WEST.

(Filed 9 October 1963.)

1. Courts § 20—

In an action instituted in this State to recover for injuries resulting from an automobile accident occurring in the State of Washington, the substantive rights and liabilities of the parties are to be determined in accordance with the law of Washington while procedural matters are to be determined in accordance with the law of this State.

2. Automobiles § 47—

In those jurisdictions having a host-guest statute limiting the liability of the driver of an automobile for injuries to a guest passenger, the burden is upon plaintiff passenger to allege and prove facts sufficient to show that the actual relationship existing between plaintiff and defendant at the time of the collision was not that of guest and host within the meaning of the statute.

3. Same— Evidence held insufficient to show that plaintiff was other than a gratuitous guest at the time of the accident in suit.

Evidence tending to show that plaintiff passenger and defendant driver were engaged in a joint adventure in a trip from a municipality in this

State to a municipality in the State of Washington in search of employment, but with allegations and evidence tending to show that the accident occurred the day after they reached their destination in Washington and while on a trip to another municipality to sign up for unemployment compensation, without allegation or evidence that that trip was pursuant to any agreement for payment, *held* insufficient to show that plaintiff was not a guest within the purview of the Washington host-guest statute, and nonsuit was proper in the absence of evidence that the accident resulted from the intentional act of defendant or gross negligence on his part.

APPEAL by plaintiff from *Patton, J.*, April (Special) Session 1963 of HAYWOOD.

Plaintiff and defendant are citizens and residents of Haywood County, North Carolina. On February 23, 1961, and prior thereto, defendant was the owner of a (particularly described) 1956 Chevrolet.

Plaintiff, in paragraph 4 of the complaint, alleged: "That on or about the 17 day of February, 1961, plaintiff and defendant planned *a joint trip together to Cedro Wooley (sic)*, Washington, for the purpose of securing employment; that plaintiff and defendant had been laid off from their jobs at Dayco Southern Plant, Hazelwood, North Carolina; that defendant agreed to drive the above described automobile *on the trip* providing the plaintiff would bear *the trip expenses;* that in accordance with said agreement before leaving *on the trip,* plaintiff installed five new tires on the above vehicle owned by the defendant and involved in the following described collision; that plaintiff gave the defendant the sum of $50.00 before leaving North Carolina for the purchase of gas and oil to make *the journey;* that plaintiff further, in accordance with said agreement, paid the food and lodging expenses of defendant *while on the road between Waynesville, North Carolina, and Cedro Wooley (sic), Washington;* that above the cost of the tires installed on the car of the defendant involved in the following described collision, the plaintiff paid over $300 for the expenses of *the trip* incurred by plaintiff and defendant." (Our italics)

Plaintiff was injured February 23, 1961, at approximately 11:00 a.m. near Burlington, Washington, as a result of a collision of two automobiles within the intersection of Cook Road and Pelver Road. The automobiles involved were the said 1956 Chevrolet owned and operated by defendant and an automobile operated by one Filemeno R. Avila. Defendant's car, in which plaintiff and also plaintiff's brother (a resident of Sedro Woolley, Washington) were passengers, approached and entered said intersection while proceeding west on Cook Road. Avila's car approached and entered said intersection while

proceeding north on Pelver Road. Plaintiff alleged the collision and his injuries were proximately caused by the negligence of defendant.

Answering, defendant denied negligence, pleaded the host-guest statute of the State of Washington (RCW 46.08.080), and pleaded (conditionally) the contributory negligence of plaintiff.

At the conclusion of plaintiff's evidence, which consists solely of plaintiff's testimony, the court, allowing defendant's motion therefor, entered judgment of nonsuit. Plaintiff excepted and appealed.

J. Charles McDarris and Frank D. Ferguson, Jr., for plaintiff appellant.

Williams, Williams & Morris for defendant appellee.

BOBBITT, J. The substantive rights and liabilities of the parties are to be determined in accordance with the law of Washintgon, the *lex loci*. Procedural matters are to be determined in accordance with the law of North Carolina, the *lex fori*. *Nix v. English*, 254 N.C. 414, 419, 119 S.E. 2d 220, and cases cited; *Knight v. Associated Transport*, 255 N.C. 462, 464, 122 S.E. 2d 64.

A Washington statute (Revised Code of Washington, Section 46.60.150) in pertinent part provides: "Every operator of a vehicle on approaching public highway intersections shall look out for and give right of way to vehicles on his right, simultaneously approaching a given point within the intersection, and whether his vehicle first reaches and enters the intersection or not."

The evidence most favorable to plaintiff tends to show defendant approached, reached and entered the intersection from Avila's right; that Cook Road, on which defendant was traveling, was the main highway; that Avila's car (proceeding north) was 500 feet south of the intersection when defendant's car (proceeding west) was 500 feet east of the intersection; that the speed of each car when 500 feet from the intersection was 35 miles per hour; that each car continued at this speed up to the moment of collision; and that, as the cars approached the intersection, each driver had an unobstructed view of the other's car.

There was plenary evidence as to the actionable negligence of Avila. Clearly, it was his statutory duty to "give right of way" to the vehicle "on his right," to wit, defendant's car.

A close question is presented as to whether, under legal principles established by decisions of the Supreme Court of Washington, plaintiff's evidence was sufficient for submission to the jury as to defendant's actionable negligence. In this connection, see *inter alia*,

Massengale v. Svangren (Wash.), 252 P. 2d 317; *Bos v. Dufault* (Wash.), 257 P. 2d 775; *Bellantonio v. Warner* (Wash.), 288 P. 2d 459; *Robison v. Simard* (Wash.), 360 P. 2d 153. However, for reasons stated below, a determination of this question is not necessary to decision on this appeal.

The host-guest statute of Washington (Revised Code of Washington, Section 46.08.080) provides: "Liability of host for injury to guest in motor vehicle. No person transported by the owner or operator of a motor vehicle as an invited guest or licensee, without payment for such transportation, shall have cause of action for damages against such owner or operator for injuries, death or loss, in case of accident, unless the accident was intentional on the part of the owner or operator, or the result of said owner's or operator's gross negligence or intoxication, and unless the proof of the cause of action is corroborated by competent evidence or testimony independent of, or in addition to, the testimony of the parties to the action: *Provided,* That this section shall not relieve any owner or operator of a motor vehicle from liability while it is being demonstrated to a prospective purchaser."

There was no evidence the accident was intentional on the part of defendant or that it resulted from defendant's gross negligence or intoxication. Plaintiff's testimony was not corroborated by competent evidence or supported by independent or additional testimony.

Admittedly, when the collision occurred, both plaintiff and his brother (Doyle Frisbee) were passengers in the car owned and operated by defendant. (Note: Plaintiff testified he had never driven a car.) Nothing else appearing, the relationship subsisting between plaintiff and defendant was that of guest and host. It was incumbent upon plaintiff to allege and prove facts sufficient to show that the actual relationship subsisting between plaintiff and defendant when the collision occurred was not that of guest and host within the meaning of the statute. *Moen v. Zurich General Accident & Liability Ins. Co.* (Wash.), 101 P. 2d 323; *Fuller v. Tucker* (Wash.), 103 P. 2d 1086; *Hayes v. Brower* (Wash.), 235 P. 2d 482; *Nielson v. Harkoff* (Wash.), 287 P. 2d 95. The Washington decisions appear to be in accord with the general rule stated in Blashfield, Cyclopedia of Automobile Law and Practice, Permanent Edition, Volume 9C, § 6146, as follows: "Automobile guest statutes, widely prevalent at the present time, preclude an injured guest from recovering against the host for ordinary negligence, and for this or other reasons, the occupant of a motor vehicle involved in an accident may seek to prove that he was not a guest, but on the contrary had some status other than that con-

templated by the statutes, and in this situation the burden of proof is upon the plaintiff." See also Blashfield, *op. cit.*, § 6115.

Under Washington decisions, the host-guest statute does not apply (1) if the passenger and the owner-operator are joint adventurers or (2) if the passenger pays for the transportation.

"The essential elements of a joint adventure are, first, a contract, second, a common purpose, third, a community of interest, and fourth, an equal right to a voice, accompanied by an equal right of control." *Moen v. Zurich General Accident & Liability Ins. Co., supra.* "The sine qua non of the relationship is a contract, whether it be express or implied. As a legal concept, a joint adventure is not a status created or imposed by law, but is a relationship voluntarily assumed and arising wholly ex contractu. The essence of a contract is that it binds the parties who enter into it, and, when made, obligates them to perform it, and failure of any of them to perform constitutes, in law, a breach of contract. A mere agreement, or concord of minds, to accompany one another upon an excursion, but without an intent to enter into mutually binding obligations, is not sufficient to create the relationship of joint adventure." *Carboneau v. Peterson* (Wash.), 95 P. 2d 1043, 1054.

"It is well settled that the factual requirements necessary to constitute payment for transportation, and thus avoid the bar of the statute, are: (1) An actual or potential benefit in a material or business sense resulting or to result to the owner or operator of the automobile, and (2) that the transportation be motivated by the expectation of such a benefit." *Woodland v. Smith* (Wash.), 354 P. 2d 391, and cases cited.

Numerous decisions relating to the host-guest statute of Washington are cited and discussed in articles by John W. Richards, Professor of Law, University of Washington, published in 15 Washington Law Review 87 *et seq.*, and in 24 Washington Law Review 101 *et seq.*

Plaintiff alleged he and defendant, while in Haywood County, entered into an agreement with reference to the trip from Waynesville to Sedro Woolley, and plaintiff's evidence tends to support this allegation. This statement in plaintiff's brief is in accord with his allegation and evidence: "As per the agreement between plaintiff Frisbee and defendant West for the trip from Waynesville, North Carolina, to Sedro Wooley (*sic*), Washington, Mr. Frisbee paid the expenses of gas and oil for the automobile, and lodging and food for both, in the amount of something over three hundred ($300) dollars." Unquestionably, if the accident had occurred in the course of the trip from Waynesville to Sedro Woolley, the facts alleged by plaintiff and sup-

ported by evidence would be sufficient to avoid the bar of the statute.

Plaintiff and defendant reached Sedro Woolley on Wednesday, February 22, 1961. Plaintiff testified: "Our trip ended in Sedro Wooley (*sic*) around 4 o'clock in the afternoon, the best I can say." Again: "We stayed at my brother's the whole time we were there." The collision occurred the following morning, February 23, 1961, some ten or fifteen minutes after leaving Sedro Woolley. Plaintiff testified on direct examination they (plaintiff, defendant and plaintiff's brother) had started from Sedro Woolley to Mt. Vernon, and that he and defendant "were going down to sign up for unemployment at Mt. Vernon." Plaintiff testified on cross-examination: "The truth about the matter, we were not on the road to Mt. Vernon."

The trip covered by the agreement between plaintiff and defendant ended on February 22, 1961, when they reached the home of plaintiff's brother in Sedro Woolley. Plaintiff does not allege facts tending to show his status on February 23, 1961, when injured, was that of joint adventurer or of paying passenger. Indeed, there is neither allegation nor evidence as to *any* agreement or arrangement as between plaintiff, defendant and plaintiff's brother or any two of them after plaintiff and defendant reached the home of plaintiff's brother in Sedro Woolley the afternoon of February 22, 1961, with reference to the operation by defendant of his said Chevrolet car. Apart from the deficiency in allegations, the mere fact, if it be a fact, that plaintiff and defendant on February 23, 1961, when the collision occurred, were on their way directly or indirectly to Mt. Vernon to sign up for "unemployment," is insufficient to support a finding that plaintiff was a joint adventurer or a paying passenger.

Plaintiff having failed to allege and prove facts sufficient to avoid the bar of the statute, the judgment of involuntary nonsuit is affirmed on that ground.

Affirmed.

STATE HIGHWAY COMMISSION v.
CLINCHFIELD RAILROAD COMPANY.

(Filed 9 October 1963.)

Highways § 2—

G.S. 136-20 relates only to the construction of underpasses, overpasses, or the installation and maintenance of gates, alarm signals or other

safety devises at railroad grade crossings, and a proceeding under the statute to require defendant railroad company to widen solely at its own expense its crossing sequent to the widening of the intersecting highway, should be dismissed.

APPEAL by defendant from *Patton, J.*, April 1963 Session of RUTHERFORD.

The State Highway Commission (Commission) initiated this proceeding in the manner stated below to compel Clinchfield Railroad Company (Clinchfield) to widen at its own expense the grade crossing in Rutherford County where Clinchfield's track and Secondary Road 2105 intersect.

The record consists of (1) the minutes of meetings of the Commission held December 7, 1961, February 1, 1962, March 15, 1962, and April 13, 1962; (2) an order dated April 26, 1962 issued to Clinchfield by the Commission's Chairman as directed by a resolution or ordinance adopted by the Commission on April 13, 1962; (3) Clinchfield's exceptions and notice of appeal to the superior court; (4) Judge Patton's judgment; and (5) Clinchfield's exceptions, appeal entries and assignments of error.

The Commission, purporting to act under authority of G.S. 136-20 and in accordance with the procedure prescribed therein, initiated this proceeding by a resolution adopted at its December 7, 1961, meeting. This resolution recited, *inter alia*, that Secondary Road 2105 had been widened in 1959 from a pavement width of 16 feet to 18 feet; and that the said crossing, in the opinion of the Commission's Chairman, was dangerous to the traveling public and unreasonably interfered with and impeded traffic on said road. In said resolution, the Commission concurred in said opinion of its Chairman and ordered Clinchfield to appear before it to show cause, if any, why it should not be required "to alter such crossing in such way as to remove such dangerous condition and to make such changes and improvements thereat as will safeguard and secure the safety and convenience of the traveling public thereafter."

The minutes of the February 1, 1962, meeting show the Commission, at the request of Clinchfield's counsel, granted Clinchfield permission to appear at the next meeting of the Commission in lieu of the date "set forth in the order."

The minutes of the March 15, 1962, meeting show counsel for Clinchfield, appearing before the Commission, *contended:* The crossing was an existing crossing, not a new crossing. The Commission intended to take additional right of way for said widening without payment of any form of compensation to Clinchfield. The only benefits

from said widening would accrue to vehicular traffic. Clinchfield would derive no benefit therefrom. The *maintenance* of the crossing, plus the giving of the right of way for the improvements, was sufficient to discharge Clinchfield's obligation. After said statement of Clinchfield's contentions, the Commission adopted a motion that "action on the matter be deferred," and that the matter be "considered for a month and taken up again at the next meeting of the Commission."

The minutes of the April 13, 1962, meeting show the Commission then "RESOLVED AND ORDAINED" that Clinchfield *construct* the proper and adequate crossing at its own expense and bear the cost of future maintenance thereof; that the crossing be constructed by Clinchfield in accordance with the pattern, design and specifications approved by the Commission; that the crossing constructed by Clinchfield "extend a distance of 5 feet each side of the paved or traveled portion of said roads and . . . be between the tracks and between the ends of the ties"; and that Clinchfield proceed with the construction of said crossing within 30 days after receipt of notice from the Commission's Chairman. The Commission's Chairman issued an order dated April 26, 1962, directing Clinchfield to proceed in compliance with said resolution or ordinance of the Commission.

(Note: The Commission's resolutions and the Chairman's order refer also to grade crossings in McDowell County. However, the hearing and judgment below and this appeal relate solely to the Rutherford County crossing.)

Clinchfield filed exceptions to said order of April 26, 1962, and appealed therefrom on the ground, *inter alia,* the Commission had no statutory or constitutional authority to adopt said resolution or ordinance of April 13, 1962.

The court, based upon "an examination of the record, pleadings and arguments and contentions of the parties," entered judgment which, after sundry recitals, concluded as follows:

"That the Court finds as a fact that the crossing located 200 feet west of Milepost No. 1 on spur tracks going into Duke Power Company in Rutherford County was dangerous to the public safety and unreasonably interfered with traffic on said highway;

"That the Order of the Commission of April 26, 1962, requiring the Railroad to build and construct proper and adequate crossing to extend five feet each side of the paved or traveled portion of said road and to be constructed between the tracks and between the ends of the ties is reasonable and necessary for the protection of the traveling public;

"That the Court finds as a fact that the work required and apportionment of the cost to the Railroad as set forth in the Order is fair and reasonable to the Clinchfield Railroad Company.

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

"That the Order of the Commission issued on April 26, 1962, is constitutional and was issued pursuant to the statutory authority vested in the State Highway Commission by Chapter 136 of the General Statutes; that said order was necessary and reasonable for the protection of the traveling public; that the work required and apportionment of the cost to the Railroad as set out fully in the said Order is fair and reasonable to the Railroad Company.

"IT IS, THEREFORE, ORDERED that the Railroad Company perform the work and bear the expense thereof as set out in the Order of the Commission, dated April 26, 1962, and that said Order is hereby in all respects confirmed.

"That Clinchfield Railroad Company herein pay the costs of this action."

Clinchfield filed exceptions to designated findings of fact and to designated legal conclusions, excepted to the judgment and appealed therefrom.

Attorney General Bruton, Assistant Attorney General Lewis and Trial Attornay Daniel for appellee.

A. K. McIntyre and E. P. Dameron for appellant.

BOBBITT, J. While the preamble of the resolution or ordinance adopted April 13, 1962, recites, *inter alia,* that "the Commission has determined and finds that the conditions existing at said grade crossings are dangerous to the safety and convenience of the traveling public and should be eliminated," there are no findings of fact or recitals as to actual conditions with reference to said crossing. Nor does it appear that evidence as to such conditions was offered at any of said meetings of the Commission.

The hearing in the superior court was on a record consisting of the minutes of said meetings of the Commission and of the Chairman's order of April 26, 1962. There were no "pleadings."

Was Secondary Road 2105 in existence when Clinchfield constructed its track? Was the grade crossing, prior to the widening of the paved portion of Secondary Road 2105 from 16 feet to 18 feet, in such condition it unduly interrupted or impeded the free and safe movement of traffic at the crossing? Did Clinchfield benefit by such widening?

Why the requirement that Clinchfield construct (extend) the crossing *five* feet each side of the paved or traveled portion of the road? Was Clinchfield the owner of the fee or of an easement in the land comprising said grade crossing? Answers to these and other factual questions may be of significance in determining whether Clinchfield is obligated at its own expense to construct the extension ordered by the Commission's resolution or ordinance of April 13, 1962.

We do not consider Clinchfield's contentions that the Commission did not comply with the procedural requirements of G.S. 136-20 or with constitutional requirements of due process. Decision is based on the ground G.S. 136-20 has no application to the factual situation disclosed by the record before us.

G.S. 136-20(a) provides, *inter alia,* if a grade crossing, in the opinion of the Commission's Chairman, "is dangerous to the traveling public, or unreasonably interferes with or impedes traffic" on a State highway, the Commission shall notify the railroad company to appear before the Commission and show cause why it "shall not be required to alter such crossing in such way as to remove such dangerous condition and to make such changes and improvements thereat as will safeguard and secure the safety and convenience of the traveling public thereafter."

G.S. 136-20(b) provides, in part, after service of notice as prescribed, "the Commission shall hear said matter and shall determine whether such crossing is dangerous to public safety, or unreasonably interferes with traffic thereon. If it shall determine that said crossing is, or upon the completion of such highway will be, dangerous to public safety and its elimination or safeguarding is necessary for the proper protection of the traffic on said State highway, the Commission shall thereupon order the construction of an adequate underpass or overpass at said crossing or it may in its discretion order said railroad company to install and maintain gates, alarm signals or other approved safety devices if and when in the opinion of said Commission upon the hearing as aforesaid the public safety and convenience will be secured thereby. And said order shall specify that the cost of construction of such underpass or overpass or the installation of such safety device shall be allocated between the railroad company and the Commission in the same ratio as the net benefits received by such railroad company from the project bear to the net benefits accruing to the public using the highway, and in no case shall the net benefit to any railroad company or companies be deemed to be more than ten per cent (10%) of the total benefits resulting from the project."

Extensive subsequent provisions of G.S. 136-20 relate directly and exclusively to orders, plans, work and apportionment of cost in connection with construction of underpasses or overpasses or the installation and maintenance of gates, alarm signals or other safety devices at such grade crossing.

Careful consideration impels the conclusion G.S. 136-20 applies only to a factual situation for which provision is made, namely, the construction of an underpass or overpass or the installation and maintenance of gates, alarm signals or other safety devices.

No opinion is expressed or intimated as to whether, upon facts established in a properly constituted action, Clinchfield is obligated to make the improvements contemplated by the Commission's resolution or ordinance of April 13, 1962, wholly or partly at its own expense.

Being of the opinion G.S. 136-20 does not apply to the factual situation disclosed by the record before us, the judgment of the court below is reversed, and the proceeding is remanded with instructions that the court below enter judgment dismissing the purported proceeding (to the extent it relates to said Rutherford County crossing) without prejudice to the Commission's right to take such further action as it may deem appropriate.

Reversed and remanded.

HAZEL B. BRENKWORTH AND HUSBAND THEODORE A. BRENKWORTH v. LILA K. LANIER, WIDOW; RUBY K. BRINSON AND HUSBAND, JESSIE F. BRINSON; MINA B. KENNEDY, WIDOW; JOHNNYE K. HUNTER AND HUSBAND, PAUL HUNTER; JAMES RAYBURN KENNEDY AND WIFE, DOROTHY B. KENNEDY; PATSY RUTH K. QUINN AND HUSBAND, CLIFTON QUINN; BOBBY LOWELL KENNEDY AND WIFE, NAOMI C. KENNEDY; SALLY JOE K. HOUSTON AND HUSBAND, LAUREN HOUSTON; WILLIAM E. CRAFT, GUARDIAN AD LITEM FOR GORDON BENNETT KENNEDY, JR., AND WIFE, MARIE ELMORE KENNEDY, AND GEORGE EDWARD KENNEDY, MINORS.

(Filed 9 October 1963.)

1. Partition § 9—

The sale pursuant to the decree does not terminate a partition proceeding since the proceeding remains pending until the proceeds of the sale have been distributed, and therefore a motion in the cause and not an independent action for a declaratory judgment is the proper procedure to present conflicting claims as to the proper distribution of the fund, but, the parties being the same, the independent action may be treated as a motion in the cause.

2. Appeal and Error § 38—

A question raised by assignments of error but not discussed in the brief is deemed abandoned.

3. Dower § 3—

The widow of an heir is not entitled to dower in the heir's share of the proceeds of sale for partition of the dower estate of the heir's mother.

4. Dower § 8; Partition § 9—

Under the 1943 amendment to G.S. 8-47 the interest rate of 6 per cent must be used in computing the present cash value of the widow's dower in the distribution of the proceeds of sale of the dower estate for partition between the widow and the heirs at law.

APPEAL by defendants from *Hubbard*, J., in Chambers in DUPLIN on 18 July 1963.

The parties seek by this action a judgment fixing the manner in which a fund, now in the hands of the clerk of the Superior Court of Duplin County, shall be disbursed.

Hobart A. Kennedy died intestate on 15 December 1950. He left as his heirs and distributees his widow, plaintiff Hazel (hereafter plaintiff), who has since married Theodore A. Brenkworth, a sister Lila K. Lanier, a sister Ruby K. Brinson, wife of J. F. Brinson, the three children of his deceased brother Gordon B. Kennedy, viz. Sally Jo Houston, wife of Lauren Houston, Gordon Bennett Kennedy, Jr., husband of Marie E. Kennedy, George E. Kennedy; and a brother, J. G. Kennedy, who died 2 July 1958, leaving a widow, Mina B. Kennedy, and four children, viz. Johnnye K. Hunter, wife of Paul Hunter, James Rayburn Kennedy, husband of Dorothy B. Kennedy, Patsy Ruth K. Quinn, wife of Clifton Quinn, and Bobby Lowell Kennedy, husband of Naomi C. Kennedy.

In 1951 the heirs of Hobart A. Kennedy filed a petition in the Superior Court of Duplin County to have plaintiff's dower allotted. On 9 January 1953 the commissioners appointed to lay off the widow's dower filed their report containing a specific description of the lands allotted the widow as dower. This report was confirmed 19 January 1953.

In November 1962 plaintiffs in the present action, with the joinder of some of present defendants, instituted a special proceeding in Duplin County against the remaining present defendants seeking a sale for partition of the lands allotted plaintiff as her dower. A sale was directed and made by commissioners appointed by the court. The sale was confirmed. On 26 February 1963 the commissioners delivered deeds to the purchasers and collected the purchase price,

$35,500. This sum was paid to the clerk of the Superior Court pending a determination of the proper manner of distribution.

Plaintiff, in her complaint, alleges she is entitled to the present cash value of an annuity computed at 6% for her life expectancy; that Mina Kennedy, widow of J. G. Kennedy, is not entitled to participate in the distributon of the fund.

Defendants, other than the guardian ad litem, filed a joint answer. They conceded plaintiff was entitled to the present cash value of an annuity for her life expectancy but asserted it should be computed at 4½% rather than at 6% as claimed by plaintiff; they also asserted Mina Kennedy, widow of J. G. Kennedy, was entitled to claim dower in one-fourth of the fund.

The parties stipulated plaintiff's age and agreed that her life expectancy should be ascertained by the use of the table appearing in G.S. 8-46.

Judge Hubbard concluded as a matter of law on the facts stipulated and admitted in the pleadings that Mina Kennedy was not entitled to dower, that plaintiff was entitled to have the present cash value of her annuity computed on the basis of 6%. Defendants excepted to the judgment and appealed.

Henry L. Stevens, III, for plaintiff appellees.
Russell J. Lanier for defendant appellants.

RODMAN, J. The special proceeding begun in 1962 for a sale for partition and distribution of the proceeds among the parties in the proportions to which they were entitled did not terminate by the sale and the collection of the proceeds. The proper procedure to secure a distribution of the fund was by motion in the cause, not by an independent action for a declaratory judgment; but since the action was begun in the Superior Court of Duplin County where the proceeding to sell was instituted and then pending, and the parties to this action are the identical parties to that proceeding, though not arranged in the order in which they appeared in the special proceeding, this action may be and is treated as a motion in the proceeding to sell for partition. *In re Will of Cox*, 254 N.C. 90, 118 S.E. 2d 17; *Mitchell v. Downs*, 252 N.C. 430, 113 S.E. 2d 892; *Beck v. Voncannon*, 237 N.C. 707, 75 S.E. 2d 895; *Simmons v. Simmons*, 228 N.C. 233, 45 S.E. 2d 124; *Craddock v. Brinkley*, 177 N.C. 125, 98 S.E. 280.

Defendants, including Mina B. Kennedy, widow of J. G. Kennedy, filed a brief presenting this single question: What rate of interest shall be used in computing the value of plaintiff's interest in the fund

derived from the sale? The single question propounded for decision is an abandonment of any question relating to the right of Mina Kennedy, asserted in the answer and denied by the judgment, to participate in the distribution of the fund. *Johnson v. Bass,* 256 N.C. 716, 125 S.E. 2d 19; *Little v. Brake Co.,* 255 N.C. 451, 121 S.E. 2d 889; *Cotton Mills v. Local,* 251 N.C. 413, 111 S.E. 2d 529. This abandonment of the asserted right is a proper recognition of established law. *In re Will of Smith,* 249 N.C. 563, 107 S.E. 2d 89; *Jones v. Whichard,* 163 N.C. 241, 79 S.E. 503; *Thomas v. Bunch,* 158 N.C. 175, 73 S.E. 899; *Redding v. Vogt,* 140 N.C. 562; *Houston v. Smith,* 88 N.C. 312.

The pertinent part of the statute, G.S. 8-47, prescribing the method of computing the present cash value of annuities reads as follows: "When a person is entitled to the use of a sum of money for life, or for a given time, the interest thereon for one year, computed at four and one-half per cent, may be considered as an annunity and the present cash value be ascertained as herein provided: Provided, the interest rate in computing the present cash value of dower shall be six per cent." This was the statute law of this state on 15 December 1950 when plaintiff became a widow, in 1953 when her dower was allotted, in 1962 when commissioners were authorized to sell the lands allotted to her as dower, and in 1963 when the sale was consummated.

The statute prescribing the manner of computing the value of annuities originated with c. 347, P.L. 1905. That statute did not fix the rate of interest. It merely said: "The interest thereon for one year may be considered as an annunity." The statute, enacted in 1905, was in effect until 1927, Rev. 1627 and C.S. 1791, when the Legislature, by c. 215, P.L. 1927, amended the statute, fixing the rate of interest at 4½%. That act made no distinction between life estates created by grant or testament and the special life estate given a woman by law when she and a man become husband and wife.

In 1943 the Legislature, engaged in reviewing the proposed codification of our statutory law, noted the seeming conflict between G.S. 8-47, fixing 4½% as the rate of interest to be used in computing an annuity, and G.S. 28-81, fixing 6% as the proper rate when the husband's land was sold to pay debts, and G.S. 46-15, which likewise fixed 6% as the proper rate for use in partition proceedings. To correct the inconsistency it enacted c. 543, which added the proviso at the end of G.S. 8-47.

By the specific language of the proviso plaintiff is entitled to have her annunity computed at 6% when her dower is sold.

Defendants argue the proviso added in 1943 does not apply because plaintiff's dower terminated when a specific area was allotted to her for lfe. The argument is fallacious. Dower is an estate for life in one-third of the lands of which the husband is seized and possessed in fee. G.S. 30-5.

The right to dower is inchoate or contingent until the husband's death. *Blower Co. v. MacKenzie*, 197 N.C. 152, 147 S.E. 829. The right to have her estate set apart to her is consummate or vested upon the death of the husband. *Trust Co. v. White*, 215 N.C. 565, 2 S.E. 2d 568. It is still a chose in action. Dower may be assigned by agreement with the heirs, G.S. 30-11, or allotted by court, G.S. 30-13. When allotted, it ceases to be a mere chose in action and becomes an estate, her dower. *Vannoy v. Green*, 206 N.C. 77, 173 S.E. 277; *Malone v. Conn*, 23 S.W. 677; *McNeer v. McNeer*, 32 N.E. 681.

In *Smith v. Smith*, 223 N.C. 433, relied on by defendants to support their contention that the annuity should be computed at 4½% there had been allotted to the widow as her dower a part of a hotel and furniture incident to use thereof. The hotel and the furniture were subject to a mortgage given to pay debts of her husband's estate. The property was insured against damage by fire. The policy contained a provision making the loss payable to the mortgagee as its interest might appear. The hotel and furniture were burned 21 December 1942. The fire insurance company recognized its liability and settled the loss on 12 February 1943. One of the questions decided by this Court on the appeal was the proper rate of interest to use in computing the value of the widow's estate. Winborne, J. (later C.J.), writing for the Court, held the widow was not entitled to have the cash value of her dower computed on an annuity determined by using 6%. He quoted the statute without the proviso added by the 1943 Legislature as determinative of the rights of the parties.

Manifestly the conclusion there reached was correct because the proviso added by c. 543, S.L. 1943, was not applicable to causes arising prior to the date of its ratification, 6 March 1943. It was not suggested that the statute could have a retroactive effect.

We find no error in the judgment. The costs of the appeal will be paid from the funds in the hands of the clerk of the Superior Court in conformity with the stipulation of the parties.

No error.

HENRY BRADLEY ROBINSON v.
UNITED STATES CASUALTY COMPANY.

(Filed 9 October 1963.)

1. **Automobiles § 2; Judgments § 18—**

The suspension or revocation of an automobile driver's license by the Department of Motor Vehicles is a quasi-judicial act and cannot be collaterally attacked.

2. **Same; Perjury § 6—**

The driver of an automobile may not sue his insurer for damages resulting from the revocation of his driver's license allegedly resulting from the false representation of his insurer that the driver did not have insurance in force at the time he was involved in an accident. G.S. 20-166.1(b), G.S. 20-279.4, G.S. 20-279.5, since such action amounts to a collateral attack upon the order of the Commissioner suspending the license and is based on subornation of perjury.

APPEAL by plaintiff from *Latham, S.J.*, April 8, 1963 Special Civil "A" Session of MECKLENBURG.

Defendant demurred to the amended complaint for failure to state a cause of action. The demurrer was sustained. Plaintiff appealed.

J. Grover Lee, Jr., and Thomas H. Lee for plaintiff appellant.

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

RODMAN, J. The allegations of the amended complaint, liberally interpreted, may be summarized thus: (1) Plaintiff, on 6 May 1959, purchased from defendant an automobile liability insurance policy providing protection in the sum of $20,000 for injury to or death of one person, $40,000 for injuries or deaths resulting from a single accident, and $5,000 property damage resulting from the negligent use of his 1953 Mercury automobile. The policy was sufficient to comply with the requirements of the Motor Vehicle Safety and Financial Responsibility Act of 1953. (2) On 15 May 1959 plaintiff, while operating his Mercury automobile "was involved in a motor vehicle collision at the intersection of Colonial and Crescent Avenues in the City of Charlotte. . . ." (There is no specific allegation that personal injury or death or property damage in excess of $100 resulted from the collision.) The policy of insurance issued by defendant was in full force and effect when the collision occurred. (3) "That shortly after said collision, the defendant insurance company fraudulently, maliciously, wrongfully, wantonly and willfully caused and procured the wrongful revocation of the plaintiff's Driver's License through the

North Carolina Department of Motor Vehicles by fraudulently representing to said department that it, The United States Casualty Company, did not insure the plaintiff against automobile liability at the time of the aforesaid accident.

"That the plaintiff is informed and believes and so alleges that on or about June 16, 1959, the defendant insurance company with full knowledge that it was on the risk for the plaintiff's accident on May 15, 1959 and on repeated dates prior to July 16, 1959 did through its agents and employees acting within the scope of their agency and authority did fraudulently misrepresent to the Department of Motor Vehicles of the State of North Carolina that the plantiff did not have any automobile liability insurance in force with the defendant insurance company on May 15, 1959 and in making such representations to the plaintiff and the Department of Motor Vehicles acting for the citizenry of North Carolina the defendant insurance company knew that such representations were false, untrue and deceitful and that in so doing with full knowledge of the consequences the defendant insurance company did fraudently, maliciously and deceitfully intend to deceive the plaintiff and the people of North Carolina by denying the existence of the plaintiff's automobile liability insurance coverage which had been in full force and effect since May 6, 1959 and was in full force and effect on May 15, 1959 as the defendant well knew; that the Department of Motor Vehicles acting for the plaintiff as a citizen of North Carolina did rely upon the false representations of the defendant insurance company; and that as the result of such reliance on said fraudulent and deceitful representations willfully, wantonly and maliciously made by the defendant insurance company as herein alleged the plaintiff did sustain the loss, injury and damage as alleged in paragraph twelve (12) of this Complaint." (4) "That as the direct and proximate result of the malicious, fraudulent and wrongful acts of the defendant insurance company, as alleged aforesaid, the plaintiff has been deprived of his driving privileges since July 16, 1959, and the plaintiff has thereby been damaged in the sum of Eight Hundred Fifty and no/100 Dollars ($850.00) which money has been actually expended by him for transportation necessary to and from his work during all of the time since the wrongful revocation of his Driver's License caused by the fraudulent acts of the defendant insurance company in having said license revoked."

In disposing of the appeal we treat the complaint as alleging personal injury, death, or property damage in excess of $100 resulting from the collision.

G.S. 20-166.1(b) imposes the duty on the operator of a motor vehicle to notify the Department of a collision in which he is involved which results in personal injuries, death, or property damage in excess of $100. The operator is required by G.S. 20-279.4 to inform the Department when he notifies it of the accident whether he carried liability insurance or was exempt from the statutory provision.

G.S. 20-279.5 makes it the duty of the Commissioner of Motor Vehicles to suspend the driver's license if the owner-operator fails to discharge his liability for the damage resulting from the collision. The license cannot be suspended if the owner "had in effect at the time of such accident an automobile liability policy with respect to the motor vehicle involved in such accident." G.S. 20-279.5(c)1.

The Commissioner is expressly required to give the owner or operator ten days' notice of the proposed date of suspension. G.S. 20-279.5(b) That section further provides: "Where erroneous information is given the Commissioner with respect to the matters set forth in subdivisions 1, 2 or 3 of section (c) of this section or with respect to the ownership or operation of the vehicle, the extent of the damage and injuries, or any other matters which would have affected the Commissioner's action had the information been previously submitted, he shall take appropriate action as hereinbefore provided, within sixty days after receipt by him of correct information with respect to said matters." This statutory provision gave to plaintiff full opportunity to present his evidence to the Commissioner to establish the fact that he did carry insurance as required.

The act of the Commissioner in suspending plaintiff's license was quasi-judicial. It cannot be collaterally attacked. *Beaver v. Scheidt, Comr. of Motor Vehicles*, 251 N.C. 671, 111 S.E. 2d 881.

Not only was plaintiff entitled to a hearing before the Commissioner on the factual question of whether he was, as he now alleges, insured by defendant; but he was entitled upon an adverse finding by the Commissioner to appeal to the Superior Court where the right to suspend would be heard *de novo*. The filing of a petition to review the Commissioner's order is the equivalent of a supersedeas suspending the order until the question at issue has been determined by the Superior Court. G.S. 20-279.2(b).

In substance plaintiff claims the right to recover damages because of false testimony given in a quasi-judicial proceeding, which testimony resulted in a finding and adjudication adverse to him. He asserts this right notwithstanding his failure to challenge the truthfulness of the testimony when he had an opportunity to do so. He does not allege he has ever sought to vacate the order of the Commissioner

revoking his driver's license. Public policy forbids the maintenance of such an action. *Gillikin v. Springle,* 254 N.C. 240, 118 S.E. 2d 611; *Gillikin v. Bell,* 254 N.C. 244, 118 S.E. 2d 609; *Brewer v. Coach Co.,* 253 N.C. 257, 116 S.E. 2d 725; *Hocker v. Welti,* 239 Ill App 392. As said by Clark, C. J., in *Godette v. Gaskill,* 151 N.C. 52, 65 S.E. 612: "[I]t would multiply and extend litigation if the matter could be re-examined by a new action between a party to the action and a witness therein; and, more than that, witnesses would be intimidated if their testimony is given under liability of themselves being subjected to the expense and annoyance of being sued by a party to the action to whom their testimony might not be agreeable. It would give a great leverage to litigants to intimidate witnesses."

The court properly sustained the demurrer since plaintiff has not and cannot state a cause of action based on subornation of perjury resulting in the loss of his driver's license.

Affirmed.

JOHN EDWARD YOW v.
L. R. ARMSTRONG AND WIFE, DOROTHY N. ARMSTRONG.

(*Filed 9 October 1963.*)

1. Deeds § 21—

Where plaintiff's allegations of the breach of a covenant of seizin is denied in the answer, the burden rests on plaintiff to establish his cause of action by showing want of title in defendants, and the fact that defendants, after denying breach of the covenant, further allege the manner in which they acquired title does not alter the burden of proof.

2. Same—

Where, in an action for breach of covenant of seizin, the evidence tends to show that the deed to defendants' predecessor in title was defective in that it was a commissioner's deed in an action in which all the parties having an interest in the land were not served, but the evidence further tends to show that defendants' predecessor in title went into possession under the deed and remained in open notorious and adverse possession thereunder for more than seven years and that defendants acquired their title, the evidence shows title in defendants and nonsuit was proper.

3. Trial § 57—

In a trial by the court under agreement of the parties the credibility of the evidence is for the court, sitting as a jury.

4. Adverse Possession § 7—

Where lands of tenants in common are sold under a tax foreclosure in a suit in which some of the tenants are not served, the commissioner's

deed to the purchaser pursuant to court order is not the act of a co-tenant, and therefore the contention that a tenant purchasing from the grantee of the commissioner could not acquire title against the other tenants is untenable.

APPEAL by plaintiff from *Bone, J.*, February 1963 Civil Session of NEW HANOVER.

Plaintiff alleged and defendants admitted defendants in May 1962 conveyed to plaintiff a lot in South Wilmington. The deed contained covenants that grantors "are seized in fee of the above granted and described premises and have good right to sell and convey the same in fee simple." Plaintiff seeks damages for the breach of these covenants.

Sec. 6 of the complaint reads: "That the defendants' title to said lands and premises is defective for that it is dependent upon a civil action brought by New Hanover County and C. R. Morse, then *City-County Tax Collector v. The Dixie Land & Development Company*, a North Carolina corporation, and others, for the purpose of foreclosing tax liens upon lands and premises of which the lot described therein is a part, in which proceeding those persons named as parties defendant were not properly served with summons and were not before the Court and that the deed of G. C. McIntire, a Commissioner named and designated in said proceeding, conveying land and premises of which the lot described in this complaint was a part, to the defendants' purported predecessor in title, was void and defective and that said defects in said proceeding constituted a fatal defect in the title of the defendants all as herein alleged."

Defendants denied the allegations of sec. 6 of the complaint. Additionally they alleged: The land conveyed to plaintiff was part of a larger tract described in a deed dated 10 September 1954 from O. R. Parker and wife and F. E. Livingston and wife to defendants, which deed purported to convey the land there described in fee; they took possession immediately upon the execution of the deed, and exercised exclusive control and dominion thereof adverse to all the world from September 1954 to May 1962 when they conveyed a part to plaintiff.

The parties stipulated the lot conveyed to plaintiff was within the boundaries set out in the deed of 10 September 1954 from Parker and others to defendants. They also stipulated: "That the facts with relation to a civil action brought to foreclose a tax lien against the Dixie Land and Development Company, and others, as alleged in paragraph 6 of the plaintiff's complaint are as therein alleged."

A jury trial was waived. The court found as a fact that defendants entered on the land described in the deed "and constructed thereon an office building and that the defendants have from and after said

time been in possession of said lands and premises and have paved roads into said lands and premises to afford them access to portions thereof and have used portions of said land as a borrow pit and have stored equipment upon said lands and premises and have cut fire lanes around the perimeter boundary of said lands, and have occupied said lands in an open, notorious and adverse fashion under known and visible lines and boundaries since the date of said deed to said defendants and have used portions of said land for the furtherance of the business of the defendants and have been in continuous possession thereof from and after September 1954. . . ."

Based on its findings the court concluded that the defendants were at the time of their conveyance to plaintiff the owners in fee. He adjudged that plaintiff take nothing.

Yow & Yow for plaintiff appellant.
Carr & Swails by James B. Swails for defendant appellees.

RODMAN, J. Plaintiff has two assignments of error: First. The court erred in holding that defendant had offered evidence sufficient to establish good title to the property sold plaintiff. Plaintiff takes the position that the burden of establishing title was on the defendants. No matter what the law may have been prior to the adoption of the Code of Civil Procedure and our registration statutes (See 14 Am. Jur. 566 and cases cited in note 8), it is now settled that when plaintiff alleges a breach of a covenant of seizin and the allegation is denied, the burden rests on plaintiff to establish his cause of action. *Eames v. Armstrong*, 142 N.C. 506; *Cherry v. Warehouse Co.*, 237 N.C. 362, 75 S.E. 2d 124; 21 C.J.S. 1000-1001.

Here defendants specifically denied plaintiff's allegation of a breach of the covenant. The mere fact that defendants did not stop with a mere denial but alleged the manner in which they acquired title was not sufficient to shift the burden of proof from plaintiff to defendants.

In this case it is immaterial where the burden of proof rested. There was plenary evidence to show defendants had physical possession of the properties described in the deed to them for more than seven years. It was possession claimed as a right by virtue of the deed to them. The evidence was ample to warrant the finding which the court, sitting as a jury made. Whether the court should have accepted the evidence as true or rejected it as unworthy of belief was for the judge sitting as a jury: his determination of that question is conclusive.

Plaintiff's second assignment of error is to the judgment itself. He contends the judgment is erroneous because based on a misconception

of the law and not supported by the facts found. He says: Defendants trace their title to the deed made by McIntire, commissioner; the defendants in the action in which McIntire was appointed and directed to act were cotenants; some were not served; the decree authorizing a sale could not bind those not parties; nothing short of twenty years' adverse possession is sufficient to bar cotenants. To support his assertion he relies on *Williams v. Robertson*, 235 N.C. 478, 70 S.E. 2d 692; *Whitehurst v. Hinton*, 230 N.C. 16, 51 S.E. 2d 899; *Peel v. Calais*, 224 N.C. 421, 31 S.E. 2d 440.

Plaintiff's contention is without merit for these reasons: (1) We find nothing in the record which tends to establish the fact that defendants trace their title to the deed made by McIntire as commissioner. Even if it be conceded that defendants did trace title to the deed executed by McIntire, commissioner, the facts alleged in sec. 6 of the complaint do not show that defendants in the action brought by Morse, tax collector, against Dixie Land and Development Co. and others were tenants in common. The facts there alleged and admitted by the stipulation are that some of the defendants were not served with process and hence not bound by the decree. (2) If it be conceded that defendants in the action under which McIntire as commissioner sold were in fact cotenants, it does not follow that those who trace their title to the deed executed by McIntire as commissioner could not ripen their color into good title by seven years' adverse possession. Where a sale is made pursuant to court order in a partition proceeding and some of the cotenants are not parties, or there is an actual partition among those parties, the deed or the decree of partition is not the act of a cotenant, but is the act of a stranger, and seven years' possession under the deed or decree confirming the partition suffices to ripen title. *Johnson v. McLamb*, 247 N.C. 534, 101 S.E. 2d 311; *Trust Co. v. Parker*, 235 N.C. 326, 69 S.E. 2d 841; *Perry v. Bassenger*, 219 N.C. 838, 15 S.E. 2d 365; *Alexander v. Cedar Works*, 177 N.C. 137, 98 S.E. 312; *Lumber Co. v. Cedar Works*, 165 N.C. 83, 80 S.E. 982.

The court correctly held that plaintiff was not entitled to recover. Of course the findings and conclusions which the court made with respect to defendants' title cannot bind those who are not parties to this action.

No error.

NELLIE RALPH JOHNSON v.
MAYWOOD N. SANDERS, EXECUTOR OF CLAUDE RALPH ESTATE.

(Filed 9 October 1963.)

1. Executors and Administrators § 24c—

There is no presumption that personal services rendered by an adult daughter to her father are gratutious when such services are rendered after the daughter has married and left her father's house and estabished a home of her own.

2. Executors and Administrators § 24a; Quasi-Contracts § 1—

As a general rule, if one performs personal services for another which are knowingly and voluntarily accepted, and nothing else appears, the law will imply a promise on the part of the recipient to pay the reasonable value of the services rendered; nevertheless, the burden remains upon the person rendering such services to show circumstances from which it may be inferred that the services were rendered and received with the mutual understanding that they were to be paid for.

3. Executors and Administrators § 24b—

While a cause of action to recover the reasonable value of personal services rendered in reliance upon oral contract to devise does not accrue until the recipient of the services dies without having made the agreed testamentary provision, the mere fact that services were rendered under circumstances from which a mutual understanding that they were to be paid for may be inferred does not imply a promise to pay at death or by will, and in the absence of a contract to pay by testamentary provision the services rendered more than three years prior to the death of the recipient are barred by the statute of limitations.

4. Same—

Testimony that the recipient of personal services stated to witnesses that the person rendering the services had been good to him and that he wanted her to have the house in which she lived because she deserved it, and that he said in the presence of the person rendering the services and her husband that he was going to leave the realty to her because they had been so good to him, while competent to be considered with other facts and circumstances upon the question of whether payment was intended on the one hand and expected on the other, is insufficient to establish a definite contract to pay for the services by testamentary disposition.

5. Executors and Administrators § 24d—

The failure of proof of the definite value of personal services rendered a decedent does not justify nonsuit in an action against the estate if the evidence is sufficient to establish implied assumpsit, since in such instance nominal damages are recoverable at least, notwithstanding that plaintiff must prove the value of the services rendered in order to be entitled to recover more.

APPEAL by plaintiff from *Peel, J.,* May Session 1963 of PASQUOTANK.

Civil action to recover for personal services rendered a decedent.

Plaintiff is the daughter of Claude Ralph who died testate on July 12, 1962. On October 26, 1962, she instituted this action against his executor to recover for services which she allegedly rendered her father from 1945 until April 1962 upon his promise to "compensate her therefor by devising or bequeathing property to her."

Plaintiff's evidence tended to show the following facts:

For twenty years prior to his death she lived next door to her father in a six-room house which he owned and leased to her husband. For the first ten years the rent was twenty dollars a month. Thereafter, a filling station was built on a part of the property and Mr. Ralph reduced the rental to fifteen dollars. At the time of his death this house had a market value of between six and eight thousand dollars. Shortly after his wife died in 1945, Mr. Ralph suffered a stroke which affected his right side. From 1945 until about three months prior to his death plaintiff did her father's laundry, cared for his clothing, and frequently cooked his meals. During 1949 and 1950 he lived in the house with plaintiff and her husband. In 1951 and 1952 he resided in his home but took his meals with them for a period of about six months in each year. Mr. Ralph never paid plaintiff or her husband for any of these services.

Plaintiff's evidence further tended to show that at various times from 1945 through 1961, Mr. Ralph had commented to the plaintiff's witnesses that she was better to him than any of his other children and he looked to her; that he did not mind asking her to do anything for him; that she had never asked him for a penny since she left home; and that he wanted her to have the house in which she lived because she deserved it. At least one of the witnesses informed plaintiff of these statements at sometime within the three years prior to her father's death. In 1950 Mr. Ralph said, in the presence of plaintiff and her husband, that he was going to leave her the place where she was living because they had been so good to him. In response to this plaintiff said: "That's all right, daddy." In August 1960 Mr. Ralph told plaintiff's mother-in-law that if he ever got well enough to go uptown he was going to have a will made and he wanted to give plaintiff the house because of what she had done for him. In his will (date undisclosed) Mr. Ralph made no provision whatever for the plaintiff. The only evidence of the value of plaintiff's services was the testimony of her husband that from 1945 until her father's death in July 1962, the services were worth six thousand dollars.

Defendant's evidence tended to show that plaintiff did very little for her father and that he had paid her for what she did. At the close

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

John H. Hall for plaintiff appellant.
Worth & Horner for defendant appellee.

SHARP J. The plaintiff in this case is an adult daughter who married, left her father's house and established a home of her own. Therefore, no presumption arises that any services she rendered to her father were gratuitous. 2 Strong, N. C. Index, Executors and Administrators, § 24c. p. 337. Plaintiff comes within the general rule that if one performs services for another which are knowingly and voluntarily accepted, nothing else appearing, the law implies a promise on the part of the recipient to pay the reasonable value of the services. *Winkler v. Killian,* 141 N.C. 575, 54 S.E. 540; *Landreth v. Morris,* 214 N.C. 619, 200 S.E. 378; *Coley v. Dalrymple,* 225 N.C. 67, 33 S.E. 2d 477. However, services rendered gratuitously to one during his lifetime may not be converted into a debt after his death. *Nesbitt v. Donoho,* 198 N.C. 147, 150 S.E. 875. The burden always rests upon the plaintiff, even when there is no presumption that the services were gratuitous, to show circumstances from which it might be inferred that services were rendered and received with the mutual understanding that they were to be paid for, or, as it is sometimes put, "under circumstances calculated to put a reasonable person on notice that the services are not gratuitous." *Lindley v. Frazier,* 231 N.C. 44, 55 S.E. 2d 815; *Twiford v. Waterfield,* 240 N.C. 582, 83 S.E. 2d 548.

Whether plaintiff rendered services to her father with no expectation of being paid therefor or under an implied promise of compensation is a question of fact. Clearly she was entitled to have the jury pass upon her claim for services rendered during the three years immediately preceding his death. *Hodge v. Perry,* 255 N.C. 695, 122 S.E. 2d 677.

Plaintiff seeks, however, to recover for services rendered over a period of seventeen years upon the allegation that decedent breached his agreement to compensate her in his will. *Stewart v. Wyrick,* 228 N.C. 429, 45 S.E. 2d 764. When compensation is to be provided in the will of the recipient, the cause of action accrues when he dies without having made the agreed testamentary provision. *Doub v. Hauser,* 256 N.C. 331, 123 S.E. 2d 821. Nevertheless, as pointed out by *Rodman, J.,* in *McCraw v. Llewellyn,* 256 N.C. 213, 123 S.E. 2d 575, the promise which the law implies on the part of the recipient to pay for services knowingly and voluntarily received, is not expanded to

imply a promise to pay at death and by will. "If the time for payment is to be extended to the death of the recipient of the services, there must be an agreement to that effect." Plaintiff's evidence in this case fails to establish such an agreement.

The statements by Mr. Ralph, expressing his gratitude for what plaintiff had done for him and a purpose to leave her the house in which she resided, constituted neither an express promise on his part to pay for such services nor were they an unqualified acknowledgment of indebtedness to her. *Dodson v. McAdams,* 96 N.C. 149, 2 S.E. 453; *Lindley v. Frazier, supra. A fortiori,* they were not a promise to pay at death or by will. A mere expression of appreciation is insufficient to establish a contract. Such statements show Mr. Ralph's kindly disposition toward his daughter, but they fail to establish a promise to reimburse her in his will for services she might thereafter render him. They were competent for the jury to consider, along with all the other facts and circumstances, upon the question whether payment was intended on the one hand and expected on the other.

A contract, whether express or implied, requires mutuality of agreement and obligation to be enforceable. "(F)rustrated expectations of a bounty, not the offspring of agreement," will not change a partially barred claim into one wholly outside the three-year statute of limitations. *Miller v. Lash,* 85 N.C. 51.

The expressions of Mr. Ralph are parallel to those made by the decedent with reference to the plaintiff's services in *Brown v. Williams,* 196 N.C. 247, 145 S.E. 233. There, although the expressions were never made to the plaintiff, it was held that the evidence was sufficient to go to the jury on the question of *quantum meruit* for the three years prior to the death of the recipient but not sufficient to show an express contract to make testamentary provision for the plaintiff.

According to the plaintiff's evidence, when she learned that her father intended to leave her the house, she had already rendered five of the total seventeen years of service for which she now seeks compensation. Her only reply when he stated this intention was, "That's all right, daddy." This exchange between plaintiff and her father is as consistent with gratuitous service on her part as it is with an expectation of payment. Yet, it is some evidence to support her claim that she expected to be paid for her services thereafter.

Plaintiff's failure to establish an express contract, however, will not defeat her right to prosecute her claim for services rendered during the three years preceding her father's death. *Cline v. Cline,* 258 N.C. 295, 128 S.E. 2d 401; *Grady v. Faison,* 224 N.C. 567, 31 S.E. 2d 760; *Coley v. Dalrymple, supra.*

Defendant's contention that the nonsuit was justified by plaintiff's failure to offer evidence as to the reasonable value of her services during the three years immediately prior to Mr. Ralph's death is untenable. True, her proof related only to the total value of the services allegedly rendered during the seventeen years of her claim. However, as stated by *Bobbitt, J.*, in *Gales v. Smith,* 249 N.C. 263, 106 S.E. 2d 164, implied assumpsit is the basis for any recovery on *quantum meruit.* Upon the breach of such a contract a plaintiff would be entitled to nominal damages at least. To recover more, plaintiff must prove the value of the services rendered. The jury is required to base its verdict on evidence; it may not speculate. *Cline v. Cline, supra.*

The evidence in this case should be submitted to the jury on the issue of *quantum meruit* for the three years prior to the death of defendant's testate.

The judgment of involuntary nonsuit is

Reversed.

DORETHA BOYKIN, ADMINISTRATRIX OF THE ESTATE OF LINDA LOUISE BURNETTE, DECEASED v. BEULAH BURNETTE BISSETTE AND JOHNNIE P. HARRIS.

(Filed 9 October 1963.)

1. Automobiles § 14—

The audible warning with horn or other signaling device required by G.S. 20-149(b) to be given by a driver before passing or attempting to pass a preceding vehicle must be given in reasonable time to afford the driver of the preceding vehicle opportunity to avoid injury which would result from a left turn or a crossing over of the center of the highway, and while the failure to observe the requirements of the statute is not negligence *per se,* it is evidence to be considered with other facts and circumstances upon the issue.

2. Automobiles § 6—

The requirement of G.S. 20-140(b) that the driver of a vehicle must drive same with due caution and circumspection and in a manner so as not to endanger or be likely to endanger persons or property, provides an absolute standard of care, and the violation of the statute constitutes negligence *per se.*

3. Automobiles § 7—

Irrespective of statute, the operator of a motor vehicle is under duty to exercise that care which a reasonably prudent person would exercise under similar circumstances to prevent injury to persons or property.

4. **Automobiles § 41d— Evidence of negligence in attempting to pass preceding vehicle under circumstances without sounding horn held for jury.**

Evidence tending to show that defendant driver attempted to pass a preceding truck in open country on two occasions but was prevented from doing so by the weaving of the truck over the center line of the highway, that defendant attempted to pass on a third occasion without previously sounding her horn and, as the vehicles came abreast, the preceding vehicle veered to its left over the center line of the highway, and that defendant, upon apprehending the danger, then sounded her horn, was forced onto the shoulder to her left, lost control and ran off the highway to her left, resulting in the fatal injury to a passenger, *is held* sufficient to overrule nonsuit in an action for the wrongful death of the passenger.

5. **Automobiles § 19—**

Where the evidence tends to show that the driver of a car was negligent in attempting to pass the preceding vehicle under the circumstances without giving prior warning by horn, such driver may not rely upon the doctrine of sudden emergency when the driver of the preceding vehicle veers to his left as the cars come abreast, since the doctrine of sudden emergency may not be invoked by a person whose own negligence brings about or contributes to the emergency in whole or in part.

APPEAL by plaintiff from *Cowper, J.*, January 1963 Civil Session of WILSON.

Civil action to recover damages for the death of plaintiff's intestate Linda Louise Burnette, an infant two months eleven days old, allegedly caused by the actionable negligence of defendant Beulah Burnette Bissette in the operation of an automobile owned by the defendant Johnnie P. Harris.

At the close of plaintiff's evidence, plaintiff took a voluntary nonsuit as to Johnnie P. Harris. From a judgment of compulsory nonsuit entered at the close of plaintiff's evidence as to Beulah Burnette Bissette, plaintiff appeals.

Robert A. Farris and Allen G. Thomas by Allen G. Thomas for plaintiff appellant.

Narron, Holdford & Holdford by Talmadge Narron for defendant appellee.

PARKER, J. Plaintiff's evidence considered in the light most favorable to her (*Bridges v. Graham,* 246 N.C. 371, 98 S.E. 2d 492) tends to show the following:

About 5:30 p.m. on 28 June 1960 defendant Beulah Burnette Bissette was driving a Ford automobile, owned by defendant Johnnie P. Harris, in a westerly direction on Highway 264 about one and one-half

miles west of Middlesex. Mrs. Cleo Harris, wife of Johnnie P. Harris, was sitting in the middle on the front seat. Sitting on her right on the front seat was Mrs. Marie Burnette, who was holding in her lap her daughter Linda Louise Burnette, a healthy baby two months eleven days old. Three boys were sitting on the back seat. About one and one-half miles west of Middlesex the pavement on the highway is about 24 feet wide, with dirt shoulders on each side about 10 feet wide. At this point the highway is straight and hilly. The weather was clear and the pavement was dry.

After passing through Middlesex, Beulah Burnette Bissette, driving at a speed of about 35 to 40 miles an hour, tried two or three times to pass a red pickup truck traveling ahead. Mrs. Marie Burnette testified:

> "After leaving Middlesex, I recall seeing a red pickup truck ahead of us. We followed him a mile or a mile and a half. She started to pass him three times, I think, and on the third time we started to pass him—every time we would start to pass him, he'd doodle out in front of us. And the third time we tried to pass him, he started over on our side, and Beulah, she went over to the left. She drove it over to the left-hand side, on the side of the dirt. The car started down the embankment on the side of the road, it went across the embankment. After it left the road, we started down that hill and hit a tree.* * * When Mrs. Bissette blew her horn for the very first time, they were side by side. The truck and car were side by side. She had not blown the horn at all before then. She had not ever blown the horn when she had attempted to pass on the two prior occasions."

Mrs. Cleo Harris testified:

> "We followed that truck a mile or a little over. She attempted to pass that truck two or three times. Then she started to pass this truck and as we got at him to pass him, the red truck was coming towards us across the center line into the left lane at that point. Beulah Burnette Bissette blowed her horn as we got beside the truck because I saw the wheels of the truck. After the truck came over to the left and she blew her horn; I don't remember nothing else; I was injured in the accident. After I saw the red truck coming over to the left I did not feel the car in which I was riding slow down or brake down any. I didn't feel nothing only when we hit the tree. When she tried to pass the truck two or three times before that, the red truck was making little doodles

in the road, cross the center line. By making a motion with my hand, I am indicating that the truck was weaving across the road."

When Beulah Burnette Bissette, immediately before her automobile left the road and hit the tree, drove to the left to pass the red pickup truck ahead, she was traveling down a steep hill, and there was no approaching traffic. Just as she approached the pickup truck to pass, it came across the white line into her lane of traffic. She cut her automobile to the left, and it left the highway, went down an embankment, and crashed into a tree. Tracks leading from the automobile at the tree to the pavement on the highway measured about 215 feet.

When the automobile hit the tree, its front was severely damaged. As a result of the automobile crashing into the tree, the baby Linda Louise Burnette sustained a fractured skull, which caused her death about two hours later. Mrs. Cleo Harris and Mrs. Marie Burnette sustained severe injuries in the wreck, requiring several months' hospitalization for each.

The driver of the red pickup truck did not stop. He has never been discovered or identified.

There is nothing in the record to indicate that Beulah Burnette Bissette was driving in a business or residential district as defined in G.S. 20-38 (a) and (w)1, at any place she attempted to overtake and pass the pickup truck ahead; in fact the record indicates it was open country. G.S. 20-149 (b) states: "The driver of an overtaking motor vehicle not within a business or residence district, as herein defined, shall give audible warning with his horn or other warning device before passing or attempting to pass a vehicle proceeding in the same direction, but his failure to do so shall not constitute negligence or contributory negligence per se in any civil action; although the same may be considered with the other facts in the case in determining whether the driver of the overtaking vehicle was guilty of negligence or contributory negligence." This warning signal must be given to the driver of the vehicle in front in reasonable time to avoid injury which would probably result from a left turn or a crossing over the center of the highway to the left by the vehicle in front. *Sheldon v. Childers*, 240 N.C. 449, 82 S.E. 2d 396. The object of this statutory provision is not only the protection of the overtaken vehicle and its occupants, but also the protection of the passing vehicle and its occupants. See *McGinnis v. Robinson,* 252 N.C. 574, 578, 114 S.E. 2d 365, 368, as to the principal purpose of G.S. 20-149 (a).

G.S. 20-140 (b) provides: "Any person who drives any vehicle upon a highway without due caution and circumspection and at a

speed or in a manner so as to endanger or be likely to endanger any person or property shall be guilty of reckless driving." This section of the statute prescribes a standard of care, "and the standard fixed by the Legislature is absolute." *Aldridge v. Hasty,* 240 N.C. 353, 360, 82 S.E. 2d 331, 338. Consequently, a violation of this section of the statute constitutes negligence *per se. Carswell v. Lackey,* 253 N.C. 387, 117 S.E. 2d 51.

Regardless of statutes regulating the operation of automobiles, it was the duty of Mrs. Bissette in the operation of the automobile to exercise the care which a person of ordinary prudence would exercise under similar conditions to prevent injury to the occupants of the automobile she was driving, and to other vehicles or persons on the highway. *Funeral Service v. Coach Lines,* 248 N.C. 146, 102 S.E. 2d 816; *Kellogg v. Thomas,* 244 N.C. 722, 94 S.E. 2d 903; *Henderson v. Henderson,* 239 N.C. 487, 80 S.E. 2d 383.

Plaintiff's evidence would permit a jury to find that Mrs. Bissette tried two or three times to overtake and pass the pickup truck traveling ahead of her, but could not do so because the truck ahead "was making little doodles in the road, cross the center line" in front of her; that with such knowledge of the dangerous operation of the truck ahead she again attempted to overtake and pass the truck ahead without giving any warning signal of her intention to do so, until her automobile and the truck were side by side and the truck was coming across the center line into her lane of passing; that then Mrs. Bissette to avoid a collision turned her automobile to the left onto the dirt shoulder, lost control of it, and it ran down an embankment and crashed into a tree some 215 feet from the pavement on the highway; that such operation of the automobile by Mrs. Bissette constituted a violation of G.S. 20-149 (b) and G.S. 20-140 (b), and also a failure to exercise the care which a person of ordinary prudence would exercise under similar conditions and charged with a like duty to prevent injury to the occupants of the automobile she was driving, and was negligence on her part; that Mrs. Bissette in the exercise of the reasonable care of an ordinarily prudent person should have foreseen that some injury would result from her negligent operation of the automobile, or that consequences of a generally injurious nature should have been expected; and that such negligent operation of the automobile by her actively and continuously operated to bring about injuries to the baby Linda Louise Burnette, and was one of the proximate causes of her death directly resulting from her injuries.

Defendant's contention that the judgment of compulsory nonsuit should be sustained, because Mrs. Bissette was confronted with a

sudden emergency, and that under such circumstances she acted as a person of ordinary prudence, similarly situated, would have acted, is not tenable. Plaintiff's evidence shows that if Mrs. Bissette was confronted with a sudden emergency, her own negligence brought it about or contributed to it in whole or in part, and she cannot invoke the sudden emergency doctrine in exculpation of her negligence as shown by plaintiff's evidence to sustain the nonsuit. *Rodgers v. Thompson*, 256 N.C. 265, 123 S.E. 2d 785.

The judgment of compulsory nonsuit as to Beulah Burnette Bissette is

Reversed.

ROBERT H. FREEMAN v. BIGGERS BROTHERS, INC.

(Filed 9 October 1963.)

Automobiles § 54f—

Evidence of the color and size of the truck which struck plaintiff and that it had on its doors signs reading "Biggers Brothers Wholesale Fruit & Produce", without evidence tending to identify the signs on the truck with defendant or with other trucks owned by defendant, or any evidence of the nature of defendant's business, *is held* insufficient to show that defendant, "Biggers Brothers, Inc.," was the owner of the truck.

APPEAL by plaintiff from *Latham, Special Judge,* June 3, 1963, Special "B" Session of MECKLENBURG.

Plaintiff alleged he was injured July 2, 1962, about 1:30 p.m., in Charlotte, N. C., as the result of the negligent operation of a truck owned by defendant and operated by defendant's driver within the scope of his employment. Answering, defendant denied all essential allegations of the complaint and conditionally pleaded plaintiff's contributory negligence in bar of his right to recover. The only evidence, except medical testimony as to plaintiff's injuries, was the testimony of plaintiff. At the conclusion of plaintiff's evidence, the court, allowing defendant's motion therefor, entered judgment of nonsuit. Plaintiff excepted and appealed.

Lacy W. Blue and Stewart & Cohan for plaintiff appellant.
Pierce, Wardlow, Knox & Caudle for defendant appellee.

BOBBITT, J. It was alleged and admitted that "the parking lot of Stamey's Drive-In Restaurant is located at the corner of North

Tryon Street and West 12th Street, and that there are entrances to said lot on West 12th Street, and on North Tryon Street." According to his allegations and testimony, plaintiff was on this lot walking toward a parked car when struck by a truck that entered the parking lot from 12th Street and, shortly after striking plaintiff, left the parking lot by way of the Tryon Street entrance.

Assuming plaintiff's evidence was sufficient for submission to the jury as to the alleged actionable negligence of *the driver* of the truck, the judgment of nonsuit must be affirmed on the ground plaintiff's evidence was insufficient for submission to the jury as to the alleged ownership of the truck or as to the alleged agency of the driver.

It was alleged and admitted that defendant is a North Carolina corporation with principal office in Charlotte, N. C. Included in paragraph 3 of the complaint is an allegation that "the said truck was registered with the Department of Motor Vehicles for the State of North Carolina, and that the registered owner of said truck was the defendant, BIGGERS BROTHERS, INCORPORATED." The allegations of paragraph 3 of the complaint are denied by defendant. The allegations of paragraph 8 of the complaint (also denied by defendant) refer to the driver of the truck as "defendant's agent, servant and employee" but do not otherwise purport to identify the driver.

There was no evidence defendant, Biggers Brothers, Incorporated, was "the registered owner of said truck." The only evidence as to the identity of the driver was plaintiff's testimony that the truck "was being driven by a colored man." Plaintiff's testimony descriptive of the truck, relied on by plaintiff as proof that defendant was the owner, was as follows: The truck "was painted a dark green color, had a canvas top, and was approximately a one-ton or a one and one-half ton capacity size." On the left door of the truck, "there was a 'kinda rectangle' sign which read 'Biggers Brothers Wholesale Fruit & Produce' " and on the right door of the truck there was a sign "reading 'Biggers Brothers Wholesale Fruit & Produce.' "

In *Knight v. Associated Transport*, 255 N.C. 462, 122 S.E. 2d 64, *Denny, J.* (now C.J.), said: ". . . we have come to the conclusion that where common carriers of freight are operating tractor-trailer units, on public highways, and such equipment bears the insignia or name of such carrier, and the motor vehicle is involved in a collision or inflicts injury upon another, evidence that the name of the defendant was painted or inscribed on the motor vehicle which inflicted the injury constitutes *prima facie* evidence that the defendant whose name or identifying insignia appears thereon was the owner of such vehicle and that the driver thereof was operating it for and on behalf of the

defendant." See also *Knight v. Associated Transport,* 257 N.C. 758, 127 S.E. 2d 536.

Whether the quoted rule applies only to "common carriers of freight . . . operating tractor-trailer units, on public highways," is not presented. Here, the name "Biggers Brothers Wholesale Fruit & Produce" is not the name of defendant. Nor is there evidence tending to identify the signs on the particular truck with defendant or with other trucks owned by defendant or operated by defendant in the course of its business. Indeed, there is no evidence as to the nature of defendant's business.

Absent evidence that defendant was the owner of the truck, plaintiff was not entitled to the benefit of G.S. 20-71.1.

If plaintiff should obtain evidence sufficient to show defendant was the owner of the truck that struck plaintiff on July 2, 1962, present decision will not bar a new action.

Affirmed.

BONEY P. NODINE AND ALL PERSONS OBLIGORS TO GOODYEAR MORTGAGE CORPORATION ON GI LOANS, I.E., VETERANS ADMINISTRATION GUARANTEED AND/OR INSURED LOANS v. GOODYEAR MORTGAGE CORPORATION.

(Filed 9 October 1963.)

1. Parties § 2—

A party plaintiff may not join with his own cause of action against defendant causes of action against the same defendant in favor of other parties similarly situated, certainly in the absence of a showing of authority to bring such actions in their behalf.

2. Money Received—

A complaint alleging unauthorized charges for delinquent payment of installments on a note secured by a mortgage, without allegations as to when, under what circumstances, and in what amounts the creditor required plaintiff to pay the "late charges" *held* insufficient to state a cause of action.

3. Pleadings § 19—

Upon sustaining a demurrer to a complaint stating a cause of action in a defective manner in omitting essential averments, the action should not be dismissed until plaintiff is given opportunity to move for leave to amend. G.S. 1-131.

APPEAL by plaintiff(s) from *Brock, Special Judge,* January 21, 1963, Special "B" Session of MECKLENBURG.

The hearing below was on demurrer to the complaint.

The allegations of the complaint, summarized in part and quoted in part, are as follows:

Boney P. Nodine is a citizen and resident of Polk County, N. C. Defendant is a North Carolina corporation with principal office in Charlotte, N. C.

On April 2, 1952, Nodine executed and delivered to Goodyear Mortgage Corporation a certain deed of trust on VA Form 4-6331, "which deed of trust runs to W. Y. Wilkins, Jr., Trustee for Goodyear Mortgage Corporation, to secure an indebtedness in the amount of $9,025.00 evidenced by a note of even date and of like amount on VA Form 4-6331a."

One of the clauses of said deed of trust and also of said note is worded (with variations indicated) as follows: ". . . principal and interest being (shall be) payable at the office of Goodyear Mortgage Corporation in Charlotte, North Carolina, *or at such other place as the holder may designate in writing delivered or mailed to the party of the first part (debtor)*, in monthly installments of $47.64 commencing on the first day of May, 1952 . . ." (Our italics).

The "unnamed plaintiffs" are numerous persons who have executed and delivered to Goodyear Mortgage Corporation notes evidencing their respective indebtednesses on VA Form 4-6331a and deeds of trust on VA Form 4-6331 "running to a trustee named therein." These deeds of trust, except for differences in the amount of the indebtedness and of the required monthly payment, contain the same clauses as the deed of trust executed by Nodine.

Each deed of trust obligates "the party of the first part" to pay each month, in addition to the stated amount required to cover principal and interest, a pro rata part of the annual "ground rents," taxes and insurance. Each deed of trust contains this provision: "The party of the third part may collect a 'late charge' not to exceed an amount equal to four percentum (4%) of any installment which is not paid within fifteen (15) days of the due date thereof, to cover the extra expense involved in handling delinquent payments."

It is alleged in paragraph 10 that "subsequent to the execution to (*sic*) the deed of trust at all times when payment was made more than 15 days after the due date the defendant has demanded and required under threat of foreclosure a payment of late charges of 4% of the total of the monthly installment of principal and interest plus the deposit for taxes and insurance set out above." It is alleged that the demand and requirement that "late charges" be paid on the part of the monthly payment deposited for use in payment of taxes and

insurance "was a breach of the contract terms and was improper and unconscionable."

The prayer of the complaint is that the court "construe the meaning of the term 'installment' for the purpose of determining the amount which is the proper basis for the computation of late charges under the terms of the aforementioned deeds of trust"; that the court "appoint a referee or an auditor to audit the books of the defendant to determine the amount that may be due each plaintiff"; that "each plaintiff have judgment against the defendant in such amount as the audit may show as has been overcharged by the defendant to the respective plaintiffs"; and that "the defendant be restrained and enjoined from making future demands in excess of the amount determined by this Court to be the proper construction of the term 'installment' in the deed of trust for the computation of late charges."

Defendant demurred on the ground the complaint did not allege facts sufficient to constitute a cause of action. The court sustained the demurrer and dismissed the action. Plaintiff(s) excepted and appealed.

W. Y. Wilkins, Jr., for plaintiff appellant.
Hedrick, McKnight & Parham for defendant appellee.

PER CURIAM. The interest of Nodine, the named plaintiff, relates solely to the note and deed of trust executed and delivered by him under date of April 2, 1952; and the interest of each of the so-called "unnamed plaintiffs" relates solely to the particular note and deed of trust executed and delivered by him. The facts alleged are insufficient to show Nodine had or has authority to file suit or otherwise act in behalf of any of the unnamed persons he undertakes to join as plaintiffs in this cause. Such unnamed persons may not be considered plaintiffs herein.

With reference to whether the facts alleged are sufficient to constitute a cause of action in favor of Nodine and against Goodyear Mortgage Corporation, the complaint discloses:

1. Particular clauses of the (Nodine) note and deed of trust are quoted. Neither instrument is set out in full. Nor is a copy of either instrument attached to the complaint.

2. There is no allegation that Goodyear Mortgage Corporation is the owner and holder of the note. Its present relationship to the note and deed of trust does not appear.

3. It is unclear whether the allegations of paragraph 10 refer to transactions between Nodine and Goodyear Mortgage Corporation or

to transactions between Goodyear Mortgage Corporation and one or more of the "unnamed plaintiffs." If intended to refer to transactions between Nodine and Goodyear Mortgage Corporation, the allegations are silent as to when, under what circumstances and in what amounts Nodine's payments for taxes and insurance became and were delinquent, and as to when, under what circumstances and in what amounts Goodyear Mortgage Corporation required Nodine to pay a "late charge" in connection therewith.

In our view, *the facts* alleged by Nodine are insufficient to constitute a cause of action. Even so, it does not appear affirmatively that Nodine has no cause of action. *Skipper v. Cheatham,* 249 N.C. 706, 711, 107 S.E. 2d 625. Hence, Nodine may move for leave to amend in accordance with G.S. 1-131.

The portion of the order sustaining the demurrer is affirmed. However, the portion thereof dismissing the action is erroneous and should be stricken therefrom. It is so ordered. As so modified, the judgment is affirmed.

Modified and affirmed.

DAVID KENNETH BURGESS, BY AND THROUGH HIS NEXT FRIEND, HIS MOTHER, HAZEL BURGESS, v. ELSIE LEE MATTOX AND RUBEN MATTOX, D/B/A BOULEVARD AUTO WRECKER SERVICE.

(Filed 9 October 1963.)

1. Automobiles § 42i—

A plaintiff who voluntarily and without any obligation to do so places himself upon the hood of a truck in order to weigh down its bumper so that the truck might push an automobile to start its motor will be held guilty of contributory negligence barring as a matter of law his right to recover for injuries sustained when he was thrown from the hood of the truck by a sudden movement which might have been anticipated in such operation.

2. Negligence § 16—

A seventeen year old boy is presumed to have sufficient capacity to understand and avoid a clear danger, and is chargeable with contributory negligence as a matter of law if he fails to do so.

3. Automobiles § 41a; Evidence § 3—

The court will take judicial notice that a truck traveling forty-five miles per hour cannot be stopped within thirty-three feet, and when plaintiff's contention of negligence is based on such inherently impossible situation, nonsuit is proper.

APPEAL by plaintiff from *Sink, E.J.*, April 1963 Session of GASTON.

Action for personal injuries. Plaintiff's evidence tended to show the following facts:

On the evening of August 13, 1961 David Kenneth Burgess, the plaintiff, then seventeen years old, and a companion, John Gilbert, Jr., were "hanging around" the defendants' place of business, the Boulevard Auto Wrecker Service. A call came in from a motorist requesting "a shove" to start his stalled automobile. The night manager dispatched Roy Carter, another visitor at the station, to start the car with defendants' pickup truck. Plaintiff and Gilbert went along for the ride, apparently without the knowledge of the manager. When the vehicles were brought together it was discovered that the truck bumper was higher than that of the automobile. Carter then sat on the hood of the truck and weighted down its bumper so that the two were flush. Plaintiff drove the truck, pushing the car down the road a short distance. It failed to start and plaintiff stopped the truck. After some conversation between the two, plaintiff exchanged places with Carter. Before he did so, however, Carter said to him, "You don't have to get up there if you don't want to."

Plaintiff described the truck and his position on it as follows: "I stood up on the bumper and sat down on the left fender. . . . I leaned over the hood of the truck to the right, holding on the hood of the truck. There was nothing else up there for me to hold on to." The fenders and the hood of the truck were one continuance surface except for a decorative "crease" about one inch high on each side. "It was not like the old timey trucks with a curved fender that went up and down."

As soon as he was seated, the truck began to push the car in low gear. When the automobile did not start Carter shifted into second. Within fifty feet the car "caught" and pulled away from the truck. When it did, the truck jerked and veered to the left. Carter applied the brakes and plaintiff "came off the truck." He hit on his feet, ran five or six steps, fell on the tar and gravel road very hard, and slid ten to fifteen feet. The truck came to a stop even with plaintiff; it never touched him. According to Gilbert, who was in the truck at the time, Carter "did not speed up or suddenly stop or do anything that would cause David to fall off the truck." Upon being recalled just before the close of the evidence, Gilbert testified that in his opinion the truck was going forty-five miles per hour at the time the automobile pulled away from it but he had no actual knowledge as to the speed in miles per hour. That estimate was his "best guess". Plaintiff

sustained a serious head injury from which he has only partially recovered.

In the complaint, plaintiff alleged that his injuries were proximately caused by Carter's negligence in failing to keep the truck under proper control in that he suddenly and rapidly decreased the speed of the truck without warning. By answer, defendant alleged plaintiff's contributory negligence in bar of any recovery in this action. At the close of plaintiff's evidence, defendants' motion for nonsuit was allowed. Plaintiff appealed.

Henry M. Whitesides for plaintiff appellant.

Carpenter, Webb & Golding and Mullen, Holland & Cooke for defendant appellees.

PER CURIAM. The plaintiff, voluntarily and without any obligation to do so, placed himself upon the hood of a truck in order to weight down its bumper so that the truck might push an automobile until its motor started. He was fully aware that the hood was smooth and there was nothing on it to which he could hold. He also knew, or should have reasonably anticipated, that there might be jerks or bumps likely to cause him to lose his balance or to throw him from the truck while it was in motion. The injuries he sustained were the result of the risks to which he deliberately exposed himself. In thus placing himself in a position of obvious peril, the plaintiff was guilty of contributory negligence which barred his right to recover as a matter of law and necessitated the nonsuit. *Bogen v Bogen*, 220 N.C. 648, 18 S.E. 2d 162; *Barnes v. Horney*, 247 N.C. 495, 101 S.E. 2d 315.

A seventeen-year old plaintiff is presumed to have sufficient capacity to understand and avoid a clear danger, and he is chargeable with contributory negligence as a matter of law if he fails to do so. *Tallent v. Talbert*, 249 N.C. 149, 105 S.E. 2d 426; *Van Dyke v. Atlantic Greyhound Corp.*, 218 N.C. 283, 10 S.E. 2d 727; *Rimmer v. R. R.*, 208 N. C. 198, 179 S.E. 753; *Baker v. R. R.*, 150 N.C. 562, 64 S.E. 506; 38 Am. Jur., Negligence, § 205, p. 891; 3 Strong, N. C. Index, Negligence, § 16. There is no evidence in the record which would overcome this presumption.

Plaintiff now contends, however, that after he had placed himself in a position of peril, he was thrown from the truck only because Carter negligently increased its speed to forty-five miles per hour. This contention is not supported by either allegation or proof. We take judicial notice that a truck traveling forty-five miles per hour cannot be stopped in thirty-three feet as plaintiff's evidence indicates

this truck was. Evidence which is inherently impossible will not take a case to the jury. *Jones v. Schaffer*, 252 N.C. 368, 114 S.E. 2d 105.

The question of Carter's agency and authority, debated in the briefs, is rendered moot by the plaintiff's contributory negligence.

The judgment of the court below is

Affirmed.

BENJAMIN M. HUFFMAN, EMPLOYEE, v. DOUGLASS AIRCRAFT COMPANY, INC., EMPLOYER; AND FIREMEN'S FUND INDEMNITY COMPANY, CARRIER.

(Filed 9 October 1963.)

1. Appeal and Error §§ 2, 16—

Where plaintiff, appearing *in propria persona* because of an asserted inability to employ counsel, fails to comply with the rules of court governing appeals, the Supreme Court, in the exercise of its supervisory jurisdiction, may treat the purported appeal as a petition for certiorari. When, upon consideration of the entire record thus brought up, there is not sufficient error in the record or merit in the appeal to warrant issuance of the writ, the writ must be denied and the appeal dismissed.

2. Master and Servant § 44—

The fact that the North Carolina Workmen's Compensation Act does not provide for trial by jury does not render the act unconstitutional.

3. Master and Servant § 93—

The findings of fact of the Industrial Commission which are supported by competent evidence are conclusive on appeal.

4. Same—

Neither the Superior Court nor the Supreme Court may receive or consider evidence on appeal from the Industrial Commission which was not introduced in the hearing before the Hearing Commissioner or the full Commission.

APPEAL by plaintiff from *Brock, S.J.*, February 18, 1963, Special Civil "B" Session of MECKLENBURG.

Plaintiff, in propria persona.

Carpenter Webb & Golding and John A. Mraz for defendants.

PER CURIAM. This is a proceeding pursuant to the Workmen's Compensation Act. Plaintiff and defendant employer were subject to

and bound by the Act on 17 July 1959. Defendant Indemnity Company was insurance carrier for employer. Plaintiff claims that his back was injured in an accident which arose out of and in the course of his employment. He asserts that the injury occurred on 17 July 1959 while he was pushing a cart up a ramp. He continued to work after that date until about 21 September 1959 when he entered a hospital for surgery. His condition was diagnosed as spondylolisthesis. He returned to work the last of November, 1959. He filed claim with the Industrial Commission early in 1961, and there was a hearing before Commissioner Mercer at Charlotte on 8 January 1962. The hearing Commissioner filed his opinion and award on 27 February 1962, holding that claimant's injury did not result from accident arising out of and in the course of his employment, and denying compensation. The full Commission sustained the hearing Commissioner, and the superior court affirmed. Plaintiff gave notice of appeal to Supreme Court.

After the hearing in superior court plaintiff's counsel, by leave of court, withdrew. Plaintiff undertook to prepare and perfect his case on appeal without the assistance of an attorney—he explains that he could not secure other counsel and the Charlotte Legal Aid Service declined to assist him because of the expense involved, they having no funds available for this purpose. The purported case on appeal by plaintiff does not contain in any form the evidence heard by Commissioner Mercer, and does not set out any of the proceeding before or awards of the hearing commissioner or the full Commission. It contains no assignments of error, in any form, related directly to exceptions taken (if any were taken) in superior court. It contains merely the judgment of the superior court, recitals of extra factual matters of fragmentary nature designed to supplement the evidence introduced before the hearing commissioner, and argumentative discourses, most of which are irrelevant to any legal questions which might be raised on this appeal. On motion of defendant, the superior court dismissed the appeal for failure of plaintiff to serve a case on appeal. Defendants have filed a motion in Supreme Court to dismiss the appeal on the grounds that no case on appeal has been served on them, no case on appeal has been settled by the judge, the purported record on appeal in Supreme Court does not comply with the rules governing appeals, and plaintiff's brief was not filed in apt time. The motion must be allowed if the decisions of this Court and its applicable rules are to be observed and followed.

Plaintiff appeared in Supreme Court *in propria persona* at the time set for argument of the appeal, offered to argue the case and insisted

that he had done all within his knowledge and means to have his appeal properly presented to and decided by this Court, insisting that justice requires a review of the case. In the exercise of its supervisory jurisdiction (*Ange v. Ange*, 235 N.C. 506, 71 S.E. 2d 19) this Court, in its discretion and on its own motion, decided to treat the purported case on appeal as a petition for certiorari. We procured the complete record of the case before the Industrial Commission and have carefully read and considered the entire record, including the evidence in question and answer form, documentary evidence, records of proceedings, stipulations, the findings of fact, conclusions of law and the awards (together with the exceptions thereto). We have also carefully read and considered the purported case on appeal and plaintiff's brief. Upon consideration of the entire record, and after full discussion in conference, we are of the opinion that there is not sufficient error in the record or merit in the appeal to warrant the issuance of a writ of certiorari, and the appeal should be dismissed.

The constitutional questions which plaintiff discusses and seeks to raise in his brief are without merit and are not properly here for decision. It has long been settled that a litigant in a workmen's compensation proceeding is not entitled to a jury trial, and the act is not unconstitutional because of the denial of trial by jury. *McCune v. Manufacturing Co.*, 217 N.C. 351, 8 S.E. 2d 219; *Lee v. Enka Corp.*, 212 N.C. 455, 193 S.E. 809; *Hanks v. Utilities Co.*, 204 N.C. 155, 167 S.E. 560; *Heavner v. Lincolnton*, 202 N.C. 400, 162 S.E. 909. The findings of fact by the Industrial Commission are conclusive on appeal when supported by competent evidence. *Pitman v. Carpenter*, 247 N.C. 63, 100 S.E. 2d 231. Neither the superior court nor the Supreme Court may receive or consider any evidence not introduced in the hearings before the hearing commissioner or the full Commission. The additional factual statements made by plaintiff in the purported case on appeal and his brief cannot be considered or acted upon by us.

It is noted, parenthetically, that defendant employer not only provided workmen's compensation insurance, but also group insurance, covering health, accidents, loss of time and hospitalization—the employees contributing premium payments. The group insurance did not provide benefits in cases of occupational injury. Plaintiff applied for and received benefits on account of the group insurance: $40 per week (except the last two weeks) while he was out of work on account of the spinal operation; about $720 for hospital, medical and surgical expenses.

Certiorari is denied and the
Appeal dismissed.

STATE v. JAMES LEE INMAN.

(Filed 9 October 1963.)

Grand Jury; Constitutional Law § 29—

When defendant, upon the call of the case for trial and prior to pleading to the indictments, moves to quash on the ground that members of his race were systematically excluded from the grant and petit juries because of race, and requests time to gather evidence substantiating his motion, due process requires that he be given reasonable opportunity to produce such evidence if any he has. The fact that counsel had been employed in the case and the case calendared for trial more than four weeks without issuance of any subpoena for witnesses to substantiate the motion, does not alter this result, although it suggests the advisability of prompt arraingnment.

APPEAL by defendant from *Froneberger, J.*, 6 May 1963 Regular "B" Criminal Session of MECKLENBURG.

Appeal by defendant from two judgments of imprisonment based upon a verdict that he was guilty of an assault with intent to commit rape and of common law robbery.

Attorney General T. W. Bruton and Deputy Attorney General Ralph Moody for the State.

Charles V. Bell for defendant appellant.

PER CURIAM. The two indictments in this case, one charging the defendant with an assault on Emily W. Smith on 26 February 1963, with intent to commit rape, a violation of G.S. 14-22, and the other charging defendant and two other persons on the same date with robbery of $34 in money from the person of Emily W. Smith, were consolidated for trial.

Defendant, a Negro, before pleading to the two indictments, made a motion to quash the indictments on the ground that Negroes are systematically excluded from serving on grand and petit juries in the superior court of Mecklenburg County, and were systematically excluded in particular from serving on the grand jury that returned the two indictments against him as true bills. The court summarily overruled the motion, and defendant excepted and assigns this as error. Defendant's counsel then asked the court for sufficient time to furnish it information to substantiate his motion. The prosecuting officer for the State opposed the request, because counsel for defendant had been employed in the case for more than four weeks, knew the case had been calendared for trial for more than four weeks, and had not issued any subpoena for witnesses to substantiate his motion. The

court denied the request of defendant's counsel, and defendant excepted and assigns this as error. Defendant then entered a plea of not guilty and the trial proceeded. He was found guilty and sentenced to imprisonment in each case.

The trial court committed reversible error in refusing to grant defendant sufficient time to offer evidence in support of his motion to quash the indictments on the ground that members of his race, by reason of their race, were systematically excluded from serving on the grand jury that returned the indictments here as true bills. Whether 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 to produce his evidence, if he has any. *S. v. Perry,* 248 N.C. 334, 103 S.E. 2d 404; *S. v. Covington,* 258 N.C. 495, 128 S.E. 2d 822.

There is nothing in the record to indicate defendant's counsel had subpoenaed any witness or witnesses, or had any witness or witnesses in court to substantiate his motion to quash the indictments. In order to further the orderly dispatch of business in the criminal courts, and to prevent a delay in a trial on the merits when the witnesses for the State and for the defendant and a jury are present in court, it might be preferable to arraign a defendant as promptly as is reasonably proper after an indictment is found against him, so that if a motion to quash the indictment is made, as here, it may be disposed of before the case is calendared or set for trial.

The verdict and the judgment in each case are reversed, and the cases are remanded for further proceedings, as ordered in *S. v. Perry, supra,* and in *S. v. Covington, supra.*

Reversed.

EVE GRIFFIN BERKLEY v. W. RUSSELL BERKLEY.

(Filed 9 October 1963.)

APPEAL by defendant from an In Chambers order entered by *Mintz, J.,* on May 24, 1963, in NEW HANOVER Superior Court.

The plaintiff, Eva Griffin Berkley, instituted this civil action against W. Russell Berkley, her husband, for alimony without divorce. Her prayer for relief included alimony *pendente lite* and counsel fees.

After motions to amend the complaint and strike certain of its allegations were passed on by the court, the parties offered evidence in the form of affidavits as to plaintiff's need for the requested *pendente* allowances and as to defendant's financial ability to pay them. The court made certain findings of fact, and on the basis of the findings entered an order that pending the final hearing the plaintiff should have the use of the home and the defendant should pay the plaintiff $75.00 per month for the support of herself and the minor daughter of the parties. The court allowed $200.00 counsel fees. The defendant excepted and appealed.

Addison Hewlett, Jr., for plaintiff appellee.
Isaac C. Wright for defendant appellant.

PER CURIAM. The evidence before Judge Mintz was conflicting with respect to the cause of the separation; likewise, divergent claims were made as to the respective incomes and needs of the parties. While the court might have made more specific and detailed findings, nevertheless enough appears to support the *pendente* allowances.

Of course, the defendant will have opportunity to make good on his alleged defenses when the controversy is heard on the merits. Sufficient reason to disturb the order does not appear.

Affirmed.

HUGH PRATHER, TRADING AS HUGH PRATHER COMPANY v. SHAW PAINT AND WALLPAPER COMPANY.

(Filed 9 October 1963.)

APPEAL by plaintiff from *Froneberger, J.*, March 25, 1963 Regular "B" Civil Term, MECKLENBURG Superior Court.

The plaintiff instituted this civil action to recover from the defendant $8,049.90 alleged to be due for certain work done and materials furnished over and above those provided for and specified in a certain written contract dated April 14, 1958. The plaintiff alleged that additional work was done and additional materials were furnished under a subsequent parol contract between the parties. After a lengthy hearing the jury found the parties did not enter into a supplemental contract as alleged by the plaintiff. From judgment

that the plaintiff recover nothing and pay the costs, he excepted and appealed.

B. Kermit Caldwell, for plaintiff appellant.
Helms, Mulliss, McMillan & Johnston, by James B. McMillan, for defendant appellee.

PER CURIAM. The written contract of April 14, 1958, was stipulated. The defendant paid in full the amount provided for in the written contract.

The plaintiff based his claim on what he alleged to be a subsequent parol contract which the defendant denied. On the issues submitted, the jury found that the parties did not enter into any parol agreement. Error does not appear in any matter material to that issue. The jury's finding settled the dispute in favor of the defendant.

No error.

STATE v. BILL STEVE HUTCHINSON.

(Filed 9 October 1963.)

APPEAL by defendant from *Campbell, J.*, July 1963 Regular "A" Criminal Session, of MECKLENBURG.

This is a criminal action, tried upon a bill of indictment, charging the defendant with the offense of armed robberty. From a verdict of guilty of common law robbery and sentence pronounced thereon, the defendant appeals, assigning error.

Attorney General Bruton, Deputy Attorney General Harry W. McGalliard for the State.
Ray Rankin for the defendant.

PER CURIAM. The appellant assigns as error the refusal of the court below to grant his motion for judgment as of nonsuit.

A careful examination of the State's evidence reveals its sufficiency to support the verdict and judgment entered below.

No prejudicial error that would justify a new trial has been shown, consequently, the verdict and judgment will be upheld.

Affirmed.

JOCIE MOTOR LINES, INC., PLAINTIFF v. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, DEFENDANT AND THE NEW DIXIE LINES, INCORPORATED, PLAINTIFF v. INTERNATIONAL BROTHERHOOD OF TEAMSTERS CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, DEFENDANT.

(Filed 16 October 1963.)

1. Master and Servant § 16—

In this action against an international labor union to recover damages resulting from an unlawful secondary boycott to compel plaintiff employer to recognize as a bargaining agent a labor union which had not been certified by any authority as a bargaining agent, the evidence considered in the light most favorable to plaintiff *is held* sufficient to be submitted to the jury upon the theory that the local unions and labor councils were the agents of the international union in committing the unlawful acts, and that the activities of the union pickets amounted to an unlawful secondary boycott in violation of § 303(a) of the Labor Management Relations Act.

2. Evidence § 31; Principal and Agent § 4— Testimony held incompetent as hearsay and as tending to prove agency by declarations of the agent.

In an action against an international union to recover damages resulting from an unlawful secondary boycott carried on by a local union as its agent, testimony of admissions by an officer of the local union made in proceedings to which the international union was not a party, which admissions were to the effect that the local union was reimbursed by the labor union's joint council to the extent of payments to the pickets carrying on the unlawful activities and that the joint council was reimbursed in part by the international union, *held* incompetent as hearsay and as tending to prove the fact of agency by declarations of the alleged agent, there being no evidence that the officer of the local union was an officer or agent of the international union.

3. Trial § 17—

The general admission of evidence competent for a restricted purpose, or competent in part, will not be held for error unless appellant, at the time of his admission, requests that its admission be restricted. Rule of Practice in the Supreme Court No. 21.

4. Evidence § 28—

In an action against a labor union to recover damages resulting from an unlawful secondary boycott, the admission in evidence of certain letters of officials of the local and international union, competent only upon the question of whether the local union was under control of the international union, and a news release, competent in part in stating admitted facts, will not be held for prejudicial error in the absence of a request at the time they were offered in evidence that their admission be restricted.

Parker and Higgins, JJ., dissent.

APPEAL by defendant from *Froneberger, J.*, September 10, 1962, Schedule "A" Regular Civil Term of MECKLENBURG, docketed and argued as No. 248 at Spring Term 1963.

On May 3, 1960, Jocie Motor Lines, Inc., hereafter called Jocie, and The New Dixie Lines, Inc., hereafter called New Dixie, instituted separate civil actions against International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, an unincorporated labor organization or union, hereafter called defendant or International Union.

The original complaint in each action, after allegations relating to the identity and corporate status of plaintiff and the identity of defendant, was as follows:

"(4) That the plaintiff derived its revenues and profits from handling and transportation of direct freight, which is freight transported from origin to destination entirely by the plaintiff, and from handling and transportation of interchange freight which is freight not transported from origin to destination entirely by the plaintiff, but interchanged between the plaintiff and other trucking companies and transported part of the way from origin to destination by plaintiff and part of the way by such other interchange trucking companies.

"(5) That during the months of May, June, July and August of 1959, the defendant induced and encouraged the employees of the plaintiff's customers and the employees of the aforesaid trucking companies doing interchange freight business with the plaintiff to engage in a concerted refusal in the course of their employment, to transport or otherwise handle any goods, articles, materials or commodities going to or coming from the plaintiff and that the object of such inducement and encouragement of the employees of the plaintiff's customers and said employees of said trucking companies was to force and require the said customers and trucking companies to cease doing business with the plaintiff.

"(6) That such action on the part of the defendant was wrongful and in violation of law and was taken by the defendant for the willful, deliberate and malicious purpose of injuring and damaging the plaintiff; that as a result of such action on the part of the defendant the plaintiff has been shut off from and deprived of freight business which otherwise and normally the plaintiff would have profitably handled and has been required to pay out large sums of money for extraordinary expenses incurred by the plaintiff in its efforts to secure, handle and transport freight shipments and otherwise operate its business despite the wrongful and unlawful acts of the defendant herein-

above set forth and that in this manner and by this means the plaintiff has been grievously injured and damaged by the defendant.

"(7) That by reason of the matters hereinabove set forth, the plaintiff has been injured and damaged by the defendant in the sum of One Hundred Twenty-five Thousand Dollars ($125,000) and is entitled to judgment against the defendant in that amount, and by reason of the defendant deliberately, willfully and maliciously inflicting such damage upon the plaintiff as hereinabove set forth, the plaintiff is entitled to judgment for punitive damages against the defendant in an additional sum of One Hundred Twenty-five Thousand Dollars ($125,000).

"(8) That the acts of the plaintiff in the operation of its business described above affects interstate commerce within the meaning of the Labor Management Relations Act (29 U.S.C. 151, *et seq.*); and that jurisdiction of this cause is conferred upon this Court by Section 303(b) of said Act (29 USC 137b *(sic)*)

"WHEREFORE, the plaintiff prays judgment against the defendant in the sum of Two Hundred Fifty Thousand Dollars ($250,000), together with the costs of this action; and the plaintiff prays the Court for such other and further relief as the Court may deem just and proper."

In each action, defendant, answering, denied plaintiff's said allegations and prayed "that it be hence discharged."

Pursuant to orders dated January 19, 1962, each plaintiff amended its original complaint by adding immediately after paragraph (5) the following:

"(5a) That in addition to the defendant's illegal secondary boycotting activities, the Defendant resorted to assaults, assaults with deadly weapons upon, and damage to the property of, the plaintiff, its employees and persons seeking to do business with the plaintiff."

Defendant, in apt time, objected and excepted to said orders of January 19, 1962.

Before answering said "Amendment to Complaint," defendant, in each action, filed a "Demurrer and Motion to Strike of Defendant," asserting as grounds therefore the following:

"1. Said complaint seeks to recover under color of the Labor-Management Relations Act 1947 (29 U.S.C.A. sec. 151 and particularly under Sec. 29 U.S.C. 137 (b) (*sic*)) punitive damages against this defendant which punitive damages are unauthorized under the foregoing statute and are not recoverable as a matter of law. Accordingly

said punitive damage count and each and every allegation therein contained including the allegations respecting defendant's alleged resort to assaults should be stricken from the face of the complaint as amended.

"2. Defendant demurs specifically to the amended complaint which purports to join in a Federal statutory proceeding a common law cause of action for unlawful trespass contrary to the terms of Section 1-127 of the General Statutes of North Carolina prohibiting misjoinder of causes of actions."

Defendant's said demurrer(s) and motion(s) to strike were overruled by order(s) dated March 30, 1962, and defendant excepted.

Thereafter, defendant, in each action, answered the amendment to complaint filed by plaintiff pursuant to said orders of January 19, 1962, as follows:

"(1) That the Defendant lacks knowledge and information sufficient as to form a belief as to the allegations in paragraph 5(a) of the Complaint as Amended and, therefore, denies the same.

"AND AS A FURTHER ANSWER AND DEFENSE, the Defendant alleges and says:

"(2) That if the alleged conduct attributed to the defendant in paragraph 5(a) of the Complaint as Amended did occur, which is denied as hereinabove stated, the said conduct occurred more than one year next preceding the filing of said Amended Complaint, as shown on the face thereof, and is barred by the Statute of Limitations respecting assault and battery actions, G.S. 1-54, which defense is specifically pled.

"(3) That the defendant did not authorize, ratify or participate in any action against the plaintiff, including that action complained of in the Amended Complaint.

"(4) That the plaintiff's controversy was with a local labor organization and not with this defendant; and that prior to the filing of this action, the plaintiff has instituted administrative proceedings against said local labor organization before the National Labor Relations Board dealing with the same subject matter as is involved in this action; and that the plaintiff has never instituted administrative proceedings against this defendant and has never charged this defendant with any misconduct whatsoever before the National Labor Relations Board.

"Except as herein modified, the Defendant adopts and ratifies its original Answer as if herein set out.

"WHEREFORE, having fully answered the Amended Complaint, the defendant renews its prayer that the plaintiff's action be dismissed, that the cost of this action be taxed to the plaintiff, and that the defendant receive such other and further relief to which it may be entitled in the premises; and further prays that the cause of action set forth in the Amended Complaint be dismissed with prejudice to the plaintiff."

At trial, for reasons that will appear from the summary of facts, the actions, by stipulation, were consolidated for trial and the two plaintiffs, collectively, were considered and treated as a single entity and referred to as "plaintiff."

Much testimony and documentary evidence was offered by plaintiff and by defendant.

Uncontradicted evidence tends to show:

In 1957, New Dixie, a Virginia corporation, and Jocie, a North Carolina corporation, were common carriers of general commodity freight in interstate and intrastate commerce. New Dixie, with headquarters in Richmond, was authorized to operate and did operate in Virginia, North Carolina and South Carolina. Jocie, with headquarters in Charlotte, was authorized to operate and did operate in North Carolina, South Carolina and Georgia.

In May, 1957, New Dixie entered into a contract, subject to I.C.C. approval, to purchase the corporate stock of Jocie; and, pending final decision on its application for approval, the I.C.C. in June, 1957, granted New Dixie temporary authority to manage and control Jocie's affairs. The sale was approved in May of 1959 and completed immediately. Thereafter, application was filed for New Dixie to take over the operating properties and franchises of Jocie. Pursuant to approval, this transfer was completed January 1, 1960. Hence, when these actions were commenced, New Dixie was the sole party in interest.

After June, 1957, New Dixie-Jocie operated as an integrated system. Of their fourteen terminals, the major terminals were those in Richmond, Charlotte and Atlanta. At the New Dixie-Jocie terminal in Charlotte, about twenty were employees of Jocie and about seventy were employees of New Dixie.

New Dixie had no labor contract and was nonunion. Jocie had a contract with Local 71 (Charlotte), with Local 728 (Atlanta) and with Local 391 (Greensboro). Jocie was a party to area-wide union contracts covering its Greensboro, Charlotte and Atlanta terminals. It was also a party to a Southern Conference Local Freight Forwarding,

Pickup and Delivery Agreement. These agreements covered approximately one hundred employees.

There was evidence tending to show:

In the first week of May, 1959, the president of Local 509 (Columbia) made demand that it be recognized as bargaining agent for Jocie's Charleston employees. No National Labor Relations Board election had been held or requested. On the morning of May 18th, union pickets were stationed in front of Jocie's Atlanta terminal. When advised of this picket line, J. D. Brothers, President of New Dixie, flew from Richmond to Atlanta. In a telephone conversation with Brothers, Guy O. Alexander, Business Manager of Local 71, demanded that the union be recognized as bargaining agent for New Dixie employees and threatened, upon refusal of said demand, to shut plaintiff down. Alexander spurned Brothers' suggestion that the union petition for a National Labor Relations Board election among its employees. Late in the afternoon of May 18th, union pickets were stationed at the New Dixie-Jocie terminal in Charlotte.

At the outset, picketing was confined to plaintiff's terminals. Despite this picketing, plaintiff's business continued to operate. Upon instructions issued by officers of local unions, pickets then began to follow plaintiff's trucks to the points of pickup and delivery at the premises of plaintiff's customers and interchange carriers, principally in or near Charlotte and Atlanta.

Picket lines were maintained at the entrances to the premises of plaintiff's customers and interchange carriers when plaintiff's trucks were there. Before setting up picket lines at the premises of secondary employers, the pickets would go to the warehouses of such employers, ask someone in charge, or if no one was in charge, anyone there, to get the employees of such employers not to handle plaintiff's freight or to sit down and stop work completely while the picket line was up and, further, to get employees of other companies not to cross the picket lines. The object of such roving pickets was to stop the flow of freight being delivered by or to the plaintiff.

While this picketing was in progress, employees of numerous customers and interchange carriers refused to handle plaintiff's freight or cross the roving picket lines and in many cases refused to do any work so long as the picket lines were present.

The pickets wrote down the names of union members who crossed the roving picket lines. This was done openly in the presence of the offending member. The names of these individuals were turned over to Hargett (President of Local Union No. 71) who, in turn, prosecuted them before Lloyd Young, President of Carolina Joint Council No. 9.

Those found guilty of crossing the roving picket lines were fined by Young.

Plaintiff continued to operate during May, June, July and August of 1959 (and thereafter) despite acts of violence committed by union pickets and unidentified persons. The acts of violence, with one exception, occurred at plaintiff's terminals or along the road rather than at the places of business of plaintiff's customers or interchange carriers. These acts of violence consisted of damage to certain of plaintiff's equipment and assaults or threatened assaults on persons (plaintiff's employees) operating plaintiff's equipment. Property damage was sustained. There were no personal injuries.

Large numbers of customers completely stopped doing business with plaintiff. Others greatly curtailed business dealings with plaintiff. Still others continued to use plaintiff's services, but only when plaintiff did all the work of handling its freight whereas, prior to the strike, they had assisted plaintiff's employees in loading, unloading and checking such freight. Local cartage agents were employed by plaintiff to pick up and deliver freight of customers who were willing to use plaintiff's services, but who were unwilling to do so at the risk of business interruptions caused by roving pickets. Extra employees were hired and additional equipment was leased to take care of freight where employees of neutral companies refused to handle it. Administrative and supervisory employees were transferred from their regular duties to handling freight, reassuring customers and other jobs related to moving freight, notwithstanding the pickets' activities. Guards were hired to protect the property of plaintiff and its employees. Damage claims were excessive due to the necessity of double handling of freight.

Additional facts will be stated in the opinion.

Defendant, in apt time, moved for judgment of involuntary nonsuit and excepted to the court's denial thereof.

Defendant tendered, and excepted to the court's refusal to submit, this special issue: "Were the local unions or persons who engaged in the picketing alleged to be illegal in this case then acting as agents of the defendant International Union?"

The court submitted, and the jury answered, the following issues:

"1. Was the Plaintiff damaged by the wrongful actions of the Defendant, as alleged in the Complaint? ANSWER: Yes.

"2. If so, what amount, if any, is the Plaintiff entitled to recover of the Defendant as actual damages? ANSWER: $104,023.11.

"3. Was Plaintiff damaged by the violent, reckless, wanton and malicious actions of the defendant, as alleged in the Complaint? ANSWER: Yes.

"4. How much, if any, is Plaintiff entitled to recover of Defendant as punitive damages? ANSWER: $120,000."

In accordance with the verdict, the court entered judgment "that the plaintiff have and recover of the defendant $104,023.11 actual damages, together with $120,000.00 punitive damages, and the costs of this action to be taxed by the Clerk."

Defendant excepted, appealed and brings forward numerous assignments of error.

Blakeney, Alexander & Machen for plaintiff appellee.

Francis M. Fletcher, Jr., Herbert S. Thatcher and McLellan & Wright for defendant appellant.

BOBBITT, J. Defendant assigns as error the denial of its motion for judgment of involuntary nonsuit. In passing upon this assignment, it is necessary to consider the nature of the cause of action alleged and the theory of the trial.

Plaintiff, in express terms, based its action on Section 303(b) of the Labor Management Relations Act, 61 Stat. 159, 29 U.S.C.A. § 187(b), which provides:

"Whoever shall be injured in his business or property by reason or (of) any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

In May, June, July and August, 1959 (and prior to amendment of September 14, 1959), the pertinent portion of Section 303(a), 61 Stat. 158-159, 29 U.S.C.A. § 187(a), provided:

"(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

"(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other per-

son to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

"(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act."

It is noted that plaintiff, in paragraph 5 of the complaint, uses substantially the language used in said Section 303(a).

The federal statutes to which reference will be made are the "National Labor Relations Act" of 1935, 49 Stat. 449 *et seq.*, as amended by the "Labor Management Relations Act, 1947," 61 Stat. 136 *et seq.* Provisions of the 1947 Act are codified as follows: § 7 is 29 U.S.C. § 157; § 8 is 29 U.S.C. § 158; § 303 is 29 U.S.C. § 187; § 301 is 29 U.S.C. § 185.

The complaint contains no reference to a strike. Nor does it refer to Local 509 (Columbia) or Local 71 (Charlotte) or to any other subordinate or affiliate of the International Union. It alleges the International Union committed the alleged unlawful acts without designating the agency through which it acted.

The following excerpts from the court's charge indicate the theory of the trial:

"As you have learned from the evidence in this case, Locals 509 and 71, local unions affiliated with the defendant International Union who were actively carrying on the strike and picketing against the plaintiffs, are not parties to these proceedings, nor were the Joint Council Nine or the Eastern or Southern Conferences, also affiliated with the defendant. The defendant International Union alone has been sued on the theory that it was the principal for whom Locals 71 and 509 were acting as agents within the scope of their authority at the time of the events out of which this lawsuit arose. Whether the facts support this theory is an issue that you must decide, as plaintiff's contentions in this respect are expressly denied by the defendant.

"Under the law the defendant International Union, on the one hand, and its subordinate affiliated bodies such as local unions, joint councils and conferences, on the other hand, are considered separate and distinct entities. The mere fact that a local union or other subordinate bodies are constituent bodies or entities embraced within or affiliated with the International Union does not of itself make the local union or other subordinate bodies the agent of the International Union, nor does this

fact of affiliation make this International Union responsible for such acts of the local unions or other subordinate bodies.

"To hold the Defendant responsible for the actions of said local unions, you must find either that defendant itself participated in such actions or that the local unions were acting as the agents of the defendant."

Whether plaintiff was damaged by unlawful secondary boycott activities of the union pickets, and, if so, whether those engaged in such activities were acting as agents of International Union were the questions involved in the first issue.

The court's final instruction with reference to the first issue was as follows: "Now . . . if the plaintiff . . . has satisfied you . . . by the greater weight of the evidence that in failing to handle the cargo of the plaintiff's transportation company, that members of the union were acting not as individuals but in concerted actions for and on behalf of the Union as its agent, that the union would become responsible for their action; and if it has not so satisfied you, then it would be not responsible. Therefore, if you find that the members of the union were not acting as individuals and that they engaged in secondary boycotting, if you find from the evidence and by the greater weight of the evidence, then it would be your duty to answer that first issue yes. If you are not satisfied, Ladies and Gentlemen of the Jury, if you are not satisfied, then it would be your duty to answer that issue no."

International Union did not except to the last quoted excerpt. We are not now concerned with whether it is insufficient or erroneous.

The relationships between the International Union, the conferences, the joint councils and the (approximately 960) locals are set forth in the constitution of the International Union. Excerpts therefrom are quoted by *Higgins, J.*, in *Transportation Co. v. Brotherhood,* 257 N.C. 18, 125 S.E. 2d 277, *certiorari* denied *sub nom. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner v. Overnite Transportation Co.*, 371 U.S. 862, petition for rehearing denied, 371 U.S. 899. In *International Bro. of Teamsters, etc. v. United States,* 4 Cir., 275 F. 2d 610, Haynsworth, Circuit Judge, summarizes the provisions bearing upon the International Union's right of control over a local union. We approve Judge Haynsworth's summary and agree with the court's conclusion, *viz.*: "It (the constitution) showed such extensive control and direction of the local as to warrant the conclusion that the local is a component of the International. The local is the internal organizational means which the International employs to keep its accounts of its membership, to collect its revenues, and to execute and enforce its policies. If all of the

other general and specific rights of control vested in International should prove insufficient to assure subservience of a local in a particular matter, the right to suspend the charter and seize immediate control of a local which adopts an independent course must be effective."

As to whether International Union exercised its right of control, the evidence is in conflict; but, when considered in the light most favorable to plaintiff, we think it was sufficient to support findings that International Union authorized the strike and supported it by direct payment of strike benefits to Local 71 (Charlotte) pickets and by indirect payment of strike benefits to Local 728 (Atlanta) pickets, and that International Union was fully advised of the secondary boycott activities being employed as a means of obtaining the objectives of the strike.

International Union contends, citing *Labor Board v. Rice Milling Co.*, 341 U.S. 665, 95 L. Ed. 1277, 71 S. Ct. 961, and other decisions, that the evidence fails to disclose secondary boycott activities in violation of Section 303(a). In our view, the evidence, when considered in the light most favorable to plaintiff, was sufficient to support findings that the activities of union pickets at the places of business of plaintiff's customers and interchange carriers *induced* and *encouraged* the employees of such secondary employers by *concerted* action to refuse to handle commodities transported by plaintiff.

International Union's assignment of error directed to the court's denial of its motion for judgment of involuntary nonsuit is overruled.

International Union assigns as error the admission by the court over its objection of the testimony referred to below.

The evidence that plaintiff was damaged by the secondary boycott activities of union pickets is plenary and uncontradicted. International union contended, and offered evidence tending to show, that it did not authorize the strike or picketing or secondary boycott activities; that, when plaintiff refused to reinstate union members who had gone on strike, such payments as International Union made were lockout benefits, not strike benefits; and that, in calling the strike and in picketing and in the secondary boycott activities, the local unions acted as autonomous unions and not as agents of International Union.

There is evidence that plaintiff "got an injunction in the Federal Court around August 20, 1959." Apparently, the roving or ambulatory picketing and secondary boycott activities were then enjoined but picketing at plaintiff's terminals was permitted to continue and did continue.

International Union assigns as error the admission, over its objection, (1) of certain testimony of J. D. Brothers, New Dixie's President,

as to what R. C. Cook, President of Local 728 (Atlanta), testified at a National Labor Relations Board hearing in Atlanta, and (2) of a portion of the official report of said hearing, consisting of testimony given by Cook at said hearing. The said record indicates the hearing was held October 29, 1959, in a proceeding to which Local 509, Local 728 and Jocie (but not International Union) were parties. The exact nature and purpose of the hearing does not appear.

Brothers testified that he, personally, cross-examined Cook at said National Labor Relations Board hearing. Brothers was permitted to testify, over objection by International Union, as follows: "Mr. Cook admitted under my cross-examination that he was reimbursed by Joint Council 9 for every, for all of the strike expenses, and in turn Joint Council 9 was partially reimbursed by the International." International Union moved to strike and for a mistrial and excepted to the denial of its said motions.

The portion of said official report offered and admitted in evidence tends to show that Local 728 made payments to Overnite and Jocie pickets; that, although not affiliated with Joint Council 9, Local 728 was reimbursed by Joint Council 9 to the extent of its payments to Jocie pickets; and that Joint Council 9 was reimbursed in part by International Union. Local 509 (Columbia) and Local 71 (Charlotte) were affiliated with Joint Council 9.

Cook was not a witness at the trial of this action.

Plaintiff suggests that this evidence was competent as a declaration against interest. Cook was testifying as President of Local 728, a party to the proceeding. Whether his declarations were against the interest of Cook or of Local 728 does not appear. There is no evidence that Cook was an officer of International Union. International Union was not a party to the proceeding and Cook was not testifying in its behalf. When his testimony was given, the alleged roving or ambulatory picketing and secondary boycott activities had been enjoined. It is noted that the statements attributed to Cook referred to what (may have) occurred in May, June, July and August of 1959.

There was independent evidence that Local 728 made payments to Jocie pickets, that Joint Council 9 made payments to Local 728 and that International Union made payments to Joint Council 9. But the evidence as to Cook's testimony at the National Labor Relations Board hearing is the only evidence that tends positively to identify payments made by International Union to Joint Council 9 as made to reimburse Local 728 in part for payments made by it to Jocie pickets. There can be no question as to the force and prejudicial effect of the testimony as to what Cook said October 29, 1959, at said National

Labor Relations Board Hearing. The evidence as to what Cook testified at said hearing was incompetent because (1) it was hearsay, and (2) agency may not be proved by the *declarations* of the alleged agent. The admission thereof is prejudicial error for which a new trial must be awarded.

International Union assigns as error the admission, over its objection, of four documents identified collectively as plaintiff's Exhibit 17, to wit:

"(1) NEWS RELEASE
'For Immediate Release to all News Media
Greenville, South Carolina
February 1, 1962

TEAMSTERS LOSE AGAIN

The Teamsters' organizers suffered another defeat in Greenville, South Carolina on February 1, 1962. In an election supervised by the National Labor Relations Board, the employees of the New Dixie Lines' terminal at Greenville rejected Teamsters Local 509 as their bargaining agent. Only one vote was cast in favor of the Union.

(This was the first election ever held in the New Dixie four state operation since this general commodity motor carrier began operations in 1945. New Dixie operates throughout Virginia, North Carolina, South Carolina, and Georgia from twenty-two terminal locations with an annual gross revenue exceeding $4,500,000.00.) (Our parentheses).

(This completes the latest chapter of Hoffa's Teamsters efforts to organize the employees of New Dixie.) (Our parentheses).

(In 1959 New Dixie and its subsidiary, Jocie Motor Lines, were involved in a prolonged and bitter struggle with the Teamsters. As a result New Dixie filed a $500,000.00 suit against Hoffa's International Union for damages alleged to have been inflicted as a result of unlawful secondary boycott activity and violence. This suit is scheduled for trial in the Superior Court of Charlotte, North Carolina on April 16, 1962.) (Our parentheses).

s/J. D. Brothers
President'

"(2) LETTER OF J. D. BROTHERS, PRESIDENT OF THE NEW DIXIE LINES, INC.

'THE NEW DIXIE LINES, INC.
NEW DIXIE
BROOK ROAD AND NORWOOD AVE., RICHMOND, VA.
P. O. BOX 5032, PHONE EL 5-9141

February 12, 1962

To all New Dixie Friends:

Enclosed is a copy of a News Release made on February 1. I thought you might be interested in its contents.

Very truly yours,
NEW DIXIE LINES
s/J. D. Brothers
President

JDB/de
Att: News Release'

"(3) LETTER OF D. S. WILLARD, PRESIDENT OF LOCAL UNION 391

'CHAUFFEURS, TEAMSTERS & HELPERS
Local No. 391

Main Office
P. O. Box 873, Phone BRoadway 3-7389,
Greensboro, North Carolina

Sub-Office
P. O. Box 598, Phone PArk 5-7586
Winston-Salem, North Carolina

Affiliated with
EASTERN CONFERENCE OF TEAMSTERS I. B. of T. C. W. & H. OF A.

Affiliated with Carolina Joint Council No. 9

February 15, 1962

Mr. James R. Hoffa, General President
International Brotherhood of Teamsters
25 Louisiana Avenue, N. W.
Washington 1, D. C.

Dear Sir and Brother:

Enclosed herewith is photocopy of letter and News Release put out by the New Dixie Lines, Inc.

This is being mailed to business concerns, as this was handed to one of Local 391 members by a customer that he was delivering at. This is for your information.

With best wishes, I am

Fraternally yours,
s/D. S. Willard, Pres.
Teamsters Local Union
No. 391

DSW:m
Encl. '

"(4) LETTER OF JAMES R. HOFFA, GENERAL PRESIDENT OF THE DEFENDANT INTERNATIONAL.

N L R B
CASE No. 11-cc-17
X New Dixie Lines
X
February 19, 1962

'Mr. Thomas E. Flynn, Area Director
Eastern Conference of Teamsters
100 Indiana Ave., N.W.
Washington, D. C.

Dear Sir and Brother:

The attached communication from D. S. Willard, President of Local Union 391 is self-explanatory.

From the looks of this I would say that it might be well to be sure of ourselves before we petition for elections. Please go to work on this and organize all of the employees and pull them out on strike if you can't win the election.

Fraternally yours,
James R. Hoffa
General President

JRH/yk
Enc. ' "

While the 1962 letters of Willard and Hoffa were not competent as evidence that Hoffa authorized, supported or ratified the strike, picketing and secondary boycott activities in May, June, July and August of 1959, they would appear competent for *a limited purpose,* that is, as bearing upon the question as to whether, as contended by International Union and as International Union's evidence tended to show, the locals in actual practice were autonomous and not subject to the direction and control of International Union. However, it does not

appear defendant requested the court to instruct the jury as to the *limited purpose* for which said 1962 letters were competent. Under Rule 21, Rules of Practice in the Supreme Court, 254 N.C. 783, 803, it is not a "ground of exception that evidence competent for some purposes, but not for all, is admitted generally, unless the appellant asks at the time of admission, that its purpose shall be restricted."

A portion of the "News Release" (through the first paragraph thereof) was admissible as explanatory of the subject referred to in said 1962 letters. The second, third and fourth paragraphs thereof (enclosed by our parentheses) are self-serving and are not competent for any purpose. However, it appears defendant's objection was directed to the "News Release" in its entirety rather than to specific portions thereof. In this connection, see *Grandy v. Walker,* 234 N.C. 734, 68 S.E. 2d 807, and *S. v. Brooks,* 260 N.C. 186, 188, 132 S.E. 2d 352.

While, under our rules, the admission of said 1962 letters and of said "News Release" over defendant's general objection would not ordinarily be ground for a new trial, the foregoing discussion with reference to the competency of this evidence seems appropriate.

We pass, without discussion, the questions raised by assignments of error directed (1) to the court's failure to submit the specific issue as to agency tendered by International Union and (2) to designated portions of the charge bearing upon the first issue. These questions may not recur at the next trial. Moreover, since a new trial is awarded, we do not discuss, upon the pleadings and evidence in the record now before us, whether the court erred in submitting the third and fourth issues or in the instructions given the jury with reference thereto.

New trial.

Parker & Higgins, JJ., dissent.

TRINITY METHODIST CHURCH, WILMINGTON, NORTH CAROLINA, AND CHARLES L. SNEEDEN, J. WARD ANDREWS, V. M. LANCASTER, MARK H. DIECHMAN, A. S. GRIST, W. J. HAYES, ROGER MATTHEWS, J. G. MCKEITHAN, AND R. F. BRADSHER, TRUSTEES OF TRINITY METHODIST CHURCH, WILMINGTON, NORTH CAROLINA v. CHAS. J. MILLER, TRADING AS CHAS. J. MILLER COMPANY AND GLENS FALLS INSURANCE COMPANY.

(Filed 16 October 1963.)

1. Process § 8—

An action for breach of contract to rebuild a church organ, the contractor claiming no interest in the organ nor any lien thereon, is an action solely *ex contractu* and does not come within the provisions of G.S. 1-98.2(1) so as to authorize service of process on the nonresident under G.S. 1-104(a).

2. Same—

G.S. 1-98.2(6) does not authorize service of process under G.S. 1-104(a) unless the defendant is a resident of this State and has departed therefrom with intent to defraud creditors or avoid service of summons, and therefore the statute can have no application when it appears from the complaint that defendant is a nonresident or if it does not affirmatively appear that he is a resident who has left the State for the purpose of defrauding his creditors and avoiding service of summons.

3. Same; Judgments § 1—

A judgment *in personam* cannot be rendered against a defendant unless personal service of process is had upon him within the State or he has accepted service, or by general appearance, actual or constructive, has waived service, and personal service outside the State under G.S. 1-104 is ineffectual to give the court jurisdiction over the person.

APPEAL by defendant Chas. J. Miller from *Parker, J.*, May Civil Session 1963 of NEW HANOVER.

This is a civil action to recover damages arising from an alleged breach of contract.

On 26 December 1956, defendant Chas. J. Miller, trading as Chas. J. Miller Company, entered into a contract with plaintiff Trinity Methodist Church of Wilmington, North Carolina, through its Board of Trustees, to rebuild an organ owned by plaintiff and located in Wilmington, North Carolina. At the time of the execution of the contract, defendant Chas. J. Miller was a citizen and resident of Charlotte, Mecklenburg County, North Carolina.

On 16 June 1961, plaintiff notified defendant Glens Falls Insurance Company, which corporation had executed a performance bond on behalf of defendant Miller, that Miller had breached his contract. On 14 December 1962 this action was instituted in New Hanover

County by issuing a summons and filing a verified complaint in which it was alleged that the individual defendant had breached his contract and "is not now a resident of North Carolina."

The answer of the defendant surety admitted that the individual defendant is not a resident of North Carolina. The affidavit for service of process outside the State alleges that, "After due and diligent search, said defendant, although a resident of North Carolina, cannot be found in this State and personal service cannot be made upon him in this State."

The defendant Miller was personally served in Logan County, Arkansas, under the provisions of G.S. 1-104.

Pursuant to the provisions of G.S. 1-134.1, Miller, through his counsel, moved to dismiss the action against him for that the court has not properly acquired jurisdiction over the person of the defendant Miller.

The motion was denied and the defendant Miller appeals, assigning error.

Henry & Henry; Burnett & Burnett; Carter, Murchison, Fox & Newton for plaintiff appellee.

Poisson, Marshall, Barnhill & Williams for defendant appellant.

DENNY, C. J. The question for determination is, in an action for damages for breach of contract, can valid service of process be had outside the State of North Carolina pursuant to the provisions of G.S. 1-104.

G.S. 1-104 provides in pertinent part as follows: "(a) In all actions and special proceedings in which a verified pleading or an affidavit for service of process outside the State has been filed pursuant to G.S. 1-98.4, and an order for such service has been issued pursuant to G.S. 1-99, it shall be sufficient for service of process outside the State to mail the original and a copy of the process, together with a copy of such pleading or affidavit, to the sheriff or other process officer of the county or corresponding governmental subdivision of the state where the party to be served is located, who shall serve same according to its tenor. * * *"

The affidavit required under the provisions of G.S. 1-98.4 must show, among other things, the following: "(2) * * * That the action or special proceeding is one of those specified in G.S. 1-98.2, that a cause of action exists against the person to be served or that he is a proper party, and that the action or special proceeding is of such a kind that the court will have jurisdiction upon service of process by publication or service of process outside the State * * *."

G.S. 1-98.2 provides the particular instances in which service of process by publication or service of process outside the State may be obtained, as follows:

"(1) Those in which the court has jurisdiction over the real or personal property which is the subject matter of the litigation;

"(2) Those in which the court by order of attachment granted therein at any time prior to judgment secures control over property belonging to the person to be served;

"(3) Those for annulment of marriage, divorce, adoption or custody of a minor child, or for any other relief involving the domestic status of the person to be served;

"(4) Those for the purpose of revoking, cancelling, suspending or otherwise regulating licenses issued or privileges granted by the State or any political subdivision thereof, or by any agency of either, to the person to be served; and

"(5) Any other actions and special proceedings in rem or quasi in rem in which the court has jurisdiction over the res.

"(6) Where the defendant, a resident of this State, has departed therefrom or keeps himself concealed therein with intent to defraud his creditors or to avoid the service of summons."

The appellees contend that subsections (1) and (6) of the foregoing statute are applicable to the factual situation in this litigation. They base their contention on the fact that Miller contracted to rebuild and modernize plaintiff's organ which is within the jurisdiction of the Superior Court where the action is pending. Conceding this to be true, the defendant Miller does not own the organ, neither are there any allegations in the complaint to the effect that he claims any interest therein or lien thereon. Consequently, the organ is not the subject matter of the litigation. *Wrenn v. Graham,* 236 N.C. 719, 74 S.E. 2d 232. This litigation is bottomed on an alleged breach of contract. Therefore, the relief sought is an *in personam* judgment, and subsection (1) of G.S. 1-98.2 has no application to the facts involved in this litigation.

Now with respect to subsection (6) of the statute, the affidavit upon which the order of service of process outside the State was based was filed in the office of the Clerk of the Superior Court of New Hanover County on 9 January 1963. This affidavit is to the effect that defendant Chas. J. Miller is a resident of North Carolina but cannot be found in the State and personal service cannot be made upon him in this State; that according to the best information available, said de-

fendant had departed from North Carolina and his last known address is 315 East Magazine Street, Booneville, Arkansas.

On the other hand, the verified complaint filed in this action on 14 December 1962 alleges that defendant Chas. J. Miller is not a resident of North Carolina.

As we construe subsection (6) of the statute, it applies only where the defendant is a resident of this State and has departed therefrom or keeps himself concealed therein with intent to defraud his creditors or to avoid the service of process. There is no allegation in the affidavit or in plaintiff's complaint, alleging that the defendant left the State with the intent to defraud his creditors or to avoid service of process. Even so, in our opinion, subsection (6) of the statute has no application to a nonresident of this State.

In *Hinton v. Insurance Co.*, 126 N.C. 18, 35 S.E. 182, 78 Am. St. Rep. 636, it is said: "Any attempt by one State to give its courts jurisdiction beyond its own limits over persons domiciled, or property situated, in another State, is a usurpation of authority and is void. This law would not apply of course in cases where the courts of one State had made personal service of process upon persons who lived in another State, but who had put themselves within the jurisdiction of that other State. And other methods of giving notice of court proceedings to nonresidents are permitted, as service by publication, where the property of the nonresident is brought under the control of the court by attachment or other equivalent act, the theory of the law being that the owner is always in possession of his property, and that its seizure will inform him of the seizure, and that he will look out for his interest. And also other methods of service of process will be allowed in cases where property is sought to be partitioned between residents and nonresidents; in cases to enforce a contract between such persons concerning property within the jurisdiction; in cases of condemnation of a nonresident's property for public purposes, and also to fix the status of a nonresident as to his relations with a resident within the jurisdiction —as in divorce proceedings. But, as was said in *Pennoyer v. Neff,* 95 U.S. 727, 'Where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam,* constructive service in this form upon a nonresident is ineffectual for any purpose. Process from the tribunals of one State can not run into another State and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits can not create any greater obligation upon the nonresident to appear. Process sent to him out of the State and process published

within it are equally unavailing in proceedings to establish his personal liability.' " *Harris v. Upham,* 244 N.C. 477, 94 S.E. 2d 370.

In *Burton v. Dixon,* 259 N.C. 473, 131 S.E. 2d 27, *Moore, J.,* speaking for the Court, said: "Jurisdiction of a party in an action *in personam,* as is the instant action, can only be acquired by personal service of process within the territorial jurisdiction of the court, or by acceptance of service, or by general appearance, active or constructive. *Warlick v. Reynolds,* 151 N.C. 606, 66 S.E. 657. In an action *in personam* constructive service (by publication, or personal service outside the State) upon a nonresident is ineffectual for any purpose. *Stevens v. Cecil,* 214 N.C. 217, 199 S.E. 161; McIntosh: North Carolina Practice and Procedure (2d ed. 1956), s. 911, p. 479."

There can be no doubt about the fact that the defendant, Chas. J. Miller, was not a resident of this State when this action was instituted. Therefore, based on the cause of action alleged in the complaint, we hold that the provisions of G.S. 1-98.2, subsections (1) and (6), do not authorize service of process by publication or service of process outside the State on the defendant, Chas. J. Miller, a nonresident, that will give the Superior Court jurisdiction to render a valid *in personam* judgment against him.

Reversed.

CAROLINA INDUSTRIAL BANK, A CORPORATION, v. TERRY ANNE MERRIMON.

(Filed 16 October 1963.)

1. Usury § 1—

In order to be entitled to recover the penalty for usury, plaintiff must show that there was a loan or forbearance of money made with the understanding of repayment, that for such loan or forbearance a greater rate of interest than is allowed by law was paid, and that there was a corrupt intent on the part of defendant to take more than the legal rate of interest for the use of the money.

2. Same—

If a transaction is a sale and not a loan, the fact that the differential between the cash and the sale price exceeds the legal rate of interest does not render the transaction usurious, but if the form of the transaction is a mere subterfuge to conceal an exaction of more than the legal rate of interest on what is in fact a loan and not a sale, the transaction will be regarded according to its true character and will be held usurious.

and if the nature of the transaction is doubtful the question is for the determination of the jury.

3. Same—

If the transaction between the purchaser and the dealer is in fact a sale and not a loan and is not, therefore, usurious even though the credit price exceeds the cash price by more than the legal interest, such transaction is not converted into a loan by reason of the fact that a finance company solicits the business of discounting the purchase money notes from the dealer and furnishes forms for the contracts and a schedule or table for the dealer to compute the finance charges, and the contract, being valid between the original parties, is enforceable by the finance company.

4. Same—

In this action by a finance company as assignee or purchaser of a note given for the balance of the purchase price of an automobile, nonsuit should have been entered on defendant's counterclaim for usury upon evidence tending to show that plaintiff voluntarily purchased the automobile and signed a "confirmation of sale" showing a differential for time payment over the cash price in an amount exceeding the legal interest, notwithstanding evidence that the finance company furnished the printed form of the contract, since the evidence discloses that the transaction was a *bona fide* sale and not a loan or forbearance of money. G.S. 24-2.

APPEAL by plaintiff from *Martin, S. J.*, February 1963 Session of BUNCOMBE.

Action by plaintiff for a deficiency judgment on an instalment note and foreclosure of a chattel mortgage on an automobile. Defendant counterclaims for the penalty arising from an alleged exaction of usury.

From judgment in favor of defendant, plaintiff appeals.

Lee, Lee & Cogburn for plaintiff.
Williams, Williams & Morris for defendant.

MOORE, J. The evidence discloses the following undisputed facts: On 17 June 1960 defendant purchased a secondhand automobile from Dorato Motors, Inc., at Oteen, North Carolina. Defendant paid $500 in cash and executed a promissory note in the amount of $1171.20, with interest from maturity at 6% per annum, payable to Dorato in 24 equal monthly instalments of $48.80; she executed to C. J. O'Connell, Trustee, and Dorato a "deed of trust on personal property" (chattel mortgage) conveying the automobile as security for the note, and obligating defendant to maintain fire, theft and collision insurance with loss payable to Dorato; and she signed a "Confirmation of Sale," showing the transaction, and containing among others the following entries:

Cash Selling Price of Car	$1295.00
Accessories .... N. C. Sales Tax	
Total Cost including accessories	$1295.00
Cash Down Payment $500.00	
Total Credit	500.00
Balance Due	795.00
Plus Differential for time payment	$ 376.20
Total Selling Price of Car—Including Time Differential	1171.20
There are spaces for showing insurance coverages, but none are filled in	
Payments $48.80 each month for 24 months Beginning 17 July 60.	

The note and chattel mortgage are on forms supplied to Dorato by plaintiff. C. J. O'Connell is secretary to one of the officials of plaintiff and plaintiff had issued instructions that O'Connell was to be trustee in the instruments purchased by it. There was no contract or agreement that plaintiff would purchase any particular notes or chattel mortgages accepted by Dorato. Defendant's note and chattel mortgage were purchased by plaintiff about 20 June 1960 for $899.28, and the "Confirmation of Sale" was delivered to plaintiff along with the note and chattel mortgage. Plaintiff obtained fire, theft and collision insurance and credit life insurance and paid premiums of $121 and $23.42. It also paid a title recording fee of $1.50. Plaintiff's profit was $126.

On 28 February 1962 plaintiff filed this action and complained that defendant was in default in the payment of the note in the amount of $334.70 and prayed for judgment in that amount and for foreclosure of its lien. On 8 March 1962 defendant paid the note in full according to its tenor. Defendant then answered the complaint and alleged that the note was usurious, the principal was $795, and the so-called "differential for Time Payment" of $376.20 was interest, and asked for recovery of $752.40 under the double-interest penalty of G.S. 24-2.

Defendant was permitted, over the objection of plaintiff, to testify that the total purchase price of the car is $1295, she paid $500 leaving a balance due of $795, and the $376.20 shown on the "Confirmation of Sale" is interest.

The trial proceeded only upon the counterclaim. The court denied plaintiff's motions to nonsuit the counterclaim. The jury found that plaintiff charged and received usurious interest and fixed the penalty at $752.40.

The usury statute, G.S. 24-2, provides, in part, that "The taking, receiving, reserving or charging a greater rate of interest than six per centum per annum, either before or after the interest may accrue, when knowingly done, shall be a forfeiture of the entire interest . . . and in case a greater rate of interest has been paid, the person . . . by whom it has been paid, may recover back twice the amount of interest paid . . ."

To maintain an action for the usury penalty the claimant must show: (1) That there was a loan, express or implied. (Or a forbearance of money, *Miller v. Dunn,* 188 N.C. 397, 124 S.E. 746; *Churchill v. Turnage,* 122 N.C. 426, 30 S.E. 122). (2) That there was an understanding between the parties that the money lent would be returned. (3) That for such loan or forbearance a greater rate of interest than is allowed by law was paid. (4) That there was a corrupt intent to take more than the legal rate for the use of the money. *Preyer v. Parker,* 257 N.C. 440, 125 S.E. 2d 916; *Loan Co. v. Yokley,* 174 N.C. 573, 94 S.E. 102; *Doster v. English,* 152 N.C. 339, 67 S.E. 754. If in fact the transaction is a bona fide sale and not a loan of money, it is not usurious. *Yarborough v. Hughes,* 139 N.C. 199, 51 S.E. 904. But if the form of the transaction is a subterfuge to conceal an exaction of more than the legal rate of interest on what is in fact a loan and not a sale, the transaction will be regarded according to its true character and will be held usurious. *Ripple v. Mortgage Corp.,* 193 N.C. 422, 137 S.E. 156. The law considers the substance and not the mere form or outward appearances. *Sherrill v. Hood, Commissioner of Banks,* 208 N.C. 472, 181 S.E. 330; *Pratt v. Mortgage Company,* 196 N.C. 294, 145 S.E. 396. If the transaction is of doubtful character it should be submitted to the jury for determination. *Loan Co. v. Yokley, supra; Sherrill v. Hood, Commr. of Banks, supra; Doster v. English, supra; Bank v. Wysong & Miles Co.,* 177 N.C. 284, 98 S.E. 769.

Most of the states have usury laws of the same import as the North Carolina statute. In interpreting these laws in relation to transactions such as the one *sub judice* there have been declared, by the overwhelming weight of authority, the following principles: (1) Usury can only attach to a loan of money or to forbearance of a debt. *Commercial Credit Co. v. Tarwater,* 110 S. 39, 48 A. L. R. 1437 (Ala. 1926). (2) A vendor may fix on his property one price for cash and another for credit, and the mere fact that the credit price exceeds the cash price by a greater percentage than is permitted by the usury laws is a matter of concern to the parties and not to the courts, barring evidence of bad faith. *Van Asperen v. Darling Olds,*

Inc., 93 N.W. 2d 690 (Minn. 1958); *National Bond & Investment Co. v. Atkinson,* 254 S.W. 2d 885 (Tex. 1952); *Brown v. Crandall,* 61 S.E. 2d 761 (S. C. 1950); 91 C. J. S., Usury, s. 18, p. 589. (3) Usury cannot be predicated upon the fact that property is sold on a credit at an advance over what would be charged in case of a cash sale so long as it appears that the price charged is in fact fixed for the purchase of goods on credit with no intention or purpose of defeating the usury laws, even though the difference between the cash price and the credit price, if considered as interest, amounts to more than the legal rate. *Bryant v. Securities Investment Co.,* 102 S. 2d 701 (Miss. 1958); *Newkirk v. Universal C. I. T. Credit Corp.,* 90 S.E. 2d 618 (Ga. 1955); *Wilson v. J. E. French Co.,* 4 P. 2d 537 (Cal. 1931); *Commercial Credit Co. v. Shelton,* 104 S. 75 (Miss. 1925); *Davidson v. Davis,* 52 S. 139 (Fla. 1910). (4) A *bona fide* credit sale upon an instalment payment basis does not involve a loan of money or a forbearance of a debt within the meaning and application of the usury laws. *Zazzaro v. Colonial Acceptance Corp.,* 167 A. 734 (Conn. 1933). (5) A finance company is not precluded from enforcing a credit sale contract according to its terms, if valid between the original parties, although the credit price exceeds the cash price by more than the legal interest. And such transaction is not converted into a loan by reason of the fact the finance company solicited such business from the dealer and furnished forms for the contract, and if the seller computes the finance charge in accordance with a table or schedule furnished by the finance company. *Black v. Contract Purchase Corp.,* 42 N.W. 2d 768 (Mich. 1950); *Commercial Credit Co. v. Tarwater, supra.*

We cite only a few cases in support of the foregoing propositions. Authorities are so numerous that an exhaustive listing would seem supererogatory. It suffices here to refer to the citations, listings, annotations and supplements of 143 A.L.R. 238-268; 57 A.L.R. 880, 881; 48 A.L.R. 1442-1446. A few jurisdictions have contrary holdings on some aspects of these matters but most of them are based on statutes differing from ours and regulating retail credit sales. *Trailmobile, Inc. v. Hardesty,* 112 N.W. 2d 535 (Neb. 1961); *National Bond & Investment Co. v. Atkinson, supra; Universal Credit Co. v. Lowell,* 2 N.Y.S. 2d 743 (1938); *E. Tris Napier Co. v. Trawick,* 139 S.E. 552 (Ga. 1927).

"If there is a real and bona fide purchase, not made as the occasion or pretext for a loan, the transaction will not be usurious even though the sale be for an exorbitant price, and a note is taken, at legal rates, for the unpaid purchase money. The reason is that the

statute against usury is striking at, and forbidding, the extraction or reception of more than a specified legal rate for the hire of money, and not for anything else; and a purchaser is not, like the needy borrower, a victim of a rapacious lender, since he can refrain from the purchase if he does not choose to pay the price asked by the seller." *General Motors Acceptance Corp. v. Weinrich*, 262 S.W. 425 (Mo. 1924).

We are unable to distinguish the instant case from *Hendrix v. Cadillac Co.*, 220 N.C. 84, 16 S.E. 2d 456 (1941). It is a *per curiam* opinion and does not recite the facts. An examination of the record on appeal reveals the following. Plaintiff purchased a secondhand automobile from defendant-dealer. Dealer quoted a price of $400; plaintiff made a cash payment of $135. In the note and conditional sale contract executed by plaintiff $72.20 was added for time price differential and insurance. The note was for $337.20 payable in 15 equal monthly instalments. The time price differential, after deducting therefrom an insurance premium, exceeded the legal rate of interest on $265 for the term of the note. Plaintiff testified he did not know the $72.20 had been added. The credit papers were assigned to a finance company. Plaintiff paid the note in full and sued the dealer and finance company for usury penalty. The trial judge nonsuited plaintiff. On appeal this Court declared: "An examination of the evidence convinces us that the transaction involved was indeed a sale and not a loan and therefore the cause of action alleged by plaintiff is not sustained by the evidence."

The instant case is in all material respects factually parallel to the *Hendrix* case. The transaction was a sale and not a loan or forbearance of debt. For a case constituting a sale in form but a loan in fact, see *Ripple v. Mortgage Corp., supra.*

The General Assembly has provided that time prices for supplies advanced for cultivation of crops shall not exceed ten per cent over the retail cash prices. G.S. 44-54. But there is no statute regulating time prices in general retail credit sales payable in instalments.

The court below erred in overruling plaintiff's motion to nonsuit defendant's counterclaim.

Reversed.

JAMES RAY PARLIER v. TOMMY BARNES & JUD BARNES AND JUD BARNES, GUARDIAN AD LITEM OF TOMMY BARNES.

(Filed 16 October 1963.)

1. Automobiles § 41f—

The evidence in this case *is held* sufficient to be submitted to the jury on the issue of defendant's negligence in colliding with the rear of the automobile driven by plaintiff.

2. Trial § 33—

A charge which contains a statement of the respective contentions of the parties and a statement of the abstract principles of law involved in the case, but which fails to apply the law to the facts in evidence or charge the jury the respective circumstances under which the issues should be answered in the affirmative and in the negative, must be held for prejudicial error. G.S. 1-180.

3. Automobiles § 46—

Where there is no evidence that the scene of the accident was within a business district as defined in G.S. 20-38(a), a charge as to the maximum speed in a business district must be held for prejudicial error in charging on an abstract principle of law not supported by any evidence in the case.

APPEAL by defendants from *Sink, E. J.*, Regular June 1963 Civil Session of WATAUGA.

Civil action, instituted 28 June 1962, to recover damages for personal injuries caused by the alleged actionable negligence of Tommy Barnes, minor son of Jud Barnes, in the operation of a Chevrolet automobile owned by and registered in the name of Jud Barnes, and kept by him for the convenience, pleasure, and business of his family.

Defendants filed a joint answer in which they deny that Tommy Barnes was negligent in the operation of his father's automobile, conditionally plead contributory negligence of plaintiff in the operation of his automobile as a bar to any recovery by him, and in which Jud Barnes avers a counterclaim to recover for damages to his automobile allegedly caused by the actionable negligence of plaintiff in the operation of his automobile.

The jury found by its verdict that plaintiff was injured by the negligence of Tommy Barnes, as alleged, that at the time of the collision Tommy Barnes was acting as agent of Jud Barnes and within the scope of his agency (this issue was answered "Yes" by consent), that plaintiff was free from contributory negligence as alleged in the answer, and awarded him damages in the sum of $10,-000. The jury did not answer the issues arising upon the counterclaim of Jud Barnes.

From a judgment in accord with the verdict, defendants appeal.

Holshouser & Holshouser for defendant appellants.
McElwee & Hall by Richard A. Vestal for plaintiff appellee.

PER CURIAM. Plaintiff's evidence tends to show: About 5:30 p.m. on 10 May 1962 he was driving his automobile west on King Street in the town of Boone. He stopped behind a truck preparing to make a left turn, and had his left arm extended "with a slow or stop sign." After he had been stopped there for approximately three or four minutes, Tommy Barnes driving his father's automobile ran into the rear of his automobile. He was thrown forward, then jerked back over the seat, and then thrown forward again. He sustained serious injuries as a result of the collision.

The joint answer admits that Jud Barnes was the owner of the automobile his son Tommy Barnes was driving at the time of the collision, and that it was registered in the name of Jud Barnes as owner.

Defendant Tommy Barnes testified on cross-examination: "I was going 35 miles an hour. * * * I remember talking to the Chief of Police up there. * * * I guess I said that I told Mr. Thomas that I ran into the back of this car because I just didn't see it. I told him the car stopped suddenly in front of me and I hit him. I told Mr. Thomas that." The Mr. Thomas referred to was Hubert Thomas, Chief of Police of the town of Boone, and a witness for plaintiff.

The complaint alleges, *inter alia*, Tommy Barnes was negligent in operating the automobile without keeping a proper lookout.

Considering plaintiff's evidence in the light most favorable to him, and the evidence of defendants favorable to him, it was sufficient to carry the case to the jury, and defendants' assignment of error that the court erred in denying their motion for compulsory nonsuit made at the close of all the evidence is overruled. *Smith v. Rawlins*, 253 N.C. 67, 116 S.E. 2d 184; *Dunlap v. Lee*, 257 N.C. 447, 126 S.E. 2d 62; G.S. 20-71.1.

Defendants assign as error the failure of the court in its charge to apply the law to the evidence on the substantial features of the case, in that the court failed to charge and apply the applicable statutory law as to speed of automobiles, and failed to charge and apply the law as it relates to the variant factual situations arising on the evidence given in the case.

A study of the charge shows that the court gave the contentions of the parties and instructed the jury with respect to negligence and

proximate cause according to the rule of the reasonably prudent man, with respect to the maximum speed in a "business district," and with respect to giving a signal when preparing to stop. But nowhere in the charge did the court instruct the jury what facts it was necessary for them to find to constitute negligence on the part of Tommy Barnes, and contributory negligence on the part of plaintiff. Nowhere in the charge did the court instruct the jury as to the circumstances under which the first issue, as to whether plaintiff was injured by defendants' negligence, should be answered in the affirmative, and under what circumstances it should be answered in the negative.

In *Glenn v. Raleigh,* 246 N.C. 469, 98 S.E. 2d 913, it is said:

> "The chief purpose of a charge is to aid the jury to understand clearly the case, and to arrive at a correct verdict. For this reason, this Court has consistently ruled that G.S. 1-180 imposes upon the Trial Judge the positive duty of declaring and explaining the law arising on the evidence as to all the substantial features of the case. A mere declaration of the law in general terms and a statement of the contentions of the parties, as here, is not sufficient to meet the statutory requirement. *Hawkins v. Simpson,* 237 N.C. 155, 74 S.E. 2d 331, where 14 of our cases are cited. In *Lewis v. Watson,* 229 N.C. 20, 47 S.E. 2d 484, this Court said, quoting from Am. Jur.: 'The statute requires the judge "to explain the law of the case, to point out the essentials to be proved on the one side or the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved." 53 Am. Jur., Trial, section 509.' "

Unless the mandatory provision of G.S. 1-180 is complied with, "there can be no assurance that the verdict represents a finding by the jury under the law and on the evidence presented." *Smith v. Kappas,* 219 N.C. 850, 15 S.E. 2d 375.

We can find nothing in the record to indicate that the collision here occurred in a "business district," as such a district is defined in G.S. 20-38 (a). The maximum speed in a "business district" is 20 miles per hour, G.S. 20-141 (b) (1); in a "residential district" 35 miles per hour, G.S. 20-141 (b) (2). There is nothing in the record to indicate that the collision here occurred in a "residential district," as such a district is defined in G.S. 20-38 (w)1. The court charged the maximum speed in a "business district" was 20 miles per hour, but did not charge as to the maximum speed elsewhere.

Under the facts here, this charge on an abstract principle of law not supported by any evidence in the case is prejudicial error. *Carswell v. Lackey,* 253 N.C. 387, 117 S.E. 2d 51; *Andrews v. Sprott,* 249 N.C. 729, 107 S.E. 2d 560.

For errors in the charge defendants are entitled to a new trial, and it is so ordered.

New trial.

HERMAN L. GREENE v. CECIL HARMON.

(Filed 16 October 1963)

Trial § 33—

The court is required to charge the jury on the applicable statutory law as well as the common law, and the court's failure to do so must be held for prejudicial error. G.S. 1-180.

APPEAL by plaintiff from *Sink,* Emergency Judge, Regular June Civil Session 1963 of WATAUGA.

This is a civil action instituted on 8 October 1962 by the plaintiff to recover for damages to his automobile, resulting from a collision between the plaintiff's automobile and the Volkswagen of the defendant on 1 August 1962, about 7:15 a.m., on Highway 321 near the "Y" intersection of old Highway 421, near Stephens' Service Station in Watauga County, North Carolina.

The defendant filed a cross-action and counterclaim for personal injuries and damages to his motor vehicle which he alleges he sustained as a result of said collision.

The jury rendered a verdict in favor of the defendant. Judgment was entered on the verdict and the plaintiff appeals, assigning error.

Holshouser & Holshouser for plaintiff appellant.
Stacy E. Eggers, Jr. and Hayes & Hayes for defendant appellee.

PER CURIAM. The appellant assigns as error the failure of the court below in its charge to the jury to apply the law to the evidence on the substantial features of the case, in that the court failed to charge the jury as to the applicable statutory law with respect to the right of way of the parties at an intersection or as to what would constitute negligence with respect to speed where safety signs had

been erected by proper officials. We think this assignment of error was well taken and must be upheld.

An examination of the charge reveals that the court instructed the jury with respect to negligence according to the common law rule of the prudent man only.

In *Pittman v. Swanson,* 255 N.C. 681, 122 S.E. 2d 814, it is said: "Our decisions are as one in holding that the positive duty of the judge, as required by G.S. 1-180, to declare and explain the law arising upon the evidence in the case means that he shall declare and explain the statutory law as well as the common law arising thereon. *Barnes v. Teer,* 219 N.C. 823, 15 S.E. 2d 379; *Kolman v. Silbert,* 219 N.C. 134, 12 S.E. 2d 915; *Spencer v. Brown,* 214 N.C. 114, 198 S.E. 630; *Williams v. Coach Co.,* 197 N.C. 12, 147 S.E. 435; *Bowen v. Schnibben,* 184 N.C. 248, 114 S.E. 170."

The appellant is entitled to a new trial and it is so ordered.

New trial.

LEROY FULTON, DR. RALPH FALLS, DR. CALVIN ACUFF, AND CHARLES MILLS, CITIZENS AND TAXPAYERS OF BURKE COUNTY, AND CHARLES MILLS AND DR. RALPH FALLS, CITIZENS AND TAXPAYERS OF CITY OF MORGANTON, AND OTHER CITIZENS v. CITY OF MORGANTON, A MUNICIPAL CORPORATION; HARRY L. RIDDLE, SR., MAYOR OF MORGANTON; TED CLEMMER, DAVID RADER, ROY BRADDOCK, AND CARL RAMSEY, MEMBERS OF MORGANTON CITY COUNCIL.

(Filed 16 October 1963)

Appeal and Error § 6—

A suit to restrain the holding of an election must be dismissed upon appeal when it appears that the election sought to be restrained has been held.

APPEAL by plaintiffs from *Huskins, J.,* in Chambers in BURNSVILLE on 8 July 1963.

Davis & Brown by Allen W. Brown and Simpson & Simpson by Dan Simpson for plaintiff appellants.

Patton & Ervin by Frank C. Patton and John H. McMurray for defendant appellees.

PER CURIAM. This action was begun 15 June 1963. Plaintiffs, in their complaint, allege: (1) Plaintiffs are citizens and taxpayers of

Burke County; plaintiffs Mills and Falls are also citizens and taxpayers of Morganton. (2) Defendants, acting upon a petition signed by more than 15% of the registered vote of Morganton, have, as provided in c. 413, S.L. 1963, "AN ACT TO AUTHORIZE THE QUALIFIED VOTERS OF THE TOWN OF MORGANTON TO DETERMINE WHETHER OR NOT BEER AND WINE MAY BE LEGALLY SOLD AND ALCOHOLIC BEVERAGE CONTROL STORES OPERATED IN THE TOWN OF MORGANTON," called an election to be held on 13 July 1963 for the purpose of ascertaining the will of the electorate with respect to the sale of beer and wine and the operation of ABC Stores. (3) Officials charged with the duty of holding the election have been designated. (4) C. 413, S.L. 1963, is a local act. It partially repeals the Turlington Act, art. 1, c. 18, of the General Statutes and Alcoholic Beverage Control Act of 1937, art. 3, c. 18 of the General Statutes, and is for that reason, by Art. II, sec. 29 of our Constitution, void. (5) Plaintiffs, citizens of Morganton, will be irreparably damaged if the election is held "in that tax funds and other funds of said City of Morganton are being and will be expended for the conduct of an illegal election."

Plaintiffs prayed: "That the defendants, their agents and employees, be permanently enjoined from holding or conducting an election in the City of Morganton on July 13, 1963, or any date under the purported authority of the Morganton Bill.

"That the Court find and declare the said Morganton Act to be invalid, void, and unconstitutional."

On 17 June 1963 Riddle, J., at the instance of plaintiffs, issued an order requiring defendants to appear before Campbell, J., in Charlotte on 29 June 1963 to show cause why the restraining order sought by plaintiffs should not issue.

Plaintiffs, learning that Campbell, J., would not be able to hear the parties at the time and place fixed, sought and obtained an order for a hearing by Huskins, J., in Burnsville on 8 July 1963.

Defendants, before the hearing, filed an answer admitting an election had been called for 13 July 1963 as authorized by c. 413, S.L. 1963. They denied plaintiffs' allegation that the act was invalid. They also denied plaintiffs' assertion of irreparable injury if the election was held.

Judge Huskins heard the parties at the appointed time and place. He concluded plaintiffs had failed to establish their claim of irreparable injury or damage to property rights. He also expressed the opinion that plaintiffs had failed to show that they were without an adequate

remedy at law. For these reasons he declined to issue the restraining order.

The election has been held. The electorate has answered the questions propounded. "It is quite obvious that a court cannot restrain the doing of that which has already been consummated." *Austin v. Dare County,* 240 N.C. 662, 83 S.E. 2d 702; *Ratcliff v. Rodman,* 258 N.C. 60, 127 S.E. 2d 788.

Appeal dismissed.

MATTHEW M. WILSON v. JOSEPHINE WILSON.

(Filed 16 October 1963.)

Divorce and Alimony § 13—

The wife's decree for permanent alimony under G.S. 50-16 legalizes their separation notwithstanding the initial separation was due to the husband's abandonment of his wife and children, and he may maintain an action for absolute divorce two years after the separation has been thus legalized notwithstanding intervening proceedings for contempt were necessary to enforce the payment of the alimony decreed, although his decree will not impair his liability for alimony under the former judgment or affect the power of the court to enforce it.

APPEAL by defendant from *Campbell, J.,* May 1963 Session of CALDWELL.

Action for absolute divorce. In his complaint, filed April 4, 1963, the plaintiff husband alleges, *inter alia,* that he and defendant have been continuously and legally separated since September 26, 1960, the date of a judgment of the Superior Court awarding permanent alimony to the defendant. Plaintiff avers that he has complied with the judgment and that his payments are now current. Answering, the defendant admitted all allegations of the complaint except those pertaining to the separation. By Further Answer, she alleged the following facts:

Plaintiff never adequately supported his wife and their six children. On August 4, 1953 he was convicted in the Caldwell County Recorder's Court of abandonment and nonsupport and sentenced to six months in prison. The sentence was suspended on condition that he pay $125.00 a month for the support of his family. Capiases were issued for plaintiff on December 11, 1953 and in 1954 and 1955 because of his wilful failure to make the payments ordered. Finally, in November 1956 the

suspension was revoked and plaintiff served the prison sentence. Upon his release, he did not return to his wife and children and still refused to support them. The defendant instituted an action against plaintiff in the Superior Court for alimony without divorce. Pending the trial of the issues, the court ordered plaintiff to make payments to the defendant for her temporary support. He was several times adjudged in contempt for failure to make the required payments and, on one occasion, was jailed until he paid the arrearage. At the September 1960 Term, the jury answered the issues in defendant's favor and a judgment was entered awarding her permanent alimony. Thereafter, plaintiff complied with the judgment only under the threat that his real property would be placed in the hands of a receiver if he failed to make the required payments.

Defendant prayed that plaintiff be denied a divorce. At the May Session plaintiff demurred *ore tenus* to the Further Answer. The matter was continued for defendant's counsel and, by consent, was heard in Burke County on June 5th. The judge sustained the demurrer and defendant appealed.

Fate J. Beal for plaintiff appellee.
Seila, Wilson and Palmer for defendant appellant.

PER CURIAM. The order sustaining the demurrer must be affirmed under the authority of *Rouse v. Rouse,* 258 N.C. 520, 128 S.E. 2d 865. Plaintiff and defendant began a new period of separation on September 26, 1960, the date of the judgment awarding defendant permanent alimony in her action instituted under G.S. 50-16. Two years thereafter plaintiff was legally entitled to institute this action. A decree of absolute divorce will neither impair his liability for alimony under the former judgment nor affect the power of the court to enforce it by contempt proceedings or otherwise.

Affirmed.

JAMES E. ATKINSON v. PILOT LIFE INSURANCE COMPANY.

(Filed 16 October 1963.)

Insurance § 36—

Where, as a result of an injury, plaintiff is continuously confined in a hospital for eleven days, and some four months after his discharge from

that hospital he enters another hospital for the same injury, the second confinement is a new and not a continuous one, and does not come within the purview of a hospital rider providing benefits for each day insured is continuously *confined in a hospital as the result of injury.*

APPEAL by defendant from *Morris, J.*, May Session 1963 of WAYNE.

Plaintiff instituted this action before a justice of the peace and obtained judgment. Upon defendant's appeal, the cause was heard *de novo* in superior court upon the following stipulated facts:

"1. The defendant, Pilot Life Insurance Company, on or about July 29, 1957, issued its policy of insurance No. 3047763 to James E. Atkinson, Goldsboro, North Carolina; that this policy provided for protection against death or injury through accidental means and by a special rider provided hospital and medical benefits upon the terms and conditions set forth in this policy; that said policy was in full force and effect in accordance with its terms on December 29, 1961, and said policy is hereby incorporated in and made a part of this statement of facts.

"2. James E. Atkinson was employed by the City of Goldsboro and on December 29, 1961, injured his hip and back while at work.

"3. As a result of this injury, Atkinson entered Wayne Memorial Hospital, Goldsboro, North Carolina, on January 1, 1962, and remained confined there until January 12, 1962; that after his discharge, the defendant paid One Hundred Sixty and No/100 ($160.00) Dollars to the plaintiff as benefits due him under the terms of the policy in issue. This sum represented Fifty and No/100 ($50.00) Dollars physician's fee which is the maximum for any one injury and One Hundred Ten and No/100 Dollars hospitalization covering the eleven (11) days' confinement in Wayne Memorial Hospital from January 1 to January 12, 1962.

"4. That in May, 1962, the plaintiff, James E. Atkinson, was still suffering from the injuries received in his December 29, 1961, accident; that because of these injuries he entered Duke Hospital on May 6, 1962, and was confined there until discharged on May 25, 1962.

"5. That the plaintiff in this action is attempting to collect One Hundred Ninety and No/100 ($190.00) Dollars, the indemnity of Ten and No/100 ($10.00) Dollars for each day of hospital confinement for the nineteen (19) days he remained in Duke Hospital in May, 1962.

"6. The applicable provision of the insurance policy in question is Part B—HOSPITAL INDEMNITY—'If, as a result of such injuries and commencing within thirty days following the date of the accident causing such injuries, the insured shall be continuously confined in a

hospital providing twenty-four hours' nursing service and facilities for diagnosis and major surgery, and if such injuries do not result in any of the losses provided for in the policy to which this rider is attached, the company shall pay an indemnity of Ten Dollars ($10.00) for each full day of such confinement but not more than Three Hundred ($300.00) Dollars for all such confinement due to injuries sustained in any one accident. Indemnity under this Part B shall be payable in addition to any indemnity to which the insured may be entitled either (1) for dislocation or fracture under Part A or (2) for physician's or surgeon's fees under Part C hereof.'

"7. That this stipulation, together with the policy of insurance hereinbefore referred to, constitutes all of the facts necessary for the determination of this case. . . ."

Upon these stipulated facts, the court entered judgment that plaintiff have and recover of defendant the sum of $190.00 plus interest and costs. Defendant excepted and appealed.

Sasser & Duke for plaintiff appellee.
Taylor, Allen & Warren and J. H. Kerr, III, for defendant appellant.

PER CURIAM. The clear meaning of the unambiguous terms of the pertinent provisions of the policy purchased by plaintiff may be stated as follows: If insured is injured by accident and, on account of such injury and within thirty days from the date thereof, enters "a hospital providing twenty-four hours' nursing service and facilities for diagnosis and major surgery," defendant is obligated to pay ten dollers per day for each day insured is *continuously confined* in such hospital. See *Parker v. Insuance Co.*, 259 N.C. 115, 130 S.E. 2d 36.

Plaintiff was injured by accident on December 29, 1961. Beginning January 1, 1962, he was *continuously confined* in Wayne Memorial Hospital for eleven days and was paid $110.00 on account thereof. On May 6, 1962, nearly four months after his discharge on January 12, 1962, from Wayne Memorial Hospital, plaintiff entered Duke Hospital. Plaintiff's confinement in Duke Hospital was a new, separate and distinct period of hospital confinement for which no coverage is provided by plaintiff's policy.

Reversed.

GLADYS JOHNSON LEE v. GORDON B. HOHN AND AVIS RENT-A-CAR SYSTEM, INC., (ORIGINAL DEFENDANTS) AND JOHN C. PANCKEY AND PAUL S. LEE (ADDITIONAL DEFENDANTS).

(Filed 16 October 1963.)

Torts § 6—

Where the jury finds that the individual defendant was not guilty of negligence in connection with the accident in suit, judgment is properly entered dismissing the action as to the individual defendant, as to the corporate defendant sought to be held liable under the doctrine of *respondeat superior*, and also as to the defendants joined for contribution.

APPEAL by plaintiff from *Morris, J.*, May, 1963 Term, LENOIR Superior Court.

Plaintiff Gladys Johnson Lee instituted this civil action against Gordon B. Hohn and Avis Rent-A-Car System, Inc., for damages, alleging the plaintiff was injured while riding as a passenger in a Buick automobile owned by Paul S. Lee and operated by Gladys S. Bennett. The injury grew out of an automobile collision involving three vehicles near Raeford. One of the vehicles was a Ford owned by the defendant Avis Rent-A-Car-System, Inc., and operated by the defendant Gordon B. Hohn. The third vehicle involved was operated by John C. Panckey. Upon motion of the original defendant Hohn, John S. Panckey and Paul S. Lee were made additional parties defendant against whom the original defendant Hohn alleged a cross action for contribution.

After pleadings were filed on behalf of all parties, the court heard evidence presented by the plaintiff and by the original defendant Gordon B. Hohn. At the conclusion of all the evidence the defendants entered motions for nonsuit which the court denied. The jury found that Gordon B. Hohn was not guilty of negligence in connection with the accident. Upon the verdict, judgment was entered dismissing the action as to all defendants. The plaintiff appealed.

Lamar Jones for plaintiff appellant.

Whitaker & Jeffress, Thomas H. Morris, Attorneys for Gordon B. Hohn, defendant appellee.

PER CURIAM. The jury found that Hohn, the driver of the other original defendant's Ford, was not guilty of negligence. That finding likewise exonerated the owner and the additional defendants whom Hohn had brought in for purposes of contribution. Error does not ap-

pear in the trial. Consequently, in the judgment dismissing the action as to all defendants, there is

No error.

STATE OF NORTH CAROLINA v. ROBERT JAMES BLACKMON

(Filed 30 October 1963.)

Burglary § 9; Criminal Law § 131; Constitutional Law § 36—

The punishment for possession of the implements of housebreaking is limited to a maximum of ten years imprisonment in the State's prison, since punishment by fine or imprisonment, or both, in the discretion of the court, as prescribed by G.S. 14-55, is not a specific punishment and therefore comes within the purview of G.S. 14-2, and further, it would be an anomalous situation if the punishment for the possession of the implements for housebreaking exceeded the punishment for the actual commission of the crime of housebreaking under G.S. 14-54. Article I, § 14 of the Constitution of North Carolina. *State v. Swindell,* 189 N.C. 151, and *State v. Cain,* 209 N.C. 275, overruled.

PARKER, J., dissenting.

APPEAL by defendant from *McLean, J.,* April Regular Criminal Session 1963 of GASTON.

The defendant entered a plea of guilty to the charges contained in two bills of indictment, (1) alleging the felonious breaking and entering of a building occupied by Goodwill Distributors, where merchandise, chattels, money, and valuable securities were kept, and (2) charging the defendant with the unlawful possession of burglary tools.

Prayer for judgment was continued in both cases until the June Criminal Session 1963, at which session the solicitor prayed for judgment in each case.

On the charge of breaking and entering, Case No. 4866, the defendant was sentenced to not less than eight nor more than ten years in the State's Prison, to be assigned to hard labor.

On the charge of unlawful possession of burglary tools, Case No. 4867, the defendant was sentenced to the State's Prison at hard labor for a period of not less than twenty years nor more than thirty years, this sentence to begin at the expiration of the sentence in Case No. 4866.

The defendant appeals, assigning error.

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

Hollowell & Stott for defendant appellant.

DENNY, C. J. The only question presented on this appeal is whether or not a sentence of not less than twenty years nor more than thirty years on a plea of guilty to the charge of unlawful possession of implements of housebreaking, constitutes cruel and unusual punishment within the meaning of Article I, Section 14, of the Constitution of North Carolina.

The appellant does not challenge the validity of the sentence imposed in Case No. 4866. Hence, it is affirmed.

The question posed on this appeal does, however, require a consideration of the sentence imposed in Case No. 4867, in light of several of our former decisions and the provisions of G.S. 14-2 and G.S. 14-3, which limit punishment not to exceed ten years. These statutes read as follows:

"14-2 * * * Every person who shall be convicted of any felony for which no specific punishment is prescribed by statute shall be imprisoned in the county jail or State prison not exceeding two years, or be fined, in the discretion of the court, or if the offense be infamous, the person offending shall be imprisoned in the county jail or State prison not less than four months nor more than ten years, or be fined.

"14-3 * * * All misdemeanors, where a specific punishment is not prescribed shall be punished as misdemeanors at common law; but if the offense be infamous, or done in secrecy and malice, or with deceit and intent to defraud, the offender shall, except where the offense is a conspiracy to commit a misdemeanor, be guilty of a felony and punished by imprisonment in the county jail or State prison for not less than four months nor more than ten years, or shall be fined."

The foregoing statutes, in almost the identical language set forth above, were codified in the Code of North Carolina, 1883, as sections 1096 and 1097. These sections were carried forward in the Revisal of 1905 as sections 3292 and 3293. They appeared in the Consolidated Statutes of 1919 as sections 4172 and 4173.

One who is convicted or pleads guilty to the charge of the unlawful possession of burglary tools or implements of housebreaking "shall be guilty of a felony (according to the provisions of G.S. 14-55) and punished by fine or imprisonment in the State's prison, or both, in the discretion of the court."

In the case of *S. v. Driver*, 78 N.C. 423, decided in 1878, the defendant had pleaded guilty to an indictment charging him with an assault and battery upon his wife. The defendant was sentenced to a term of five years in the county jail, and then to give a bond with

sureties in the sum of $500.00 to keep the peace for five years longer. Justice Reade, in speaking for the Court, said: "We have examined our Rev. Code which was prior to our penitentiary system and to our Constitution of 1868, when imprisonment was altogether in the county jails, and unless we have inadvertently overlooked some crime, there was none the punishment whereof was for so long a time. In many cases the punishment was specified; in others it was not to be less than so and so; in others, not exceeding so and so; and in others, at the discretion of the court; these last being generally *small offenses* where it was *not usual to punish much;* and to cover all cases of felony where the punishment was not specific, there was the following provision: 'Every person who shall hereafter be convicted of any felony for which no specific punishment shall be prescribed by statute, and which is now allowed the benefit of clergy, shall be imprisoned at the discretion of the court, not exceeding two years; or if the offense be infamous, the court may also sentence the convict to receive one or more public whippings, to stand in the pillory, or pay a fine, regard being had to the circumstances of each case.' Rev. Code, ch. 34, sec. 27."

Section 9 of Chapter 167 of the Public Laws of North Carolina, 1868-69, was enacted in lieu of the Revisal Code, Chapter 34, Section 27, and read as follows: "Every crime or offence whatever, heretofore punishable by the laws of North Carolina when the present Constitution went into effect, with public whipping or other corporeal punishment, shall hereafter, in lieu of such corporeal punishment, be punished by imprisonment in the State's prison (or County jail), for not less than four months nor more than ten years."

Justice Reade in the *Driver* case quoted with approval from the decision in which Lord Devonshire was tried by the Court of the King's bench and fined thirty thousand pounds. 11 State Trials, 1354. The case was later considered by the House of Lords, and in its opinion it said: "It is so very evident as not to be made a question whether in those things which are left to the discretion of the judges, that the law has set them bounds and limits, which, as God says to the waves of the sea, 'Hitherto shalt thou go, and no farther.' * * * But if the judge may commit the party to prison till the fine be paid, and withal set so great a fine as is impossible for the party to pay, then it will depend upon the judge's pleasure whether he shall ever have his liberty, and thus every man's liberty is wrested out of the dispose of the law and is stuck under the girdle of the judges." This Court held in the *Driver* case that the court below was without power to sentence the defendant to a term of imprisonment in excess of thirty days.

In *S. v. Rippy* (1900), 127 N.C. 516, 37 S.E. 148, the defendant was indicted for rape and entered a plea of guilty upon the third count in the bill of indictment for "unlawfully and carnally knowing and abusing" an innocent female between the ages of ten and fourteen years. The solicitor, with the sanction of the court, accepted the plea. This offense was created by Chapter 295, Laws of 1895, now codified as G.S. 14-26, which provided that the offense "shall be punished by fine or imprisonment in the State's prison, at the discretion of the court." The sentence imposed was ten years in the State's Prison. Clark, J., later C. J., writing the opinion for the Court, held the sentence imposed was clearly within the punishment authorized. He further held: "There is nothing to show that this discretion reposed by the statute in the Judge was abused." Continuing, the writer of the opinion said: "The only exception in the transcript is that Code, sec. 1096, provides that persons convicted of felonies for which 'no specific punishment is prescribed by statute' shall be imprisoned in the county jail or penitentiary not exceeding two years, and be fined, in the discretion of the court. But the penalty prescribed by chap. 295, Laws 1895, is specific —fully as much so as that laid down in Code, sec. 1096, and is different in kind. The former authorizes fine or imprisonment in the penitentiary at the discretion of the court. The latter, a fine in the discretion of the court, and imprisonment in jail or the penitentiary, not exceeding two years, etc. These sections (1096 and 1097 (now G.S. 14-2 and 14-3)) apply only where an act is prohibited or is made unlawful, without specifying the nature of the punishment * * *. The quantum of punishment, whenever mentioned in The Code, is either 'in the discretion of the court,' or 'not exceeding,' etc. It can not be said that all the crimes in The Code, therefore, fall within the scope of secs. 1096 and 1097, because 'no specific punishment' is prescribed. The punishment is specific (i.e., specified as fine, or imprisonment in jail or in State's Prison), though the extent of the specified punishment is left in the discretion of the court, or in its discretion not exceeding a limit stated."

The trouble in connection with the question now before us began with the *Rippy* case. The controversy before the Court in that case was whether the two- or the ten-year maximum applied. The Court disposed of the question presented for determination in that case when it held that the ten-year sentence imposed was within the punishment authorized. However, the writer of the opinion continued by way of dictum and said that punishment by fine or imprisonment, or both, in the discretion of the court, is specific, and hence, section 1096 of the Code (now G.S. 14-2) did not apply.

Thereafter, using as sound reasoning the dictum in the *Rippy* case, this Court in *S. v. Swindell* (1925), 189 N.C. 151, 126 S.E. 417, held that G.S. 14-2 had no application in *Swindell's* case because punishment by fine or imprisonment, or both, in the discretion of the court, was specific punishment, and that a sentence of thirty years in the State's Prison, at hard labor, was authorized by C.S. 4209 (now G.S. 14-26), and was not in violation of Article I, Section 14, of the Constitution of North Carolina. In *S. v. Cain,* 209 N.C. 275, 183 S.E. 300, this Court upheld a sentence of not less than 25 nor more than 30 years for violation of the statute under which the present defendant was indicted, on authority of the *Swindell* case.

In the case of *S. v. Dunn,* 208 N.C. 333, 180 S.E. 708, Clarence Dunn, son of the defendant, while using the defendant's car, struck and killed a person, and thereafter the defendant was indicted and convicted as an accessory after the fact for "aiding, assisting, procuring, and counseling the said Clarence Dunn to flee from the scene of said felony," etc. C.S. 4201 (now G.S. 14-18), prior to the enactment of Chapter 249 of the Laws of 1933, read as follows: "If any person shall commit the crime of manslaughter he shall be punished by imprisonment in the county jail or State Prison for not less than four months nor more than twenty years." The following proviso was added to C.S. 4201 on 10 April 1933: "Provided, however, that in cases of involuntary manslaughter the punishment shall be in the discretion of the court, and the defendant may be fined or imprisoned, or both."

The defendant contended on appeal from a sentence to work on the roads for six months, that the proviso added by the Legislature in 1933 was designed to make involuntary manslaughter a misdemeanor instead of a felony, and that, therefore, the Recorder's Court in Richmond County had jurisdiction, and hence, no indictment could lie in the Superior Court. This Court said, speaking through Brogden, J.: "This contention, however, cannot be maintained: * * * (T)he proviso did not purport to create a new crime, to wit, that of involuntary manslaughter. * * * Indeed, the Court is of the opinion, and so holds, that the proviso was intended and designed to mitigate the punishment in cases of involuntary manslaughter and to commit such punishment to the sound discretion of the trial judge."

Even so, if we are to continue the *Swindell* and *Cain* cases as authoritative on the question under consideration, a sentence for involuntary manslaughter can be imposed in excess of that allowed by G.S. 14-18 for manslaughter.

Likewise, G.S. 14-54 provides: "If any person, with intent to commit a felony or other infamous crime therein, shall break or enter

either the dwelling house of another otherwise than by a burglarious breaking; or any storehouse, shop, warehouse, bankinghouse, counting-house or other building where any merchandise, chattel, money, valuable security or other personal property shall be; or any uninhabitated house, he shall be guilty of a felony, and shall be imprisoned in the State's prison or county jail not less than four months nor more than ten years."

Therefore, if the punishment to be imposed in the discretion of the court, as provided in G.S. 14-55, for the possession of the implements of housebreaking, is not limited by the provisions of G.S. 14-2, then we have the anomalous situation of upholding the imposition of a sentence in the State's Prison three times as long as could be legally imposed for the actual commission of the crime of housebreaking under G.S. 14-54. We have come to the conclusion that the Legislature never intended to authorize any such disparity.

Therefore, the cases of *S. v. Swindell, supra,* and *S. v. Cain, supra,* are overruled. Likewise, so much of the opinion in *S. v. Richardson,* 221 N.C. 209, 19 S.E. 2d 863, as holds where there is a provision in a statute to the effect that punishment shall be in the discretion of the court and the defendant may be fined or imprisoned, or both, that this is equivalent to a "specific punishment" within the meaning of G.S. 14-2 and is not controlled thereby, is modified to the extent herein indicated.

The judgment entered in Case No. 4867 in the court below is set aside and this cause is remanded to the Superior Court of Gaston County for sentence in accord with this opinion, within the limits prescribed by G.S. 14-2.

Error and remanded.

PARKER, J. *dissenting.* Even if I concede that what was said by the Court in *S. v. Rippy,* 127 N.C. 516, 37 S.E. 148, quoted in the majority opinion, is *dictum,* yet it became law by reason of the decision of this Court in *S. v. Swindell,* 189 N.C. 151, 126 S.E. 417, which was rendered by a strong and unanimous Court. The opinion in the *Swindell* case was filed on 18 February 1925. On 22 January 1936 the Court filed its opinion in *S. v. Cain,* 209 N.C. 275, 183 S.E. 300, holding that the decision in the *Swindell* case is determinative of this appeal. The decision in the *Cain* case was rendered by a strong and unanimous Court. Of the five judges who decided the *Swindell* case, two were not members of the Court that decided the *Cain* case, but had been replaced by two distinguished judges. On 29 April 1942 the opinion in *S. v. Richardson,* 221 N.C. 209, 19 S.E. 2d 863, was filed,

which states: "Is a provision in a criminal statute 'that the punishment shall be in the discretion of the Court and the defendant may be fined or imprisoned or both,' the prescribing of a 'specific punishment' within the meaning of section 4172 of the Consolidated Statutes of North Carolina? The answer is in the affirmative. *S. v. Rippy,* 127 N.C. 516, 37 S.E. 148; *S. v. Swindell,* 189 N.C. 151, 126 S.E. 417." This decision was rendered by a strong and unanimous Court of seven judges, of which four of the associate justices afterwards became chief justice. Of the seven judges who decided the *Richardson* case, only Chief Justice Stacy participated in the decision in the *Swindell* case. Of the seven judges who decided the *Richardson* case, only Chief Justice Stacy and Justices Schenck and Devin participated in the *Cain* decision. Subsequent to the decision in the *Cain* case, the membership of the Court was increased from five to seven. The decisions in the *Swindell, Cain,* and *Richardson* cases were participated in by eleven members of this Court, five of whom have been chief justice and one of whom is the present distinguished chief justice of this Court. In addition, the so-called *dictum* in the *Rippy* case was written by Justice Walter Clark, afterwards for over twenty years chief justice of this Court and one of the most learned legal scholars who ever sat on the bench in this State, and concurred in by a unanimous Court.

The Court held in the *Swindell* case in 1925 and in the *Cain* case in 1936, adopting as law what was said in the *Rippy* case in 1900, and repeating it again in the *Richardson* case in 1942, that a provision in a criminal statute "that the punishment shall be in the discretion of the court and the defendant may be fined or imprisoned or both" is the prescribing of a "specific punishment" within the meaning of what is now G.S. 14-2, and the General Assembly has met in Raleigh and gone many times since and has not seen fit to disagree with our interpretation of the language of the statute.

I do not agree with the following statement in the majority opinion: "Therefore, if the punishment to be imposed in the discretion of the court, as provided in G.S. 14-55, for the possession of the implements of housebreaking, is not limited by the provisions of G.S. 14-2, then we have the anomalous situation of upholding the imposition of a sentence in the State's Prison three times as long as could be legally imposed for the actual commission of the crime of housebreaking under G.S. 14-54. We have come to the conclusion that the Legislature never intended to authorize any such disparity.

"Therefore, the cases of *S. v. Swindell, supra,* and *S. v. Cain, supra,* are overruled. Likewise, so much of the opinion in *S. v. Richardson,* 221 N.C. 209, 19 S.E. 2d 863, as holds where there is a provision in a

statute to the effect that punishment shall be in the discretion of the court and the defendant may be fined or imprisoned, or both, that this is equivalent to a 'specific punishment' within the meaning of G.S. 14-2 and is not controlled thereby, is modified to the extent herein indicated."

G.S. 14-54 is concerned with breaking into or entering houses other than burglariously. G.S. 14-55 is concerned with preparation to commit burglary or other housebreakings. There is a vast difference between burglary and housebreaking, and I am sure the General Assembly realized this when it enacted what is now G.S. 14-55, authorizing more severe punishment than G.S. 14-54. See the drastic punishment prescribed for burglary, as defined in G.S. 14-51, set forth in G.S. 14-52.

I do not agree in the overruling of our former decisions in the *Swindell* and *Cain* cases, and in the modification of the *Richardson* case. There is no assurance but that in the years ahead, when all, or most, of the present members of the Court are gone, a future Court of learned judges will decide that the majority opinion here is erroneous and will overrule it, and hold that the *Swindell* and *Cain* cases, and what is said in the *Rippy* and *Richardson* cases, are correct and sound law. If a change is to be made, in my opinion it should be done by the General Assembly. I vote to affirm the judgment below on the authority of the *Swindell* and *Cain* cases.

STATE OF NORTH CAROLINA v. JESSE GARFIELD PATTON

(Filed 30 October 1963.)

1. Constitutional Law § 30; Criminal Law § 86—

A person who is formally charged with the commission of a crime is entitled to a speedy and impartial trial under both the Federal and State Constitutions, but the right to a speedy trial is necessarily relative, and may be used only as a shield to protect a defendant against arbitrary and oppressive delays due to the fault of the prosecuting authorities.

2. Same—

A delay of more than four years between the time the alleged offense was committed and the retrial of defendant does not violate defendant's constitutional right to a speedy trial, notwithstanding two of defendant's witnesses may not be available at the retrial, when it appears of record that there was no contention of undue delay in respect to the original trial and that retrial was had shortly after and in accordance with the order of the Federal Court setting aside the former conviction on the

ground that defendant was not represented by counsel, since the delay was not due to the prosecuting authorities but to the act of defendant in procuring a retrial.

3. **Appeal and Error § 35; Criminal Law § 151—**

The Supreme Court will take judicial notice of its own records in an interrelated proceeding where the parties are the same, and therefore will take notice of an affidavit filed in proceedings for *certiorari* relating to the same prosecution.

4. **Constitutional Law § 30; Criminal Law § 86—**

When it appears from the record that defendant's witness would testify that he drove defendant to a city in another state some time before the alleged offense was committed in this State, that the witness knew defendant had no automobile and "believed" it would have been almost impossible for defendant to have been in this State at the time the offense was committed, the fact that such witness was incapacitated at the time of trial is not ground for continuance, since such testimony would have no probative force in support of defendant's defense of alibi. Constitution of North Carolina, Article I, § 17.

APPEAL by defendant from *Campbell, J.*, May Criminal Session 1963 of CALDWELL.

Criminal prosecution on an indictment, found at the February Term 1960, charging the defendant on 20 October 1958 with robbing J. E. Chandler of $12 in money by the use of firearms and other dangerous weapons, a violation of G.S. 14-87. (Since the citizens of North Carolina in the General Election of 6 November 1962, by a majority of the votes cast, amended Article IV of the State Constitution, terms of the superior court are now designated in this article of the Constitution as sessions of court.)

Plea: Not guilty. Verdict: Guilty as charged.

From a judgment of imprisonment, defendant appeals.

Attorney General T. W. Bruton and Assistant Attorney General James F. Bullock for the State

Claude F. Seila for defendant appellant.

PARKER, J. Defendant assigns as error the denial by the court of his written motion, made before pleading to the indictment, to dismiss the indictment against him and to discharge him from custody on the ground that to try him now on an indictment found against him at the February Term 1960 would be a denial of his constitutional rights to a speedy and impartial trial, and of his rights to due process of law under the Fourteenth Amendment to the Federal Constitution. In his written motion, he states that the offense charged in the indict-

ment is alleged to have occurred on 20 October 1958, that at the time of the alleged commission of the offense he was rooming and boarding at the house of Mrs. Florence Rutledge in Roanoke, Virginia, who could testify, if alive, that at the time of the commission of the alleged offense he was in Roanoke, Virginia, but that she is now dead; and further that one Kermit Vanhoy, who carried him to Roanoke, Virginia, on 12 October 1958, and was with him in Roanoke, Virginia, on 17 and 23 October 1958, and knows that he had no automobile, recently sustained a serious brain injury in an automobile accident and is unable to testify in his behalf.

A chronicle of this case prior to the May Criminal Session 1963 is necessary for a proper consideration of this assignment of error.

On 25 October 1958 defendant was arrested in Caldwell County, North Carolina, and charged with the robbery of J. E. Chandler.

At the December Term 1958 of the superior court of Caldwell County, an indictment was properly found by the grand jury of that county charging him with larceny of $12 in money from the person of J. E. Chandler by assaulting him and putting him in bodily fear and danger of his life. Defendant was not tried at that term.

At the February Term 1960 of the superior court of Caldwell County, the indictment upon which he was tried in this case was properly found by the grand jury of that county.

It seems from defendant's following testimony, given in the instant trial, that he was lawfully imprisoned during a part or most of 1959:

> Direct examination: "Yes, I have been in difficulty with the law before. Well, in . . . I think it was 1949, I was convicted of breaking and entering; and then in 1956, I believe it was, I was convicted of . . . it was whisky; in other words, a whisky car was involved in it. The Federals took it and I went and took it back. This happened in 1955 but they didn't try me until 1958 . . . receiving stolen property. I served time for these offenses. When I was tried for those offenses, I pleaded guilty."
>
> Cross examination: "Yes, I was in Federal Prison. That was for transporting a stolen car across state lines. Yes, it was a liquor car; it had been. I just hauled some for the distillers. I served a term in the Federal Prison and State's Prison."

Defendant was first tried on the indictment here charging armed robbery at the February-March Term 1960. He pleaded not guilty. He was not represented by counsel, having dismissed his employed counsel on the day of trial. He was convicted and sentenced to imprisonment. He did not appeal.

On 6 March 1962 Froneberger, Judge Presiding, appointed Claude F. Seila, a member of the bar of Caldwell County, to represent defendant, an indigent person, in a post-conviction hearing. On 25 March 1963 the United States Court of Appeals, Fourth Circuit, by a decision rendered by two judges, with one judge dissenting, held that defendant, who dismissed his employed counsel on day of trial after having been told that his trial would commence that day, with or without counsel, did not waive his constitutional right to assistance of counsel to defend charge of armed robbery. The majority opinion closed with this language: "The District Court should afford the State of North Carolina a reasonable opportunity to retry the prisoner. In default of this, the District Court should order his release. To that end, the case will be remanded for further proceedings consistent with the views herein expressed." *Patton v. State of North Carolina,* 315 F. 2d 643. In this majority opinion appear these words, which seem to support what we have said above that it appears from Patton's testimony here that he was undergoing lawful imprisonment during a part or most of 1959: "At the February 1960 term, the grand jury returned an indictment against Patton for armed robbery and the case was called for trial on that indictment on March 8, 1960. Patton was at that time in state custody and was serving a sentence for another offense."

When the opinion of the United States Court of Appeals, Fourth Circuit, was certified to the United States District Court for the Middle District of North Carolina, Preyer, United States District Judge, Middle District of North Carolina, entered on 29 April 1963 an order as follows:

> "It is, THEREFORE, ORDERED, in accordance with said opinion, that the State of North Carolina is afforded the opportunity to retry the petitioner at the criminal term of the Superior Court of Caldwell County, North Carolina, to be held at Lenoir, North Carolina, commencing on the 20th day of May, 1963;
>
> "It is further ordered that if the State of North Carolina does not retry the petitioner at said term of court, the petitioner is to be forthwith released and absolutely discharged."

Defendant at the May Criminal Session 1963 was tried on the indictment found at the February 1960 Term. He was represented by his assigned counsel, Claude F. Seila.

The State's evidence shows these facts: On 20 October 1958 J. E. Chandler, a man 76 years old, was operating a little store about 50 or 100 feet from his home. About 7:00 p.m. on the same date, his store

was closed and while he was in his home eating supper with his wife, who was about the same age, defendant Patton came into the house and said he wanted to get a package of cigarettes. After Chandler finished eating supper, he got his flashlight and went out to his store to unlock the door. When he was unlocking the store, Patton came up behind him, threw his hands over his mouth, lifted him off the ground, and said, "Tie him up." Another man tied one of his hands and tried to tie the other. Chandler had the padlock in his hand and hit him in the face with it. Then he tied his hands. They took from his person $15 in money. Chandler was making all the noise he could. When these two men saw the flashlight, which was being carried by Chandler's daughter and son-in-law as they approached, they hit him on the head with some kind of heavy metal, ran, jumped in a car, and left. It required 14 stitches to sew up the wound on Chandler's head caused by the blow. Chandler could not identify the other man. On the morning of that day Chandler was carrying a load of cattle to Wilkesboro, and saw defendant Patton standing on the highway at the foot of Blowing Rock Mountain.

Defendant offered no witnesses. He testified in substance as follows: He is 38 years old. On 20 October 1958 he was in Roanoke, Virginia, seeking employment and was not in Caldwell County. He went to Roanoke, Virginia, in Kermit Vanhoy's car. He had been there for several weeks. He stayed in Roanoke, Virginia, in a rooming house on Day Street, he believes, until 30 October 1958. The keeper of the boarding house, whose name he does not recall, died two or three years ago. Last October Kermit Vanhoy had an automobile accident, has a blood clot on his brain, and is not quite normal at the present time. On 20 October 1958 he was not at the Chandler home and did not see them. He did not strike him and did not rob him.

Defendant is claiming no undue delay in respect to his trial at the February-March Term 1960. On the contrary, what he is concerned with is the delay between the time of the commission of the alleged crime on 20 October 1958 and the beginning of the retrial at the May Criminal Session 1963, when one of his witnesses, Mrs. Florence Rutledge, had been dead two or three years, and another witness, Kermit Vanhoy, had had an automobile accident in October 1962, has a blood clot on the brain, and is not quite normal at the present time. By reason of these facts, he contends he is unable to offer the testimony of these two witnesses and no retrial should have taken place, and he should have been discharged.

The right of a person formally accused of crime to a speedy and impartial trial has been guaranteed to Englishmen since Magna Carta,

and the principle is embodied in the Sixth Amendment to the Federal Constitution, and in some form is contained in our State Constitution and in that of most, if not all, of our sister states, or, if not, in statutory provisions. *S. v. Webb,* 155 N.C. 426, 70 S.E. 1064; 22A C.J.S., Criminal Law, sec. 467(2).

G.S. 15-10, entitled "Speedy trial or discharge on commitment for felony," requires simply that under certain circumstances "the prisoner be discharged from custody and not that he go quit of further prosecution." *S. v. Webb, supra.*

The Court said in *Beavers v. Haubert,* 198 U.S. 77, 49 L. Ed. 950, 954: "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice."

The constitutional right to a speedy trial is designed to prohibit arbitrary and oppressive delays which might be caused by the fault of the prosecution. *Pollard v. United States,* 352 U.S. 354, 1 L. Ed. 2d 393; *State v. Hadley,* Mo., 249 S.W. 2d 857. The right to a speedy trial on the merits is not designed as a sword for defendant's escape, but as a shield for his protection.

But here there has been no arbitrary and oppressive delay or reluctance on the part of the State to prosecute. On the contrary, the delay in the time of the retrial is wholly due to the belated discovery by the United States Court of Appeals, Fourth Circuit, on defendant's appeal, of a fatal error in the first trial at the February-March Term 1960, which entitled defendant to relief from the sentence and judgment which had been pronounced upon him on his first trial, but only to the point of remanding the case back so as to afford the State of North Carolina a reasonable opportunity to retry the defendant, or, in default of this, to order his release. The Federal Court of Appeals rendered its decision on 25 March 1963. When this opinion was certified to the United States District Court for the Middle District of North Carolina, that Court on 29 April 1963 entered an order, according to the mandate of the Court of Appeals, affording the State of North Carolina an opportunity to retry defendant at the criminal term commencing on 20 May 1963, or if he was not retried at that term he should be forthwith and absolutely released. The retrial was had in strict conformity with the order of the federal court. Under such circumstances there has been no denial of defendant's constitutional rights to a speedy trial, as the delay in the time of the retrial was caused by his successful efforts to reverse his conviction at the first trial. *Ex parte Alpine,* 203 Cal. 731, 265 P. 947, 58 A. L. R. 1500; *People v. Lundin,* 120 Cal. 308, 52 P. 807; *Ex parte Warris,* 28 Fla. 371,

9 So. 718; *Silvey v. State,* 84 Ga. 44, 10 S.E. 591; *Marzen v. People,* 190 Ill. 81, 60 N.E. 102; *Ferguson v. Bechly,* 224 Iowa 1049, 277 N.W. 755; *State v. Dehler,* 257 Minn. 549, 102 N.W. 2d 696, 89 A. L. R. 2d 496; *State v. Bulling,* 105 Mo. 204, 15 S.W. 367, 16 S.W. 830; *State v. Schnell,* 107 Mont. 579, 88 P. 2d 19, 121 A. L. R. 1082; *State v. Hadley, supra; Patterson v. State,* 50 N. J. L. 421, 14 A. 125; *Ex parte Meadows,* 71 Okl. Cr. 353, 112 P. 2d 419, 427; *Com. v. County Prison,* 97 Pa. 211; *Smith v. Com.,* 85 Va. 924, 9 S.E. 148; *Com. v. Adcock,* 8 Grat. (49 Va.) 661; *Vance v. Com.,* 2 Va. Cas. 162; *In re Murphy,* 7 Wash. 257, 34 P. 834; *State v. Miller,* 72 Wash. 154, 129 P. 1100; 22A C. J. S., Criminal Law, sec. 472(4); 16 C. J., Criminal Law, sec. 804(2); Wharton's Criminal Procedure, 1957, Vol. 5, p. 3. See *Fay v. Noia,* 372 U.S. 391, 9 L. Ed. 2d 837, in which case Noia and two others were convicted of murder in 1942, and the Supreme Court of the United States on 18 March 1963 rendered an opinion affirming an opinion of the Court of Appeals, Second Circuit, which held that Noia's conviction be set aside and that he be discharged from custody, unless given a new trial forthwith. See also *State v. Hadley, supra,* in which the Supreme Court of Missouri, Division No. 2, held that defendant was not denied his constitutional right to a speedy trial because of a delay of twenty years between the time when he was originally arrested and the beginning of his second trial after a judgment, under which he was confined in the penitentiary, on a previous verdict of conviction, was vacated in a habeas corpus proceeding brought by him.

When a case is retried, after a successful appeal to an appellate court, there is always the hazard that one or both of the parties may be deprived of the testimony of one or more witnesses by death or incapacity. To hold that when a defendant in a criminal action by his appeal has secured a new trial he cannot be prosecuted promptly again, because by the death of a witness who would testify in his favor, if alive, at the time of the retrial, he would in such trial by such death and loss of evidence be denied the right of due process of law under the Fourteenth Amendment to the Federal Constitution and to the rights of "the law of the land" provision of Article I, Section 17, of the State Constitution, would mean that some, if not many, cases could not be tried again. When a defendant by his appeal obtains a new trial, the law does not require that the State in order to prosecute him again must guarantee that all his witnesses shall be alive and capable of testifying for him at the retrial, for to require that would be for the law to exact of the State impossibilities. If a defendant by his appeal secures a new trial, and if at the time of the new trial the State's es-

sential witnesses are dead or incapable of testifying, the State has no other recourse than to discharge the defendant, no matter how guilty he may be. To paraphrase the language in *Beavers v. Haubert, supra,* due process of law secures rights to a defendant but it does not preclude the rights of public justice. The State has not lost the right to retry defendant by reason of the death of Mrs. Florence Rutledge, one of his witnesses. In *State v. Dehler, supra,* the Court held that an accused who, about seventeen years after his conviction and sentence for murder, is released on habeas corpus for lack of jurisdiction of the court in which he was tried, cannot properly claim the absence of a right to retry him for the reason that, due to the lapse of time, it is more difficult to prove insanity, his main defense.

Defendant's defense is an alibi; that is, that he was in Roanoke, Virginia, at the time the State's evidence shows the offense was committed in Caldwell County, North Carolina, and, therefore, he could not have committed the crime. He assigns as error the refusal of the trial court to continue the trial to a later session of court due to his inability to have Kermit Vanhoy as a witness at the trial due to his illness, and he further contends that to try him at the May Criminal Session 1963 for an offense alleged to have been committed on 20 October 1958, when Vanhoy, due to an automobile wreck in October 1962, has a blood clot on the brain and is not quite normal at present, denies him due process of law under the Fourteenth Amendment to the Federal Constitution, and his rights under "the law of the land" provision of the State Constitution, Article I, Section 17. In his brief he states: "But the retrial is of no benefit, if, because of the delay occasioned by the State in affording him a 'fair' trial, his only witnesses are unavailable, one being dead, and the other incapacitated." This statement in the brief is erroneous in stating the delay was occasioned by the State, as we have pointed out above, and further in error in asserting by inference that the State did not afford him a fair trial.

Defendant in his written motion to dismiss the indictment against him and to discharge him from custody, made at the May Criminal Session 1963, states this in respect to Kermit Vanhoy:

> "As a further ground for said Motion the defendant shows unto the Court that Mr. Kermit Vanhoy, who took the defendant to Roanoke, Virginia, on the 12th day of October, 1958, and who was with the defendant on the 17th day of October, 1958, and on the 23rd day of October, 1958, in Roanoke, Virginia, and who knows of his own knowledge that the defendant did not have an automobile or any other means of transportation to and from Caldwell

County, North Carolina, where the said offense is alleged to have occurred, was recently seriously injured in an automobile accident and sustained serious brain injury in said accident, and is therefore unable to testify in behalf of the defendant; that the defendant is not responsible for the condition of Kermit Vanhoy."

On 28 March 1962 defendant, through his present counsel Claude F. Seila, filed a petition in this Court for a writ of certiorari to review an order entered by Judge Froneberger on 7 March 1962 in a post-conviction hearing involving the constitutionality of his trial, conviction, and sentence at the February-March Term 1960. Judge Froneberger in his order denied defendant any relief. In the petition for a writ of certiorari filed with us, which petition we denied, there is an affidavit by Kermit Vanhoy. We take judicial notice of our own records in this interrelated proceeding where the parties are the same. *S. v. McMilliam,* 243 N.C. 775, 92 S.E. 2d 205; *U. S. v. Pink,* 315 U.S. 203, 216, 86 L. Ed. 796, 810; *Dimmick v. Tompkins,* 194 U.S. 540, 48 L. Ed. 1110; *Bienville Water Supply Co. v. Mobile,* 186 U.S. 212, 46 L. Ed. 1132; *Freshman v. Atkins,* 269 U.S. 121, 124, 70 L. Ed. 193, 195; *West v. L. Bromm Baking Co.,* 166 Va. 530, 186 S.E. 291; 31 C. J. S., Evidence, pp. 625-6. That affidavit is:

"Kermit Vanhoy, being first duly sworn, deposes and says:

"That he is a citizen and resident of Yadkin County, North Carolina.

"That on the 12th day of October, 1958, this affiant drove his automobile from North Carolina to Roanoke, Virginia, where this affiant was employed; that on said occasion Jesse Garfield Patton rode with this affiant to Roanoke, Virginia, for the purpose of trying to find a job there.

"That this affiant and Jesse Garfield Patton arrived in Roanoke, Virginia during the night of October 12, 1958, and this affiant left Roanoke, Virginia, and went to his job on the 13th day of October, 1958, leaving Jesse Garfield Patton at 218 Day Avenue, Roanoke, Virginia;

"That thereafter on the 17th day of October, 1958, this affiant returned to Roanoke and saw Jesse Garfield Patton at Roanoke, Virginia; that this affiant drove back to Jonesville, in Yadkin County, North Carolina, on Friday, October 17, 1958, leaving Jesse Garfield Patton in Roanoke, Virginia.

"That thereafter on October 23rd, 1958, on a Thursday night this affiant returned to Roanoke and the following morning, Oc-

tober 24th, 1958, Jesse Garfield Patton came to eat breakfast at the boarding house where this affiant boarded in Roanoke, Virginia;

"That thereafter this affiant and Jesse Garfield Patton came to Caldwell County, North Carolina, for the purpose of visiting a friend of Jesse Garfield Patton, and Patton was at that time on October 25, 1958, arrested and charged with 'Larceny from the Person.'

"That this affiant knows that Jesse Garfield Patton had no automobile and this affiant verily believes that it would have been almost impossible for Jesse Garfield Patton to have committed any crime in Caldwell County on the 20th day of October, 1958.

/s/ Kermit Vanhoy

Kermit Vanhoy

"Sworn to and subscribed before me this 6th day of March, 1962.

/s/ Ted G. West

Notary Public."

It is manifest from Vanhoy's affidavit, and from the extract from defendant's motion, which we have quoted above, that Kermit Vanhoy, if he had been present as a witness in the present trial and had testified, could not have testified as to where defendant was on 20 October 1958, and that his testimony would not have supported defendant's alibi. The part of the last sentence in Vanhoy's affidavit that he "knows Jesse Garfield Patton had no automobile" is of little value because of bus transportation and the vast number of automobiles in Virginia and North Carolina. The last part of the last sentence in Vanhoy's affidavit that he "verily believes that it would have been almost impossible for Jesse Garfield Patton to have committed any crime in Caldwell County on the 20th day of October 1958" is incompetent in evidence as merely the expression of opinion. Further, there is nothing in the record before us to show that Vanhoy will ever be capable of testifying as a witness.

The trial court did not err in refusing to continue the case due to the absence of Vanhoy. Further, defendant was not denied his right to due process of law under the Fourteenth Amendment to the Federal Constitution, and his right to the protection of the provisions of "the law of the land" provision of Article I, Section 17, of the State Constitution in his retrial due to the absence of Vanhoy as a witness.

We have examined the assignments of error to the charge brought forward and discussed in defendant's brief, and they are not sufficient to justify a new trial.

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

No error.

STATE OF NORTH CAROLINA, EX REL. NORTH CAROLINA UTILITIES COMMISSION v. WESTERN CAROLINA TELEPHONE COMPANY.

(Filed 30 October 1963.)

1. Telephone Companies § 1; Utilities Commission §§ 1, 6—

The Utilities Commission is given general supervision over rates and services rendered by telephone companies and has the duty, either on its own motion or upon petition, to hold hearings to determine the just, reasonable and sufficient rates which such utilities may charge. G.S. 62-30, G.S. 62-72.

2. Utilities Commission § 6—

Where the petition of a telephone company for increase in rates states the proof upon which the company intends to rely, summarized with sufficient particularity to prevent the interested parties from being misled, the procedure, if the summary of the proposed evidence is too concise, is to permit an amendment rather than to dismiss the proceeding.

3. Same; Constitutional Law § 24—

The Utilities Commission must determine a petition for an increase in rates on the basis of the facts existing at the time such increase is effective, and if a subsequent change in condition warrants a new rate, such new rate must relate to the date of change and the parties must be accorded an opportunity to be heard with respect to the effect, if any, such change had on the rate structure, and a denial of such opportunity would be a deprivation of due process.

4. Utilities Commission § 6—

Where at the time of the hearing of a petition for a telephone rate increase the Utilities Commission is apprized of the petitioner's intention to transfer certain of its exchanges to a subsidiary, and had in fact approved plans for such transfer, and the Commission notwithstanding denies motion to dismiss on the ground that such transfer would affect the rate structure, it is error for the Commission, almost six months after the termination of the hearing and some four months after the petitioner had transferred the exchanges, to grant the motion to dismiss the proceeding.

5. Same—

Where, a telephone company, during the pendency of its petition for an increase in rates, transfers part of its exchanges to a subsidiary, the Utilities Commission, in the exercise of its discretion, may make the subsidiary a formal party and treat the original petition as a joint petition for a uniform system of rates; or it may make the subsidiary a party and fix proper rates for the subsidiary's exchanges and for the original petitioner's exchanges.

6. Utilities Commission § 1—

Procedures before the Utilities Commission are not as strictly technical as proceedings in the Superior Court, and the Commission may regulate its own procedure within broad limits by rules and regulations not inconsistent with statutory provisions.

APPEAL by Western Carolina Telephone Company from *Walker, S.J.,* February 1963 Civil Session of MCDOWELL.

On 26 January 1962 Western Carolina Telephone Company (hereinafter petitioner) filed with the Utilities Commission its petition seeking permission to increase its rates—the proposed increase to become effective 1 March 1962.

It then owned and operated twenty telephone exchanges, nineteen located in the western part of North Carolina, the twentieth at Clayton, Ga. The petition, by exhibits attached, showed in detail the proposed changes, with estimated increases in revenues; the gross revenue derived from rates then in effect; operating expenses for the preceding years; and anticipated expenses, original cost of its properties, and depreciation claimed; a balance sheet for the period ending 30 September 1961; and the asserted "fair value rate base." It alleged the fair value of its properties in North Carolina was $6,680,000 which "is less than that which would be found if a cost study were made to determine Reproduction Cost New. Petitioner is also of the opinion that such fair value figure is less than that which would be calculated from a Trended Cost Study."

The Commission, on 5 February 1962, suspended the proposed increase in effect as permitted by G.S. 62-71. The Commission, by order dated 23 February 1962, permitted the increase to become effective upon Western's agreement to refund any amounts collected in excess of that authorized by the Commission. Petitioner agreed.

On 6 April 1962, 37 of petitioner's subscribers filed a protest to the proposed rate increase. They alleged the proposed rates were "unjust, unreasonable, excessive and discriminatory." They asked the Commission to refuse to authorize any increase.

Three days later protestants filed with the Commission a motion to dismiss, because: (1) petitioner had already been granted authority

"to sell and transfer to Westco Telephone Company certain of its North Carolina telephone properties, the effect of which is to materially and substantially alter the revenues, expenses, investment, accrued depreciation, and capitalization of the petitioner as presented in its Petition, rendering any determination of the probable earning capacity of the property of the Company under the particular rates proposed as required by G.S. 62-124, impossible;" (2) the petition did not state in sufficient detail, to comply with the Commission's rules, the proof which it intended to offer.

The Commission fixed the time to hear the motion to dismiss and, if denied, the petition for the increase in rates. It is stated in the opinion of the commissioner writing for the majority: "After hearing extended argument on the motion by all counsel at the scheduled date, time and place, protestants' Motion to Dismiss was denied by the Commission, two Commissioners voting to allow the motion. The matter then proceeded to hearing on the merits."

When all the evidence had been presented, protestants again moved to dismiss. The motion was denied.

The hearings terminated 27 April 1962. In June 1962 petitioner conveyed nine of its North Carolina exchanges to Westco, its subsidiary. This conveyance consummated plans of petitioner, made with the Commission's approbation, to extend telephone service to remote mountain areas.

On 4 October 1962 the Commission, with two commissioners dissenting, filed a lengthy opinion concluding with an order which allowed the motion to dismiss "without prejudice to petitioner to institute such new proceeding as it is advised."

Petitioner assigned errors and appealed to the Superior Court. It overruled all of petitioner's assignments of error and "affirmed and approved" the order of the Commission.

Van Winkle, Walton, Buck & Wall by Herbert L. Hyde for appellant.

F. Kent Burns for appellees.

RODMAN, J. The reason usually given for the creation of quasi-judicial bodies is the assertion that they can expeditiously and economically resolve factual questions necessary for the proper disposition of special problems committed to them for decision.

The Utilities Commission is given general supervision over rates charged and services rendered by telephone companies. G.S. 62-30. It is the duty of the Commission on its own motion or upon complaint by

a patron or upon petition of a public utility to hold a hearing to determine "the just, reasonable and sufficient rates" which the utility may charge. G.S. 62-72.

In January 1962 petitioner applied to the Commission for permission to increase the rates charged for services rendered patrons of the nineteen North Carolina exchanges then owned and operated by it. This proposal to increase rates was challenged by patrons on procedural grounds as well as on the merits.

More than eight months after the petition was filed, after the motion to dismiss was denied, and after a full hearing on the merits, the proceeding was dismissed because of asserted procedural defects. Petitioner was told it might start anew. When the order dismissing the proceeding was filed, petitioner sought permission to correct the defects found to exist, by amending its petition and supplementing the evidence which it had offered. This request was denied. We are now called upon to determine whether the Commission acted properly in dismissing the proceeding, thereby denying the petitioner an opportunity to be heard with respect to the asserted defects.

The procedural challenge asserts two defects: (1) the petition did not comply with the rule of the Commission for that it did not set out in detail the evidence on which the petitioner would rely to establish its rate base, and (2) petitioner would shortly convey nine of its exchanges to a wholly owned subsidiary. Such conveyance would render "any determination of the probable earning capacity of the property of the company under the particular rates proposed as required by G.S. 62-124 impossible."

The Commission did not in its order specify which of the grounds assigned by protestants warranted the order of dismissal. However, we think it apparent from the opinion forming the basis of the order that it was not because of any defect in the form of the petition. It is nowhere suggested anyone was misled by the manner in which petitioner summarized the evidence it would offer. If the Commission had thought petitioner's summary of the evidence it intended to present too concise, the Commission would undoubtedly have permitted an amendment.

The second reason assigned for dismissing the petition is based on this factual situation: Petitioner's exchanges are located in small mountainous communities. The cost of maintaining existing lines and constructing new lines to serve additional customers is abnormally expensive. The areas served are sparsely settled. Petitioner could not obtain on the open market funds necessary to finance the construction of lines to provide adequate service to the areas adjacent to some of its

exchanges. To obtain funds to provide this service, petitioner had created a wholly owned subsidiary. Petitioner intended to convey nine of its exchanges to its subsidiary at a price fixed by the Commission. The subsidiary, Westco, would then borrow money from a governmental agency at a low rate of interest. The proceeds of the loan would be used to pay petitioner the purchase price of the properties to be conveyed. The balance of the loan would be used by Westco in improving and enlarging its facilities. The monies to be paid petitioner by Westco would be used to reduce petitioner's indebtedness. Steps had been taken by petitioner to accomplish the desired result prior to the filing of the petition for an increase in rates. All petitioner had done had the Commission's sanction. The Commission knew when it heard the petition for a rate increase what properties were to be conveyed, the value assigned to these properties, the amount Westco would borrow, and the rate of interest it would pay.

Protestants argued that the Commission could not, until the conveyance had been made and a reasonable time had elapsed, ascertain the revenues and expenses of the remaining exchanges necessary to determine a fair return to petitioner for the exchanges it would retain.

To this argument petitioner responded: It was seeking a uniform schedule of rates applicable to all nineteen exchanges. The rate increase, if granted prior to the conveyance to Westco, would apply to all exchanges because then owned by petitioner, and the Commission necessarily had to fix and authorize Western to charge a rate for all its exchanges, but when the conveyance was made, Westco would operate its exchanges at the same rates which petitioner was authorized to charge.

Whether it was proper for the Commission to hear evidence on the proposed rate increase for all nineteen exchanges when a sale of nine of the nineteen was imminent was raised by Commissioner Noah on 23 February, when he dissented from the order of the Commission permitting petitioner to obligate itself to refund any sums collected in excess of those authorized by the Commission. He called attention to the fact that the Commission had approved the contemplated conveyance to Westco, saying: "Westco would obtain a loan from the Rural Electrification Administration (REA). The loan has been approved and transfer of the properties from Western to Westco is being consummated." He stated the petition filed 26 January related to all the properties then owned by petitioner, and an order based thereon would prescribe the rates for the exchanges owned as well as the rates applicable to exchanges to be conveyed to Westco. He concluded: "I do not believe the undertaking or commitment of Western for itself and its subsid-

iary, Westco, to be a satisfactory arrangement for the protection of the public. I believe that Western, for itself, and Westco, for itself at the proper time, should furnish, as provided by G.S. 62-71, a satisfactory bond or bonds or in the alternative should deposit in escrow the differences in the present rates and the proposed rates which these companies would collect until the lawfulness of the increases are determined." Here then, before the motion to dismiss had been filed, was a definite recognition that the petitioner was acting not only to establish rates for the exchanges to be retained by petitioner but rates to be charged by Westco after the transfer was consummated.

At the time fixed for the hearing protestants argued their motion to dismiss. The chairman then announced: "Gentlemen, it is the opinion of the majority of the Commission that this Motion should be denied and we should hear your evidence."

This ruling was essentially a determination of the right of petitioner to seek an order applicable to all the exchanges, which order would bind Westco when the contemplated conveyance was consummated.

That the Commission and the parties so interpreted the ruling on the motion to dismiss is clearly indicated by the colloquy between Commissioner Peters and counsel for petitioner before any evidence with respect to values and rate base was offered: "COMMISSIONER PETERS: Mr. Walton, isn't it true that you came to the court room this morning to proceed to produce evidence relating to the entire properties of Western Carolina Telephone Company? MR. WALTON: Yes, sir. COMMISSIONER PETERS: And do these entire properties not include the properties which Western Carolina has proposed to own as well as what Westco is proposed to own, if and when the spin-off, so called, is ever consummated? MR. WALTON: That is correct. COMMISSIONER PETERS: What is to prevent our going ahead on that basis?"

This interpretation of the scope of the ruling is fortified by the announcement of the chairman when, at the conclusion of all evidence, he said in denying the motion to dismiss: "We are going to deny the Motion and give an Exception. We will take what has been presented by all who have testified here and do our best to render a just decision." No member of the Commission then dissented.

When the hearing ended, petitioner owned all nineteen exchanges. The challenged rates went into effect on 1 March. Petitioner was entitled to have the lawful rates fixed as of that date. Such a determination was necessary to ascertain what amount, if any, petitioner had illegally collected. The Commission could not consider events occurring subsequent to 1 March, the date the rates went into effect, to as-

certain what were proper rates on that date. True, a change in condition might warrant a new rate, but that rate would relate to the time the change occurred.

If the change of which the Commission takes notice occurs subsequent to the hearing, interested parties are entitled to notice that the Commission intends to fix a rate as of the date of the change. The parties must then be accorded an opportunity to be heard with respect to the effect, if any, the change has on the rate structure. A denial of that right would be a denial of the constitutional guarantee of due process. *Biddix v. Rex Mills*, 237 N.C. 660, 75 S.E. 2d 777; *English v. Long Beach*, 217 P. 2d 22, 18 A.L.R. 2d 547, and annotations; *Hill v. Casualty Co.*, 252 N.C. 649, 114 S.E. 2d 648; *Skipper v. Yow*, 249 N.C. 49, 105 S.E. 2d 205; 89 C.J.S. 352.

The Commission, in the exercise of its discretion, could have made Westco a formal party, thereby treating the original petition as a joint petition for a uniform system of rates, *Utilities Comm. v. State*, 250 N.C. 410, 109 S.E. 2d 368, or it could have made Westco a party and fixed proper rates for Westco's exchanges and for petitioner's exchanges. As said by *Moore, J.*, in *Utilities Comm. v. Area Development Co.*, 257 N.C. 560, 126 S.E. 2d 325: "Ordinarily, the procedure before the Commission is more or less informal, and is not as strict as in superior court, nor is it confined by technical rules; substance and not form is controlling. In the absence of statutory inhibition, the Commission may regulate its own procedure within broad limits, and may prescribe and adopt reasonable rules and regulations with respect thereto, provided such rules are consistent with the statutes governing its actions."

The judgment of the Superior Court is reversed. It will remand the cause to the Utilities Commission for further proceedings not inconsistent with the principles here declared.

Reversed.

IN RE JAMES EDWARD DONNELLY.

(Filed 30 October 1963.)

1. Automobiles § 2—

Where no warrant, summons, arrest report, or other lawful process is served on or delivered to the driver of an automobile arrested in another state, evidence that a copy of the arrest report was placed among his

personal effects and that he delivered a sum in cash to an official to obtain his release, which sum was not returned, is insufficient to show a judicial forfeiture of bail or collateral deposited to secure defendant's presence in court. G.S. 20-16(a) (7), and the Department of Motor Vehicles is not authorized to suspend or revoke the operator's license upon such evidence. G.S. 20-23.

2. Same—

A license to operate a motor vehicle on public highways of this State is a personal privilege and property right of which a person may not be deprived except in accordance with statutory provisions as they are written and construed in this jurisdiction, and a contrary holding in another jurisdiction is not conclusive here.

3. Same—

The provisions of G.S. 20-16(a) (7) that the Department of Motor Vehicles shall have authority to suspend an operator's license upon a showing by its records or "other satisfactory evidence" that the licensee has committed an offense in another state which, if committed here, would warrant revocation, *held* to refer to the form of notice of conviction in another state and does not purport to confer extra territorial jurisdiction on our courts to determine the guilt or innocence of a person charged with committing an offense in another state.

4. Same—

On appeal from the discretionary suspension of an automobile driver's license, the hearing in the Superior Court is *de novo*, and the Superior Court is not vested with any discretionary authority but is empowered to make only judicial review of the facts to ascertain whether the licensee is in fact and in law subject to suspension or revocation.

APPEAL by petitioner from *Froneberger, J.*, July 1963 Session of GASTON.

Petition for restoration of motor vehicle operator's license.

James Edward Donnelly, petitioner, is a resident of Gaston County, North Carolina, and on 10 March 1963 was holder of a driver's license duly issued to him by the Commissioner of Motor Vehicles of the State of North Carolina. On said date he was operating a motor vehicle on a public highway of the State of South Carolina. He was stopped by a highway patrolman of that State, placed under arrest and lodged in the common jail at Clover, South Carolina. He was advised that the cause of arrest was drunken driving. He remained in jail several hours, and was released when he delivered $50 in cash to an official. Thereafter he received by mail a notice from the South Carolina State Highway Department, dated 19 March 1963, advising that his privilege of operating a motor vehicle in South Carolina was suspended for 12 months for driving while under the influence of intoxicants.

Attached to the notice was a copy of a letter to the North Carolina Department of Motor Vehicles stating that he had been arrested for drunken driving and had forfeited bail on 11 March 1963. The North Carolina Department entered an order on 26 March 1963 suspending his driver's license for one year. G.S. 20-16(a) (7); G.S. 20-23. In the meanwhile petitioner had employed counsel and by letter of 25 March 1963 requested a hearing as provided in G.S. 20-16(d). A hearing was held on 23 April in Gaston County by an agent of the North Carolina Department of Motor Vehicles. On 24 April petitioner was advised that his license would "remain in a state of suspension" until 28 March 1964. On 13 May he filed petition for a hearing *de novo* in the Superior Court of Gaston County. G.S. 20-25. The Commissioner filed answer to the petition and a hearing was had in superior court on 8 July.

At the hearing petitioner testified in substance as follows: He was driving on a South Carolina highway. He was in a line of traffic which had been stopped by patrolmen to check drivers' licenses. Patrolman B. M. Poore examined his license, required him to get out of the car, and asked if he had been drinking. He stated he had drunk two beers. The patrolman had him to walk a few paces and told him he had had too much to drink. Petitioner denied this. He was taken to jail by another patrolman, who told him he had been arrested for driving while under the influence of intoxicants. Later patrolman Poore came to his jail cell and told him he was charged with "being drunk." Thereafter petitioner called his wife. She came for him. He got $50 in cash from her and delivered it to an official and was released. He did not get a receipt for the money and had no trial. He signed no papers. No warrant, citation or other paper was served on or delivered to him. No one informed him of a time or place for trial. No one took anything out of his pockets at the jail. He was not searched. He retained his pocketbook, cigarettes, matches and other personal belongings. He thought the $50 was taken for a fine.

The respondent, North Carolina Commissioner of Motor Vehicles, introduced in evidence a document, marked "Exhibit A," and entitled "Official Summons and Arrest Report," with the heading "South Carolina State Highway Patrol," date "March 20, 1963," and case designation "*South Carolina versus James Edward Donnelly.*" It sets out petitioner's address, occupation, driver's license number, and his vehicle's make, model and license number. It directs defendant to appear before Magistrate Joe F. Youngblood at Clover, S. C., at 11:00 A.M. on March 11, 1963, to answer a charge of driving under the influence of intoxicating liquor. It gives the date of arrest, 10 March 1963, and the name of the arresting officer, B. M. Poore. At the bottom it has

these entries: "Amount of Fine $50.00 . . . Certified correct Joe Youngblood—3-11-63."

B. M. Poore, South Carolina highway patrolman, testified in substance: In his opinion, petitioner was under the influence of intoxicants when arrested. He staggered when he walked and had the odor of intoxicants on his breath. He advised Donnelly that he was under arrest for drunken driving. He did not advise Donnelly the date he would be required to appear before the Magistrate. At the jail Donnelly's personal belongings were taken, in Poore's presence, and placed in an envelope. Poore filled out the "Summons ticket" (Exhibit A above) and placed it in the envelope with Donnelly's belongings, and told him his bail was $50. Poore was not present when petitioner was released from jail. Poore did not sign a warrant; he signed Exhibit A, but not under oath. It was placed in petitioner's envelope, but Poore does not know whether it was given to him or not. No warrant, notice or summons was officially served on petitioner. Exhibit A was not handed to him.

The judge made full findings of fact, including such of the facts recited above as are not in dispute and also the following:

". . . (P)etitioner received a copy of official summons and arrest report signed by the arresting officer. . . ."

". . . (P)etitioner failed to appear in the Magistrate's Court at the time and place designated in the summons and arrest report and . . . the case was called for a hearing; . . . the petitioner failed to appear and the cash bond deposited by the petitioner was forfeited. . . ."

Petitioner "committed the offense of and was guilty of operating a motor vehicle on the highways in the State of South Carolina on March 10, 1963, while under the influence of intoxicating liquors . . . ."

The court was of the opinion "That the North Carolina Department of Motor Vehicles acted within its lawful authority in suspending the petitioner's . . . operator's permit . . .," and adjudged that respondent's suspension order of 26 March 1963 is affirmed.

Petitioner appeals.

Mullen, Holland & Cooke for petitioner.

Attorney General Bruton and Assistant Attorney General Brady for Respondent.

MOORE, J. N.C.G.S. 20-23 provides that "The Department is authorized to suspend or revoke the license of any resident of this State upon receiving notice of the conviction of such person in another state

of any offense therein which, if committed in this State, would be grounds for the suspension or revocation of the license. . . ." Such authority to suspend a driver's license may be exercised either "with or without preliminary hearing." G.S. 20-16 (a) (7). A forfeiture of bail or collateral deposited to secure a defendant's appearance in court is, for the purposes of the foregoing sections, equivalent to a conviction—provided the forfeiture has not been vacated. G.S. 20-24(c).

The criminal offense, operating a motor vehicle upon a public highway while under the influence of intoxicating liquor, as defined by the South Carolina statute, is in all material aspects the same as set out in the North Carolina statute. Code of S. C., s. 46-343; N.C.G.S. 20-138.

On this appeal the inquiry is whether there was a judicial forfeiture of petitioner's bail upon which to predicate a suspension or revocation of his North Carolina driver's license.

The court below found as a fact "that petitioner *received* a copy of official summons and arrest report signed by the arresting officer." If this finding means that the arresting officer put the indicated document in an envelope containing some of petitioner's personal belongings, the finding is supported by evidence. But the evidence is positive that no warrant, summons, arrest report or other lawful process was served on or delivered to petitioner, to bring to his notice or knowledge the offense with which he was charged, the court before which he was to appear, or the time and place of trial. Furthermore, it appears on the face of the "official summons and arrest report" that it could not have been served on or delivered to petitioner before the purported forfeiture of bail took place. It is dated "March 20, 1963"—this date is ten days subsequent to the arrest, and nine days after the purported forfeiture. Indeed, it does not appear that respondent, North Carolina Commissioner of Motor Vehicles, contends that any warrant or other lawful process was served on petitioner. Respondent contends only that petitioner's bail was forfeited, and that under the provisions of G.S. 20-24(c) such forfeiture is equivalent to a conviction.

This Court has had occasion to decide this exact question in a prior opinion. *In re Wright*, 228 N.C. 301, 45 S.E. 2d 370, rehearing 228 N.C. 584, 46 S.E. 2d 696. A North Carolina citizen, holder of a North Carolina driver's license, was arrested in South Carolina on a charge of driving while under the influence of intoxicants. He gave bond. No warrant was served. He did not appear for trial, and his bond was forfeited. Upon receipt of notice of the forfeiture the North Carolina Department of Motor Vehicles suspended his license. This court held that where no warrant is served no legal action is pending in court,

and when no legal action is pending there can be no valid judgment of forfeiture of bail. Further, the mere deposit of security with an arresting officer or magistrate pending issuance and service of warrant, which deposit is retained without the semblance of judicial or legal forfeiture is not a forfeiture of bail within the meaning of G.S. 20-24(c).

Respondent desires that we reconsider the matter in the light of a decision of the South Carolina Court in the case of *State v. Langford,* 223 S.C. 20, 73 S.E. 2d 854 (1952), in which our opinion in the *Wright* case is discussed and a contrary result is reached. In the *Langford* case defendant was arrested and orally advised that he was charged with operating a motor vehicle while under the influence of intoxicants. The charge was entered on the criminal docket of the Municipal Court of Greenville, South Carolina, but no warrant was ever served. Defendant posted bond, but failed to appear when the court convened later in the day. The bond was forfeited. The South Carolina law provides that all proceedings before a magistrate in criminal cases shall be commenced on information under oath, upon which, and only which, shall a warrant of arrest issue. The Court said: ". . . (J)urisdiction of the offense charged and of the person accused is indispensable to a valid conviction. 'It has been said that jurisdiction of the subject matter of a particular case is vested in the court when the appropriate charge is filed, while the jurisdiction of the person is acquired when the party charged is arrested or voluntarily appears in court and submits himself to its jurisdiction.' 22 C.J.S., Criminal Law, s. 143, p. 235. While jurisdiction of the offense or subject matter may not be waived, the objection that the court has no jurisdiction of the person may be waived, and as a general rule 'is waived when accused submits to the jurisdiction of the court by posting bail or entering a recognizance without objection.' 22 C.J.S., Criminal Law, s. 161, p. 259." Further: "It is our conclusion that respondent (defendant) has waived any right to attack, upon the ground that no warrant has been issued for him, the judgment of forfeiture entered in the Greenville Municipal Court."

Respondent implies that the opinion of the South Carolina Court in *Langford,* as to the validity of the forfeiture of bail when no warrant has been served, is binding on this Court in the case at bar. We are not dealing here with the South Carolina statute authorizing the suspension of driver's license upon forfeiture of bail. We are concerned only with the force and effect of the North Carolina statute, G.S. 20-24(c). We adhere to our holding in the *Wright* case. In the text from which the South Carolina Court quotes we find the following: *"Where a court has jurisdiction of the offense or subject matter,* the objection

that it has no jurisdiction of the person of accused may be waived." Emphasis added. 22 C.J.S., Criminal Law, s. 161, p. 418. A license to operate motor vehicles on the public highways of North Carolina is a personal privilege and property right which may not be denied a citizen of this State who is qualified therefor under our statutes. It may be suspended or revoked only in accordance with statutory provisions as they are written and construed in this jurisdiction.

As a matter of law the finding of the court below that "the cash bond deposited by the petitioner was forfeited" cannot be sustained on this record. It was not such judicial forfeiture as will support the suspension or revocation of a North Carolina driver's license.

The court below also found as a fact that petitioner "was guilty of operating a motor vehicle on the highways in the State of South Carolina on March 10, 1963, while under the influence of intoxicating liquors." Respondent contends that this finding, taken alone, is sufficient to sustain the judgment. He relies upon the following language of G.S. 20-16(a) (7): "The Department shall have the authority to suspend the license . . . upon a showing by its records or *other satisfactory evidence* that the licensee . . . (7) Has *committed* an offense in another state. . . ." He insists that this authorizes the court, in a hearing pursuant to G.S. 20-25, to determine the guilt or innocence of petitioner as the sole basis for withholding or granting him relief from the suspension or revocation. It is true that the superior court in the *Wright* case found as a fact that Wright was not guilty, and the Supreme Court held that the facts found, including incidentally the finding of innocence, were sufficient to support the judgment that petitioner's license be restored. It is not stated or even intimated in that opinion that the superior court of North Carolina may determine the guilt of a licenseholder, with respect to offenses alleged to have been committed in another state, as the sole predicate for suspension or revocation of his license. It is proper for the Department's hearing agent to hear and consider evidence bearing on guilt and innocence, among other things, relative to offenses outside the State, to assist him in reaching a decision in the exercise of discretionary authority. In its finding as to guilt the court below was merely reviewing this aspect of the Department's decision. On appeal and hearing *de novo* in superior court, that court is not vested with discretionary authority. It makes judicial review of the facts, and if it finds that the license of petitioner is in fact and in law subject to suspension or revocation the order of the Department must be affirmed, otherwise not. *In re Wright, supra* (rehearing opinion, p. 589). The Department may not suspend or revoke license in the first instance until it receives "notice of the

conviction . . . in another state." G.S. 20-23. It is therefore the conviction in another state that is under review in superior court. The statutes do not contemplate a suspension or revocation of license by reason of a conviction in North Carolina of an alleged offense committed beyond its borders. In criminal matters the courts of North Carolina have no original extraterritorial jurisdiction. *State v. Carson,* 228 N.C. 151, 44 S.E. 2d 721; *State v. Hall,* 114 N.C. 639, 19 S.E. 602. The words "other satisfactory evidence," in G.S. 20-16(a) (7) refer to the form of notice of conviction in another state, and confer no extraterritorial jurisdiction of the offense itself.

The judgment below is

Reversed.

MABEL R. BRADFORD, EXECUTRIX OF THE ESTATE OF FRANK L. BRADFORD, DECEASED, v. MRS. DORIS KELLY.

(Filed 30 October 1963.)

1. Insurance § 61.1—

The compromise and settlement of a claim by insurer for which it would be liable under the terms of its policy will not bar the right of insured, or anyone covered by the policy, from suing the releasor for his damages provided he has neither ratified nor consented to such settlement.

2. Same— In insured's action against driver of other car involved in collision, insurer is neither proper nor necessary party.

In an action for wrongful death by the personal representative of insured against the driver of the other car involved in the fatal collision, defendant pleaded as a bar a compromise and settlement procured by plaintiff's insurer of defendant's claim for her damages arising from the same collision, and, in the alternative, set up a cross action for her damages. Insurer sought to be allowed to intervene to plead the release as against the cross action. *Held:* Insurer is not a proper party and does not have such interest in the subject matter of the litigation as to constitute it a necessary party, and its motion to intervene was properly denied, since, if the plea in bar is sustained, insurer has no further liability, and, if the plea in bar is overruled and plaintiff pleads the release or moves to strike the counterclaim it would bar not only the counterclaim but also plaintiff's action, while if plaintiff declines to plead the release she would assume the risk of a judgment in excess of the settlement, and in no event would insurer be adversely affected.

APPEAL by petitioner, Allstate Insurance Company, from *Martin, S.J.,* June 1963 Non-Jury Civil Session of BUNCOMBE.

Frank L. Bradford died on October 10, 1962. He had been injured on September 18, 1961 when the automobile he was operating collided with the automobile operated by defendant.

Plaintiff, as his executrix, brings this action to recover for his pain and suffering, medical expenses, loss of earnings, property damage, and wrongful death which, she alleges, were proximately caused by the negligence of the defendant on September 18, 1961. Answering the complaint, the defendant denied negligence and, as a First Further Answer and Defense, alleged that Bradford—or someone in his behalf —had paid her $559.02 in full settlement of the damages she sustained in the collision; that Bradford had subsequently ratified the settlement; and that it constituted an accord and satisfaction between the parties. As a Second Further Answer and Defense, defendant alleged a counterclaim for injuries to her person and property in the event this plea of compromise and settlement should not be sustained.

Replying to the answer, plaintiff alleged that if any payment had been made to the defendant it was without the knowledge or consent of Bradford and that she "objects thereto, and does not ratify the same, and . . . is not bound thereby . . ." At the same time plaintiff moved to strike the plea in bar contained in the First Further Answer on the ground that she had filed a reply setting forth matters in avoidance. In the alternative, she moved that the plea in bar be heard prior to the trial of the case on its merits.

Allstate Insurance Company carried the liability insurance upon Bradford's automobile. Upon receiving notice of the defendant's counterclaim, it petitioned the court for leave to intervene in order that it might set up as a defense thereto a release executed by the defendant on September 22, 1961 in consideration of $559.02 whereby defendant had discharged Bradford and his personal representatives from any liability growing out of the accident on September 18, 1961. The judge denied the plaintiff's motion to strike the defendant's plea in bar but ordered that it be heard "prior to the trial of the balance of said case." He denied the petition of Allstate Insurance Company to intervene and it appealed.

Van Winkle, Walton, Buck and Wall by O. E. Starnes, Jr., for plaintiff appellee.

Williams, Williams and Morris for intervenor appellant.

SHARP, J. The standard automobile liability insurance policy provides that the insurer may, in its discretion, settle any claim against the insured for which it would be liable under the terms of the

policy. When exercised in good faith these provisions are valid and binding on the insured. G.S. 20-279.21(f) (3); *Alford v. Insurance Co.,* 248 N.C. 224, 103 S.E. 2d 8; *Lumber Co. v. Insurance Co.,* 173 N.C. 269, 91 S.E. 946. However, it is now settled law in this State that the exercise of this privilege by the insurer will not bar the right of the insured, or anyone covered by his policy, to sue the releasor for his damages where he has neither ratified nor consented to such settlement. *Lampley v. Bell,* 250 N.C. 713, 110 S.E. 2d 316; *Beauchamp v. Clark,* 250 N.C. 132, 108 S.E. 2d 535; *Campbell v. Brown,* 251 N.C. 214, 110 S.E. 2d 897; 38 N.C.L., Rev., 81 and 570; 32 A.L.R. 2d 937. As pointed out by *Denny, J.* (now C.J.) in *Lampley v. Bell, supra:*

> "It seems to be well-nigh the universal holding in this country that where an insurance carrier makes a settlement in good faith, such settlement is binding on the insured as between him and the insurer, but that such settlement is not binding as between the insured and a third party where the settlement was made without the knowledge or consent of the insured or over his protest, unless the insured in the meantime has ratified such settlement."

The case now confronting us raises this question: What are the rights and liabilities of an insurer which has satisfied the claim of a party injured in a collision with its insured when the insured subsequently institutes an action for his own damages and the defendant from whom it had procured a release, pleads the previous settlement as a bar to the plaintiff's cause of action and in the alternative sets up a counterclaim against the plaintiff for his damages?

Accord and satisfaction is an affirmative defense which must be pleaded. *Koonce v. Motor Lines, Inc.,* 249 N.C. 390, 106 S.E. 2d 576. Therefore Allstate is apprehensive that unless it is allowed to intervene and plead the release, it too would be bound by any judgment which the defendant might obtain against the plaintiff and thus be subjected to a liability it had already discharged. *Hall v. Casualty Co.,* 233 N.C. 339, 64 S.E. 2d 160; *Campbell v. Casualty Co.,* 212 N.C. 65, 192 S.E. 906; *Squires v. Insurance Co.,* 250 N.C. 580, 108 S.E. 2d 908. Plaintiff is equally apprehensive that her case would be seriously prejudiced if the jury should learn that her testate's insurer, convinced that its insured was the party at fault, had paid the defendant for his damages.

It is the rule with us that in an action for damages founded upon the alleged negligence of the insured, his liability insurance carrier is not a proper party defendant. *Taylor v. Green,* 242 N.C. 156, 87 S.E. 2d 11. The trial judge's refusal to allow Allstate to intervene must be up-

held unless the insurance carrier, under the facts of this case, has become a necessary party. Does Allstate presently have such an interest in the subject matter of this litigation that it will either gain or lose by the direct operation and effect of any judgment which defendant might recover against the plaintiff on her counterclaim? *Mullen v. Louisburg,* 225 N.C. 53, 33 S.E. 2d 484; *Griffin & Vose, Inc. v. Minerals Corp.,* 225 N.C. 434, 35 S.E. 2d 247; *Garrett v. Rose,* 236 N.C. 299, 72 S.E. 2d 843.

If, upon the hearing of the plea in bar, it is determined that the plaintiff ratified the settlement made by Allstate Insurance Company, as defendant alleges, Allstate has no problem for such a determination would end the case. After parties have compromised and settled their claims growing out of an automobile collision, neither may thereafter maintain a cause of action against the other which arises out of the same collision. *Snyder v. Oil Co.,* 235 N.C. 119, 68 S.E. 2d 805; *Houghton v. Harris,* 243 N.C. 92, 89 S.E. 2d 860; *Jenkins v. Fields,* 240 N.C. 776, 83 S.E. 2d 908. Therefore, as plaintiff correctly points out, Allstate's petition to intervene prior to a final determination of the plea in bar is premature.

However, in each of the cases which have come to this Court involving the right of a plaintiff to prosecute his action after a settlement with the defendant by his insurance carrier, the defendant's plea of compromise and settlement has been overruled upon a finding that plaintiff had neither consented to the settlement nor ratified it. Recognizing the possibility of a similar result in this case, both plaintiff and Allstate request the Court to define the status of defendant's counterclaim in the event her plea in bar is not sustained.

These questions arise: Having, by her plea in bar, judicially admitted her acceptance of $559.02 in full settlement of all damages which she suffered as a result of the collision with plaintiff, can the defendant at the same time, by way of an alternative plea, maintain a counterclaim for those same injuries? If plaintiff should move to strike the counterclaim because of the settlement which defendant has plead, would she thereby ratify the settlement and cause the dismissal of her own action?

The novel questions presented by this appeal emanate from the modern requirement that every automobile owner carry liability insurance and from the standard provision in such policies permitting his carrier, in its discretion, to settle any claim against him within the coverage of the policy. Counsel for the respective parties have cited us no factually analagous case from any jurisdiction. Our research discloses that at least two have considered these questions.

In *Faught v. Washam,* Mo., 329 S.W. 2d 588, decided in September 1959, plaintiff's counsel, unknown to the plaintiff, was also representing his insurance carrier. Without plaintiff's knowledge, the attorney plead a release obtained by the carrier from the defendant in bar of the counterclaim which defendant asserted against plaintiff. The defendant thereupon moved to dismiss plaintiff's action. The subsequent procedural course of this case is not clear from the opinion. However, the court held that under "the peculiar facts of this case," it was clear that plaintiff had not intended to ratify the settlement. It acknowledged a total lack of precedent "in which this novel point has been ruled," and avoided the questions before us by denying defendant's motion to dismiss and ordering that the counterclaim be tried separately. The court did not intimate whether the judgment in the first case tried would be *res judicata* in the trial of the second. Our North Carolina practice and procedure, however, does not permit such a severance. See *Allen v. Salley,* 179 N.C. 147, 101 S.E. 545.

In 1960, Division No. 2 of the Court of Appeals of Georgia considered the problem in *Cochran v. Bell,* 102 Ga. App. 617, 117 S.E. 2d 645. In that case, plaintiff and defendant both suffered damage in an automobile collision. Plaintiff's insurance carrier paid the defendant in full settlement of his claims against plaintiff and received his release in return. Thereafter plaintiff brought an action against defendant who set up a counterclaim for his own damages without pleading the release. Plaintiff moved to dismiss the counterclaim on the ground that defendant had released his cause of action. On these facts, the court held that neither party had a right of action against the other and dismissed the suit. The rationale of the opinion is that while the settlement was not binding upon the plaintiff in the first instance because not authorized by her, it placed her in a position of having to elect whether to ratify or repudiate the settlement. When she successfully relied upon it to dismiss the counterclaim she could not thereafter adopt the inconsistent position of disavowing the release.

Subsequently, the Supreme Court of Georgia decided the case of *Allstate Insurance Co. v. Hill,* 218 Ga. 430, 128 S.E. 2d 321. The background facts of this case differed from *Cochran v. Bell* only in that when defendant set up his counterclaim in plaintiff's action, plaintiff then called upon her liability insurer, Allstate Insurance Company, to defend the cross action but refused to permit it to plead the release executed by the defendant. Whereupon, Allstate instituted this action against defendant to enjoin him from further prosecuting the counterclaim or, in the alternative, for permission to intervene in the original suit of the plaintiff against defendant. The Court held that Allstate

was entitled to the injunction. No provision of the Georgia law would allow the insurance carrier to intervene in the case of plaintiff against defendant Hill. It reasoned therefore that if defendant Hill should recover a judgment against the plaintiff therein, the release he had executed would bar his enforcement of such judgment against Allstate; therefore, an injunction would put an end to litigation. The Court said that it was not then necessary to decide whether plaintiff was so bound by the release executed by defendant Hill as to bar her suit.

Quillan, J., dissenting in *Allstate Insurance Co. v. Hill,* was of the opinion that Allstate was entitled neither to enjoin the cross action nor to intervene in the action pending between the original parties. Adhering to the reasoning in *Cochran v. Bell,* he argued that "in the stated circumstances," as between plaintiff and defendant themselves, there was no valid settlement; that as long as it was not pleaded, the release executed by defendant did not extinguish the right of either party to recover damages from the other; that when the plaintiff brought her action for damages arising out of the collision and then chose not to plead the release as a defense to the counterclaim, she thereby elected to repudiate it and thus gave defendant the right to maintain his cross action against her. In the view of Justice Quillian, when plaintiff repudiated the release, Allstate was thereupon relieved from any further obligation to defend the cross action against her. He agreed with the majority that, having settled with defendant, Allstate had no further liability to him on any judgment he might subsequently acquire against the plaintiff on his counterclaim. He pointed out, however, that the insured, as a matter of equity, would be entitled to have any judgment which might be entered against her in favor of Hill credited with the amount of Allstate's payment to him.

Three months later the Georgia Supreme Court (two justices dissenting), in effect, overruled *Cochran v. Bell* by holding, in a case parallel with *Allstate Insurance Co. v. Hill,* that the standard policy clause giving the insurance carrier the right to settle claims against its insured constitutes it the agent of the insured and that the latter is bound by its settlement as if he had made it himself. *Aetna Casualty & Surety Co. v. Brooks,* 218 Ga. 593, 129 S.E. 2d 798. The North Carolina Court expressly repudiated this solution of the problem in *Lampley v. Bell, supra.*

The dissent in *Allstate Insurance Co. v. Hill, supra,* appears to us to contain the better reasoning. It is our opinion that should the defendant's plea in bar in this case be overruled, the plaintiff would then be put to an election. She must either ratify the release which Allstate obtained from the defendant in behalf of her intestate by pleading it in

bar of defendant's counterclaim or reject it by declining so to plead. If plaintiff elects to plead the release, such a plea would bar not only defendant's counterclaim but also her own cause of action. *Phillips v. Alston,* 257 N.C. 255, 125 S.E. 2d 580. Moreover, should plaintiff move to strike the counterclaim upon the ground that defendant had released his cause of action against her intestate, such a motion would likewise constitute a ratification. She may not blow hot and cold. On the other hand, if plaintiff should decline to plead the release she would thereby discharge Allstate from any further responsibility and personally assume the risk that a judgment in excess of the carrier's compromise payment to the defendant might be rendered against her on the counterclaim. Furthermore, the release which defendant executed and delivered to Allstate would be a complete defense to the carrier in any suit he might bring against it on such a judgment. Having negotiated with the insurance company and taken its money as consideration for the release, a party would be estopped to make any further claim against the carrier for injuries growing out of the collision which was the subject matter of the settlement. This Court has held that a tort-feasor, knowing that an insurer has a claim for subrogation against him, may not defeat that claim by paying to the insured the full amount of his damages and taking a complete release from him. *Phillips v. Alston, supra. A fortiori,* one who has himself settled a cause of action with an insurance company may not again impose liability upon it by securing a judgment against its insured for the same injuries.

From the foregoing we conclude that Allstate Insurance Company is neither a proper nor a necessary party to this action. The order of the court below is

Affirmed.

HOWARD B. JACKSON v. W. K. MAUNEY, JR. AND CAROLINA THROWING COMPANY, INC.

(Filed 30 October 1963.)

1. Boating—

Mere ownership of a boat does not impose liability for injury received by a passenger due to the negligence of the operator of the boat.

2. Master and Servant § 33—

The master or principal is liable for the acts of his servant or agent only when the servant or agent is engaged in the course of his employ-

ment at the time of and in respect to the very transaction out of which the injury arises, and if the servant or agent is acting outside the scope of his employment the employer or principal is not responsible therefor.

3. Same; *Boating*—

Evidence tending to show that a corporation maintained a boat for use in entertaining its customers and for entertaining and in furtherance of better relations between its employees, and that the injury in suit was inflicted on the corporation's vice president, riding as a guest, by the negligent operation of the boat by the corporation's secretary and treasurer while on a boat ride during vacation for pleasure, *is held* insufficient to be submitted to the jury upon the issue of *respondeat superior*, notwithstanding evidence of casual discussions of business among the parties during the trip.

APPEAL by defendant Carolina Throwing Company, Inc. from *McLean, J.*, March 29, 1963 Civil Session of CLEVELAND.

Plaintiff instituted this action against W. K. Mauney, Jr., to recover compensation for personal injuries sustained while riding as a passenger in a motor boat negligently operated by Mauney.

Thereafter plaintiff sought and was granted permission to make Carolina Throwing Company, Inc., hereafter Carolina, a defendant. The amended complaint reiterated the allegations of the original complaint with respect to the negligence of Mauney. Additionally plaintiff alleged the boat in which he was riding was owned and maintained by Carolina "for the pleasure, enjoyment, entertainment, use and convenience of its employees . . ." Mauney was secretary and treasurer of Carolina. He was operating the boat as agent of Carolina "within the course and scope of his employment and with its knowledge, permission and consent for the purpose of affording pleasure, enjoyment and entertainment to an employee of the defendant, Carolina Throwing Company, Inc., the plaintiff."

Mauney filed an answer admitting all the allegations of the complaint except those relating to his asserted negligence and the extent of the injuries sustained by plaintiff.

Carolina, in its answer, admitted that Mauney was its secretary, plaintiff, its vice president. It admitted it owned the boat in which plaintiff was riding when he was injured. It denied the boat was being used in the furtherance of its business alleging that the injury occurred while plaintiff and defendant Mauney were on a vacation and were using the boat solely for their own pleasure.

When the case was called for trial, the parties stipulated: (1) plaintiff was injured as a result of Mauney's negligence; (2) fair compensation for plaintiff's injuries was $7,500.

To determine the liability of Carolina, the court submitted this issue: "Was the defendant, W. K. Mauney, Jr., the agent or employee of the defendant, Carolina Throwing Company, Inc., and as such acting within the scope of his employment and in furtherance of his principal's business as alleged in the complaint?" The jury answered in the affirmative. It was thereupon adjudged that plaintiff recover of defendants the sum of $7,500 with costs. Carolina excepted and appealed.

McDougle, Ervin, Horack & Snepp by Frank W. Snepp for plaintiff appellee.

Mullen, Holland & Cooke by James Mullen for defendant appellant.

Robinson, Jones & Hewson for defendant appellee.

RODMAN, J. Carolina assigns as error the court's refusal to allow its motion for nonsuit.

Plaintiff alleges he was injured when Mauney, traveling at a high speed, negligently left the channel and entered a shallow cove. The boat grounded, pitching plaintiff into the windshield.

Plaintiff neither alleges nor offered evidence tending to show the grounding was due to a defect in the boat or to Mauney's incompetence. The negligence alleged is Mauney's failure to utilize the knowledge and skill he possessed. Carolina was not liable for plaintiff's injuries merely because it owned the vessel in which plaintiff was riding or because it permitted Mauney to use the boat. *Linville v. Nissen,* 162 N.C. 95, 77 S.E. 1096; *Reich v. Cone,* 180 N.C. 267, 104 S.E. 530; *Brown v. Wood,* 201 N.C. 309, 160 S.E. 281; *Weatherman v. Ramsey,* 207 N.C. 270, 176 S.E. 568; *Parrott v. Kantor,* 216 N.C. 584, 6 S.E. 2d 40; *Hawes v. Haynes,* 219 N.C. 535, 14 S.E. 2d 503; *McIlroy v. Motor Lines,* 229 N.C. 509, 50 S.E. 2d 530; *Grindstaff v. Watts,* 254 N.C. 568, 119 S.E. 2d 784; *Cohee v. Sligh,* 259 N.C. 248.

The sole ground on which liability can be imposed on Carolina is the assertion that it is responsible for the acts of Mauney, its secretary.

A master or principal is liable for those acts of his servant or agent done in the performance of the work for which the servant or agent was employed. The relationship must "Exist between the wrongdoer and the person sought to be charged for the result of the wrong at the time and in respect to the very transaction out of which the injury arose." *Creech v. Linen Service Corp.,* 219 N.C. 457, 14 S.E. 2d 408. Devin, C.J., quotes with approval in *Travis v. Duckworth,* 237 N.C. 471, 75 S.E. 2d 309, this statement taken from Tiffany on Agency: "A servant is acting in the course of his employment when he is engaged in that which he is employed to do, and is at the time about his

master's business. He is not acting in the course of his employment, if he is engaged in some pursuit of his own." If the servant or agent is acting outside the scope of his employment, the employer is not responsible. *Lewis v. Tobacco Co., ante,* 410; *Lindsey v. Leonard,* 235 N.C. 100, 68 S.E. 2d 852; *Hinson v. Chemical Corp.,* 230 N.C. 476, 53 S.E. 2d 448; *Salmon v. Pearce,* 223 N.C. 587, 27 S.E. 2d 647; *Walker v. Manson,* 222 N.C. 527, 23 S.E. 2d 839; *Smith v. Moore,* 220 N.C. 165, 16 S.E. 2d 701; *McLamb v. Beasley,* 218 N.C. 308, 11 S.E. 2d 283; *Puckett v. Dyer,* 203 N.C. 684, 167 S.E. 43; *U. S. v. Eleazer,* 177 F. 2d 914; *Manuel v. Cassada,* 59 S.E. 2d 47, 18 A.L.R. 2d 395; *Rogers v. Allis-Chalmers Mfg. Co.,* 92 N.E. 2d 677, 18 A.L.R. 2d 1363; *Olender v. Gottlieb et al.,* 101 N.E. 2d 622; *Voytas v. U. S.,* 256 F. 2d 786; Master and Servant, 57 C.J.S. s. 570 and 35 Am. Jur. s. 553 and 554.

The evidence viewed in the light most favorable to plaintiff is sufficient to establish these facts: Plaintiff, vice president of Carolina, is also an employee of J. P. Stevens Co., in charge of its upholstering business; he lives in New York; he gives 95% of his time to Stevens and 5% to Carolina; Carolina manufactures and sells yarn; Stevens manufactures and sells cloth; Mauney was secretary and treasurer of Carolina; Carolina owned a motor boat which it "used for the entertaining of customers, building of good will among the community, entertaining our employees and better relations with the employees of the plant, and employees and officers of the corporation;" the mill was on vacation during the week of 4 July 1960, "everybody, except the watchman, was on vacation;" plaintiff, Mauney, and a Mr. Crawford decided to take a vacation that week; they went to Crescent Beach and were accompanied by their families. Plaintiff testified: "We rented a house there and all of us paid for it. The purpose of this trip so far as I was concerned was for relaxation and recreation . . . On July 9, when the accident occurred, we were going up to Carolina Beach and up towards Wilmington, and up the Inland Waterway. We were not going to do anything up there, it was just a pleasure trip up the Inland Waterway . . . As far as I was concerned, all three of us were taking the boat down there, Mr. Crawford, Mr. Mauney and myself, so we could all use it down there for our own personal pleasure. And on the day when this accident happened, we were all pleasure bent for our own personal pleasure . . . Whether there was a boat and vacation involved or not, I would go ahead and do my job to the best of my ability regardless of whether I had a vacation with Billy and regardless of whether I used the company boat, I would give them the benefit of my advice and help for whatever value it may be under any circumstances. So, it is true that actually using the boat and going on the vacation for recreation

and relaxation had nothing to do with my attitude toward the corporation." Plaintiff, when asked if during the week he was on vacation he had any business discussions with Mauney, replied: "I answer I don't remember any specific conversations but usually when we got together— . . . I am sure we did." Defendant Mauney testified that Carolina needed a yarn salesman, and while they were on vacation he and plaintiff discussed the employment of a salesman recommended by plaintiff. There is nothing in the record to indicate when these conversations with respect to employment of a salesman or any other business matter took place. It appears unequivocally that the boat ride was for pleasure—not for business.

To hold that an employer is liable for acts done by his employees while on vacation merely because the employer provides them with a means of enjoyment, and casual discussions occur among the vacationers with respect to the employer's problems during the vacation period would stretch the doctrine of *respondeat superior* beyond its point of elasticity.

We have announced we will not expand the "family purpose doctrine" to include a motor boat provided by a parent for the enjoyment and relaxation of members of his family. *Grindstaff v. Watts, supra.* We perceive no sound reason for imposing liability on a corporation in similar circumstances.

The motion for nonsuit should have been allowed.

Reversed.

BETTY HARRISON v. ROBERT A. WILLIAMS, JR., TRADING AND DOING BUSINESS AS HENRY'S DRIVE-IN RESTAURANT AND TRAILER PARK.

(Filed 30 October 1963.)

1. Negligence § 37a—

Evidence that patrons of defendant's dining room frequently went into the kitchen area of the premises to pay their bills and that on the occasion in question plaintiff was directed by defendant's employee to go into that area to purchase cigarettes at a vending machine, *held* sufficient to support a finding that plaintiff was an invitee at the time and place of her fall in the kitchen area.

2. Negligence § 37b—

A proprietor owes his invitees the legal duty to maintain the aisles and passageways of his place of business in such condition as a reason-

ably careful and prudent person would deem sufficient to protect patrons from danger while exercising ordinary care for their own safety.

3. Same—

Ordinarily, the existence of a step between floor levels raises no inference of negligence on his part of the proprietor.

4. Negligence § 37f—

Evidence to the effect that plaintiff, in going as directed by defendant's employee to purchase cigarettes at a vending machine, failed to see a step downward between floor levels because the area was "dimly lighted," without evidence as to the amount, kind, or location of the lights then burning or the difference in the floor levels, *is held* insufficient to be submitted to the jury on the issue of defendant's negligence.

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

Plaintiff's action is to recover damages for personal injuries she sustained as a result of a fall while in defendant's place of business, known as "Henry's Drive-In Restaurant and Trailer Park," located on the west side of Highway #421, south of Wilmington, N. C. Defendant was engaged in the business of "preparing and serving to 'Drive-In and dining room' customers plate lunches, sandwiches, cigarettes, soft drinks, and other lawful beverages."

Plaintiff alleged her fall and injuries were proximately caused by the negligence of defendant in respects referred to in the opinion.

Answering, defendant denied negligence and conditionally pleaded the contributory negligence of plaintiff.

The only evidence was that offered by plaintiff. Exclusive of the testimony of a doctor, the evidence consists of the testimony of (1) plaintiff, (2) Michael A. Harrison, plaintiff's husband, (3) George Montford, and (4) Mary Hines. The pertinent evidence as to plaintiff's actions prior to her fall and injury, summarized or quoted, is set forth below.

On the night of September 5, 1961, Mr. Montford, accompanied by plaintiff and her husband, drove to defendant's place of business. They arrived "about 8:40" and parked "almost in front of the main dining room." While so parked, a 7-Up was ordered for each of the men and a Coca-Cola for plaintiff. They were served. Two "girls," Mrs. Lou Hall and Mrs. Sadie West, were waiting on the customers in the parked cars.

A "few minutes"—"about 15 or 20 minutes" after their arrival, plaintiff told her husband she was going to the ladies' rest room and got out of the car. Since "the girls were mighty busy and you could not flag or yell them down," plaintiff's husband handed her a dollar bill and asked her to bring him "a pack of cigarettes."

Plaintiff "had been in this Drive-In on numerous occasions before this accident" but she and those with her had always gone "in the second dining room to eat." On this occasion, plaintiff entered "the main dining room." The ladies' room was in "the large dining room." When plaintiff "was there before," there "was a cigarette machine in the lower corner" but "it was missing." No one was in "this Dining Room." She looked for a waitress but there was no waitress in the dining room(s). The "girls" were outside. On previous occasions, plaintiff and her husband had gotten their own cigarettes "out of the machines."

Between the main or large dining room and the kitchen area, there was a "small dining room," sometimes referred to as the "second dining room." Plaintiff walked "through the large dining room, . . . through the small dining room to the kitchen." There she found a girl known to her as "Ann," who was sitting "at a little counter, . . . sitting there working." Plaintiff told Ann she wanted to get some cigarettes, handed Ann the dollar and Ann gave plaintiff the change. Ann told plaintiff "the cigarette machine is down there," pointing to the end of the counter. Ann, the only girl "in there," had her hands full. Plaintiff walked "into the area between the kitchen and the counter by direction." When plaintiff "started to come around the counter," she "didn't see the step-down" and fell.

Other evidence bearing upon the alleged negligence of defendant will be set forth in the opinion.

At the conclusion of plaintiff's evidence, the court, allowing defendant's motion therefor, entered judgment of involuntary nonsuit. Plaintiff excepted and appealed.

Wm. K. Rhodes, Jr., for plaintiff appellant.
Royce S. McClelland and L. Bradford Tillery for defendant appellee.

BOBBITT, J. The only question is whether the court erred in granting defendant's motion for judgment of involuntary nonsuit. Decision depends upon whether the evidence, when considered in the light most favorable to plaintiff, is sufficient to support a finding that plaintiff's fall and injuries were proximately caused by the negligence of defendant.

It is unnecessary to restate the familiar and well settled general legal principles pertinent to decision on this appeal. This has been done in numerous cases including the following: *Reese v. Piedmont, Inc.*, 240 N.C. 391, 82 S.E. 2d 365; *Sledge v. Wagoner*, 248 N.C. 631, 104 S.E. 2d 195; *Skipper v. Cheatham*, 249 N.C. 706, 107 S.E. 2d 625; *Garner v. Greyhound Corp.*, 250 N.C. 151, 108 S.E. 2d 461, 81 A.L.R. 2d 741.

Defendant contends plaintiff fell in a portion of his premises not designed for use by patrons and was not an invitee with reference to the place where she fell. However, there was evidence that patrons of the dining rooms frequently went into the kitchen area of the premises to pay their bills. Too, there was evidence that plaintiff, having obtained change for the express purpose of buying cigarettes, was proceeding as directed by defendant's employee. *Cupita v. Country Club*, 252 N.C. 346, 113 S.E. 2d 712, cited by defendant, is readily distinguishable. In our view, there was sufficient evidence to support a jury finding that plaintiff was an invitee at the time and place of her fall and injury.

Defendant owed plaintiff, as invitee, the legal duty to maintain the aisles and passageways of its place of business in such condition as a reasonably careful and prudent proprietor would deem sufficient to protect patrons from danger while exercising ordinary care for their own safety. *Skipper v. Cheatham, supra; Sledge v. Wagoner*, 250 N.C. 559, 109 S.E. 2d 180.

"Generally, in the absence of some unusual condition, the employment of a step by the owner of a building because of a difference between levels is not a violation of any duty to invitees." *Benton v. Building Co.*, 223 N.C. 809, 28 S.E. 2d 491; *Reese v. Piedmont, Inc., supra; Garner v. Greyhound Corp., supra.*

"Different floor levels in private and public buildings, connected by steps, are so common that the possibility of their presence is anticipated by prudent persons. The construction is not negligent unless, by its character, location or surrounding conditions, a reasonably prudent person would not be likely to expect a step or see it." *Garrett v. W. S. Butterfield Theatres, Inc.* (Mich.), 246 N.W. 57. This statement is quoted with approval in *Reese v. Piedmont, Inc., supra,* and in *Garner v. Greyhound Corp., supra.* The mere fact there was a step downward or change in floor level raises no inference of negligence against defendant. *Reese v. Piedmont, Inc., supra;* Annotation: 65 A.L.R. 2d 471, *482.*

Plaintiff alleged the area in which the step was located "was not adequately lighted." She alleged defendant was negligent in that he failed to provide sufficient light to disclose the step and failed otherwise to give warning thereof and that, absent sufficient lighting or warning, the step constituted a dangerous condition, and that in these respects defendant failed to exercise reasonable care to provide a reasonably safe aisle or passageway for use of his invitees-customers.

There was no allegation or evidence that the step was defective in any respect. Plaintiff alleged it was "a steep step downward," descend-

ing from "one floor level down *several* inches to another floor level." (Our italics).

Plaintiff's evidence tends to show there was *a step downward.* No evidence was offered purporting to describe the step. The evidence is vague as to its exact location. There is no evidence as to the difference in floor levels. If the difference in floor levels was sufficient to constitute notice of the step, this legal principle would be pertinent: "Where a condition of premises is obvious to any ordinarily intelligent person, generally there is no duty on the part of the owner of the premises to warn of that condition." *Benton v. Building Co., supra; Reese v. Piedmont, Inc., supra.* Plaintiff testified she "was thoroughly familiar with the lay-out of that Drive-In." However, she also testified she "had not been around that direction before."

Plaintiff relies primarily upon her contention that the aisle or passageway she was directed to use, particularly the step, was insufficiently lighted. She alleged the area where the cigarette vending machine was located "was dimly lighted" and that the step "could not be clearly seen or detected in the dim and insufficient light."

Plaintiff's husband testified the cigarette vending machine was in the area referred to as the Grill; that the cash register was in the Grill; and that "you had to go through the kitchen to get to the Grill." Presumably, although here as elsewhere the evidence is vague, there is no partition between the area referred to as the kitchen and the area referred to as the Grill. No evidence indicates the dimensions of kitchen, Grill or any other portion of defendant's place of business. No evidence indicates the height, length, etc., of the counter referred to in plaintiff's testimony. (Note: No diagram or photograph was offered to illustrate or explain testimony.)

Plaintiff testified "(i)t was dark in there" when she started to come around the counter; that she "didn't see the step-down"; that she "didn't realize there was a step there"; and that "(t)here was overhead light, but in that corner there was not." On cross-examination she testified: "The floor was not well lighted. At the floor there was no light. There were overhead lights. I didn't look up to see what kind. There was not light enough where I stepped down. . . . I am saying it was not light enough for me to see it automatically when I walked around the corner. I didn't know the step-down was there, and there were no signs to indicate there was one there."

Mary Hines, a witness for plaintiff and a former employee of defendant, testified: "(T)here were flourescent lights overhead from the Grill but not over the step"; that "(t)here were three but most of the time only one on"; and that she was not working, was not present and

did not know what lights were on when plaintiff fell. Plaintiff offered no evidence as to the location of the three overhead flourescent lights, or as to how many were burning on the occasion of plaintiff's fall.

The word "dark," a relative term, used by plaintiff on direct examination, must be considered with plaintiff's testimony on cross-examination that "it was not light enough for (her) to see it *automatically* when (she) walked around the corner." (Our italics). This testimony suggests that plaintiff by the exercise of due care could have observed the step but failed to do so. Plaintiff's husband and Montford had been patrons of defendant's place of business on numerous prior occasions. Although they arrived on the scene shortly after plaintiff fell, they did not testify with reference to the step or with reference to the location and number of lights.

Obviously, precise factual evidence was available. Suffice to say, plaintiff did not offer such evidence.

The conclusion reached is that the vague and indefinite evidence offered by plaintiff fails to disclose facts essential to a determination as to plaintiff's right to recover. Hence, on account of plaintiff's failure to offer sufficient evidence to establish actionable negligence on the part of defendant, the judgment of involuntary nonsuit is affirmed.

Affirmed.

ROBERT McFARLAND v. NEWS AND OBSERVER PUBLISHING COMPANY, INC.

(Filed 30 October 1963.)

1. Libel and Slander § 1; Torts § 2—

An individual making a statement containing libelous matter to a newspaper and the newspaper publishing such matter are joint tort-feasors in publishing the libel.

2. Libel and Slander § 11; Torts § 7—

Where the party defamed institutes separate actions for libel against the individual making the statement and the newspaper publishing the defamatory matter, a release of the individual from liability is a release of the newspaper also, regardless of the adequacy of the consideration paid for the release.

3. Pleadings § 30—

Where it appears upon the face of the pleadings that defendant was a joint tort-feasor in publishing a libel and that plaintiff released the other

tort-feasor, defendant's motion for judgment on the pleadings should be allowed, since judgment on the pleadings is proper when all facts necessary to establish a plea in bar are either alleged or admitted in plaintiff's pleadings.

APPEAL by plaintiff from *Parker, J.*, January, 1963 Civil Term, NEW HANOVER Superior Court.

On December 13, 1960, the plaintiff instituted this civil action against the News and Observer Publishing Company to recover actual and punitive damages based upon the following allegations:

"3. On or about the first day of November, 1960, one Clyde Patton made a statement to a reporter of the defendant that the plaintiff was guilty of stealing timber belonging to the Wildlife Resources Commission.

"4. The defendant in its issue of November 2, 1960, published said charge of stealing timber, and stated:

" 'A Wildlife Commission report on the case against the five men quoted Burney as saying his reason for requesting a *nol pros* was that the case was "not one thing in the world but a land squabble between the State and some private individuals and ought to be tried in civil court."

" 'Wildlife Resources Director Clyde Patton differed sharply with Burney's contention that the first case was nothing more than "a land squabble. They were actually stealing our timber," Patton said.

" 'On April 22nd Holly Shelter refuge managers discovered five men cutting timber on the 40,000-acre tract. The five, identified as Grant Holliday, Harry Blanding, Noah Brailsford, Robert McFarland and Arthur Bannerman, were arrested and charged with trespassing, cutting and stealing timber valued at over $50.

" 'On September 26 Burney took the *nol pros* . . .'

"5. Said publication charging plaintiff with stealing was false, malicious and defamatory, and accused the plaintiff of being a thief, and with being guilty of a crime."

By answer, the defendant admitted it published the news story complained of upon the basis of information given to its reporter by Mr. Clyde Patton, Director of the North Carolina Wildlife Resources Commission, upon a matter arising in the course and scope of his official duties; that the publication involved a matter of public concern, and the publication was in good faith and without malice.

By way of amendment to the answer, and as a further defense, the defendant alleged:

"1. On the 10th day of November, 1960, Robert McFarland, the plaintiff in the present action, commenced a civil action against Clyde Patton for the recovery of damages alleged to have been sustained by the plaintiff Robert McFarland; and in the complaint filed in the said civil action against Clyde Patton in the Superior Court of New Hanover County, North Carolina, the plaintiff Robert McFarland alleged that on or about the 1st day of November, 1960, the defendant Clyde Patton falsely and maliciously charged that the plaintiff Robert McFarland was guilty of stealing and 'made said charge and defamatory statement to a reporter of the News and Observer, a newspaper of large and general circulation in the State and elsewhere, intending for it to be published in said newspaper, and maliciously stated in substance that plaintiff was a thief, and falsely accused the plaintiff of being a thief, and of stealing timber belonging to the North Carolina Wildlife Resources Commission.' And in said complaint in said civil action against Clyde Patton, the plaintiff Robert McFarland alleged: 'And the said News and Observer published in North Carolina, published said false and defamatory statements in its issue of November 2, 1960, on pages 1 and 2, after naming plaintiff and four others, Clyde Patton stated "they were actually stealing timber." ' "

The plaintiff, by reply to the further defense, said that Article 1 of the amendment to the answer is admitted. As a fourth further defense, the defendant alleged the plaintiff made a voluntary settlement with, and obtained complete satisfaction from, Clyde Patton of all damages arising out of the charges and the publication thereof referred to above, and executed the following release:

"Know all men by these presents:

"That I, Robert McFarland of the County of New Hanover and State of North Carolina, that for and in the consideration of One ($1.00) Dollar of United States currency to him in hand paid by Clyde Patton of the City of Raleigh, the County of Wake and the State of North Carolina, does by these presents release and discharge the said Clyde Patton of and from any, and all manner of action, causes of action, judgments, execution, debts, dues, claims, damages and demands of every kind and nature whatsoever which are against the said Clyde Patton, he ever had or now has or which

he or his heirs, executors or administrators have now or may hereafter have by reason of the statement alleged to be libelous as set forth in the Complaint in this cause of action.

"IN WITNESS WHEREOF, Robert McFarland has hereunto set his hand and seal this the 11th day of September, 1962.

"S/Robert McFarland (SEAL)."

By reply to the amendment setting up the fourth further defense, the plaintiff stated:

> "Further answering this article of the amendment to the answer, the plaintiff admits the execution of Exhibit C thereto attached and therein referred to."

The plaintiff alleged and the defendant admitted demand for retraction and its denial.

The defendant filed a written motion for judgment on the pleadings. After hearing, the court dismissed the action upon the ground the plaintiff's pleadings at most disclosed a joint tort committed by Clyde Patton and by the present defendant; and the plaintiff's release of Patton likewise released this joint tort-feasor.

The plaintiff excepted and appealed.

Rountree & Clark, by George Rountree, Jr., Isaac C. Wright for plaintiff appellant.

Poisson, Marshall, Barnhill and Williams, by Alan A Marshall, Lassiter, Leager, Walker and Banks by Wm. C. Lassiter for defendant appellee.

HIGGINS, J. According to the allegations and admissions in the pleadings, Mr. Patton, Director of the North Carolina Wildlife Resources Commission, and Mr. McFarland, the plaintiff in this action, became involved in a controversy concerning the right of the latter to remove timber from certain lands which Mr. Patton claimed belonged to the State agency of which he was Director. Warrants were issued charging the plaintiff and others with trespassing on the lands of the Commission and taking, stealing, and carrying away 60 logs, more or less, belonging to the State, valued at more than $50.00. The defendants in the warrant were bound over to the Pender County Recorder's Court for trial. Upon demand for a trial by jury the case was removed to the Superior Court of Pender County.

In the Superior Court the solicitor for the State entered a *nol pros* with leave, stating the controversy involved the title to land and ought

to be tried in the civil court. Mr. Patton, being dissatisfied with the action of the solicitor in dismissing the case against the plaintiff, contacted the reporter for the defendant and gave out the story which forms the basis of the cause of action here alleged. The defendant published the story. The plaintiff filed separate suits against Mr. Patton and against the defendant.

"It is well settled that all who take part in the publication of a libel or who procure or command libelous matter to be published may be sued by the person defamed either jointly or severally." *Bell v. Simmons,* 247 N.C. 488, 101 S.E. 2d 383.

"That the publication of a libel causing injury to the person defamed is a civil wrong and is embraced within the category of torts may not be gainsaid, and it follows that all those who join in the publication . . . must be regarded in law as joint tort-feasors . . ." *Taylor v. Press Co.,* 237 N.C. 551, 75 S.E. 2d 528.

"There may be responsibility for publication by another, as in the case of . . . (agency) or an express or implied authorization to publish, as where a statement is made to a newspaper reporter." Prosser, Law of Torts, 2d Ed., § 94, p. 600; *Clay v. People,* 86 Ill. 147.

"In North Carolina the consequence of participation in the publication of a libel is joint liability for damages . . ." 41 N.C.L.R. 522.

The release of Patton operated as a release of the News and Observer Publishing Company. "Most of the courts have continued to hold that a release to one of two concurrent tort-feasors is a complete surrender of any cause of action against the other, without regard to the sufficiency of the compensation actually received." Prosser on Torts, 2d Ed., § 46, p. 243.

"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." (citing authorities) *Simpson v. Plyler,* 258 N.C. 390, 128 S.E. 2d 843.

All facts necessary to establish the plea in bar are either alleged or admitted in the plaintiff's pleadings. Hence it became the court's duty to pass on the plea as a matter of law. Judgment sustaining the plea is in accordance with the authorities controlling in this State. This disposition makes it unnecessary to discuss or consider any of the other defenses interposed.

Affirmed.

CEDRIC EARL NEWCOMB AND ANNIE NEWCOMB v. GREAT AMERICAN INSURANCE COMPANY

(Filed 30 October 1963.)

1. Insurance § 47—

A granddaughter living with her parents in her grandmother's home at the time of the accident is a relative "residing" in the grandmother's home notwithstanding the arrangement is temporary and the parents maintain a home to which they intend to repair upon the return home of another member of the grandmother's family, and therefore the granddaughter does not come within the provisions of a policy issued to the grandmother for expenses and medical payments to persons other than the named insured and her relatives resident of the same household.

2. Same—

That section of a policy of insurance providing coverage for medical payments to the named insured and each relative of the named insured, but excluding liability for such injuries while occupying an automobile owned by insured or one furnished for the regular use of insured or any relative, *held* not to cover bodily injury to insured's granddaughter occurring while insured was driving a vehicle owned by the granddaughter's parents.

3. Insurance § 48b—

A policy of collision insurance covering the specified automobile owned by insured or any other automobile unless such other vehicle is owned by insured or any relative does not cover a vehicle owned by insured's daughter and son-in-law and damaged in an accident while being driven by insured.

APPEAL by defendant from *Bundy, J.*, March Session 1963 of WAYNE.

Plaintiff's action is to recover on an automobile insurance policy issued October 1, 1959, by defendant to Mrs. Willie Gray, designated therein as "Named Insured," in which Mrs. Gray's Oldsmobile is designated "owned automobile." The policy was in full force and effect on June 12, 1960.

On June 12, 1960, plaintiffs, husband and wife, owned a Ford. Plaintiff Annie Newcomb is the daughter of Mrs. Gray. On said date, Mrs. Gray was operating plaintiffs' Ford. Wendy Gray Newcomb, four months old, was a passenger in the Ford. Wendy was plaintiffs' daughter and "lived with her parents." While operated by Mrs. Gray, the Ford ran off the road. On account thereof, Wendy received fatal injuries and plaintiffs' Ford was damaged.

In separately stated causes of action, plaintiffs alleged they were entitled to recover (1) for medical, ambulance, hospital and funeral expenses incurred by them on account of their infant daughter's fatal injuries, and (2) on account of collision or upset damage to their Ford.

Plaintiffs base their first cause of action on Part II, Coverage C, and their second cause of action on Part III, Coverage E, of said policy.

The case was submitted on stipulated facts and the policy. In addition to facts included in the foregoing statement, the following facts were stipulated:

> "2. Mrs. Tessie Thompson Gray (the person designated in said policy as Mrs. Willie Gray) was at the time the above policy was issued and at the time of the accident a widow and mother of three children. Both boys were away from home. John Gray, the oldest, was in the Navy, and Bobby Gray was in school at the University of North Carolina. Her daughter, Annie Gray Newcomb, one of the plaintiffs herein, was married in August, 1957. After the wedding, Annie Gray Newcomb and her husband, Cedric Earl Newcomb, the other plaintiff herein, moved into the home of Mrs. Gray. In April, 1958, Cedric Newcomb and his wife, Annie, the plaintiffs, renovated and furnished a house which belonged to Mrs. Gray and which was about one-quarter of a mile distance from Mrs. Gray's home. The plaintiffs lived in this house until March 1959, when Mrs. Gray's mother, who had been living with Mrs. Gray, died. Plaintiffs then returned to Mrs. Gray's home and lived with her until about June or July of 1959, when Bobby Gray came home from the University. Plaintiffs moved out of Mrs. Gray's home and into their own cottage and stayed there about one month until Bobby Gray returned to the University, at which time the plaintiffs moved back into the house with Mrs. Gray and slept, ate, lived and stayed there up to the time of the accident, June 12, 1960. At all times herein mentioned, and since April, 1958, the plaintiffs' cottage has been kept clean and furnished and all utilities have been kept on and ready for habitation. The plaintiffs planned to remove themselves from Mrs. Gray's house and into their cottage when John Gray got out of the Navy or Bobby Gray got out of college, which would have been in 1961."

Pertinent policy provisions will be set forth in the opinion.

It was stipulated that plaintiffs, if entitled to recover, were entitled to recover $354.50 on their first cause of action and $650.00 on their second cause of action.

The court entered judgment that plaintiffs have and recover of defendant $1,004.50, together with interest and costs. Defendant excepted and appealed.

Henson P. Barnes for plaintiff appellees.

Taylor, Allen & Warren and John H. Kerr, III, for defendant appellant.

BOBBITT, J. "Part II—Expenses for Medical Services," on which plaintiffs base their first cause of action, provides in pertinent part:

"Coverage C—Medical Payments. To pay all reasonable expenses incurred . . . for necessary medical, . . . ambulance, hospital, . . . and funeral services:

"Division 1. To or for *the named insured* and each *relative* who sustains bodily injury, . . . including death resulting therefrom, hereinafter called 'bodily injury,' caused by accident, while occupying or through being struck *by an automobile;* (Our italics)

"Division 2. To or for *any other person* who sustains bodily injury, caused by accident while occupying (a) the owned automobile . . .; or (b) a non-owned automobile, if the bodily injury results from (1) its operation or occupancy by the named insured . . . or (2) its operation or occupancy by a relative, . . .

" . . .

"Exclusions. This policy does not apply under Part II to bodily injury: (a) . . .; (b) sustained by the named insured or *a relative* (1) while occupying an automobile *owned by* or furnished for the regular use of either the named insured or *any relative,* other than an automobile defined herein as an 'owned automobile,' or (2) . . ." (Our italics).

"Relative" is defined in "Part I—Liability" of the policy as "a relative of the named insured who is a resident of the same household." It is expressly provided that this definition of "relative" applies to Part II and Part III.

Plaintiffs contend they and their infant daughter were not relatives of the named insured who were residents of the same household and therefore plaintiffs are entitled to recover under Division 2 of Coverage C.

Plaintiffs, daughter and son-in-law of Mrs. Gray, are co-owners of the Ford. They are relatives of the named insured (Mrs. Gray), the daughter by blood and the son-in-law by marriage. Wendy, who sustained the "bodily injury," was the granddaughter of Mrs. Gray and therefore a relative of the named insured by blood. In *Fidelity and Casualty Company of New York v. Jackson,* 4 Cir., 297 F. 2d 230, it was held that the mother-in-law of the named insured, residing with him in the same household, was his "relative" within a similar policy

provision. In accord: *Aler v. Travelers Indemnity Co.* (U.S.D.C. Md.), 92 F. Supp. 620.

While the word "resident" has different shades of meaning depending upon context, *Barker v. Insurance Co.,* 241 N.C. 397, 399, 85 S.E. 2d 305, we think it clear, under the stipulated facts, that plaintiffs, their infant daughter and Mrs. Gray were living together on June 12, 1960, as members of one household, and were then *residents* of the same household within the terms of the policy. *State Farm Mut. Automobile Ins. Co. v. James,* 4 Cir., 80 F. 2d 802; *Aler v. Travelers Indemnity Co., supra; Ransom v. Casualty Co.,* 250 N.C. 60, 108 S.E. 2d 22; Words and Phrases, Permanent Edition, Volume 19, p. 700 *et seq.* Their status is determinable on the basis of conditions existing at the time the casualty occurred. *State Farm Mutual Automobile Insurance Co. v. Ward* (Mo.), 340 S.W. 2d 635.

Plaintiffs, in their allegations, base their first cause of action on the coverage provided in Division 2 of Coverage C. However, this coverage is provided to or for "any other person," that is, to a person other than the named insured or a relative. In view of our decision that plaintiffs and their infant daughter were relatives of the named insured on June 12, 1960, Division 2 of Coverage C has no application. The coverage applicable to plaintiffs and their infant daughter as relatives of the named insured is that provided in Division 1 of Coverage C. Hence, it is appropriate to consider whether plaintiffs are entitled to recover under the provisions thereof.

In our view, the only reasonable construction of the pertinent provisions of Division 1 of Coverage C is as follows: Division 1 of Coverage C provides coverage to or for the named insured and each relative who sustains "bodily injury" while occupying any automobile except (1) an automobile *owned* by either the named insured or *by any relative,* and (2) an automobile furnished for the regular use of the named insured or any relative, other than an automobile defined in the policy as an "owned automobile." Decisions supporting this construction of the coverage provided by Division 1 of Coverage C include the following: *Johns v. State Farm Mutual Automobile Ins. Co.* (Ala.), 146 So. 2d 323; *Moore v. State Farm Mutual Automobile Ins. Co.* (Miss.), 121 So. 2d 125; *Dickerson v. Millers Mutual Fire Ins. Co. of Texas* (La.), 139 So. 2d 785; *Mallinger v. State Farm Mut. Auto. Ins. Co.* (Iowa), 111 N.W. 2d 647; *O'Brien v. Halifax Insurance Co. of Massachusetts* (Fla.), 141 So. 2d 307; *Travelers Indemnity Company v. Hyde* (Ark.), 342 S.W. 2d 295; *McMillan v. State Farm Insurance Company,* 27 Cal. Rptr. 125; *Morton v. Travelers Indemnity Co.* (Cal.), 263 P. 2d 337. Also, see *Aler v. Travelers Indemnity Co., supra.*

The only automobile described in the policy as "owned automobile" was Mrs. Gray's Oldsmobile. Plaintiffs' infant daughter, a relative of the named insured, was injured fatally while occupying the Ford automobile owned by relatives of the named insured, the plaintiffs herein. Hence, plaintiffs may not recover under Division 1 of Coverage C.

Plaintiffs, in their allegations, base their second cause of action on "Part III—Physical Damage," which, in pertinent part, provides:

"Coverage E—Collision. To pay for loss caused by collision to the owned automobile or to *a non-owned automobile* . . ." (Our italics).

"Non-owned automobile" is defined in Part III as "a private passenger automobile . . . *not owned by* . . . either the named insured or *any relative* . . ." (Our italics).

We perceive no ambiguity in the pertinent provisions of Coverage E. *Parker v. Insurance Co.*, 259 N.C. 115, 130 S.E. 2d 36. No collision coverage is provided for plaintiffs' Ford. Plaintiffs' Ford was not the automobile described in the policy as the "owned automobile." Nor was it a "non-owned automobile," as defined in the policy. On the contrary, it was an automobile owned by relatives, to wit, the plaintiffs. Hence, plaintiffs may not recover under Coverage E.

For reasons stated, the judgment of the court below, as to both causes of action, is reversed.

Reversed.

STATE v. MELVIN STILWELL ROGERS.

(Filed 30 October 1963.)

1. Incest; Parent and Child § 1—

In a prosecution for incest, the married mother of the prosecutrix may not testify that defendant, a person not her husband, is the natural father of the prosecutrix, since a mother will not be permitted to bastardize her own issue and testify to illicit relations except in an action which directly involves the parentage of the child, and, the prosecutrix having been born in wedlock, the law will conclusively presume legitimacy in the absence of evidence that the husband was impotent or could not have had access.

2. Incest—

Our statute makes consanguinity the basis of the crime of incest, G.S. 14-178, and therefore a defendant may not be prosecuted under the statute for having carnal relations with his adopted daughter.

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

This is a criminal action in which the defendant was tried upon a bill of indictment charging him with unlawfully, wilfully and feloniously having carnal intercourse with one Corinne (Connie) Rogers, his daughter, knowing such relationship to exist.

The State's evidence tends to show that after a courtship of two or three months, Dorothy Stines (then Dorothy Frye) was lawfully united in marriage with Edgar Weaver on 17 September 1944; that thereafter they lived together as husband and wife. On 14 March 1945, Dorothy Frye Weaver gave birth to Connie Rogers, the prosecutrix, while Dorothy Frye Weaver and her husband, Edgar Weaver, were living together as husband and wife. They continued to live together for some thirteen years, during which time three additional children were born of this marriage.

On 16 December 1955, by and with the written consent of Dorothy Frye Weaver as mother, and Edgar Weaver as father, the Welfare Department of Catawba County entered its final order affirming the adoption of Connie Rogers, the prosecutrix, by the defendant, Melvin Stilwell Rogers, with whom she thereafter resided.

The evidence further tends to show that on 11 May 1962, Connie Rogers, the prosecutrix, and Melvin Stilwell Rogers, the defendant, engaged in sexual intercourse at Mackie's Motel, near Conover in Catawba County.

Mrs. Dorothy Stines (formerly Mrs. Dorothy Frye Weaver) was permitted to testify that before she married Edgar Weaver on 17 September 1944, she had sexual intercourse with the defendant Melvin Stilwell Rogers, and became pregnant as a result thereof; that she was pregnant when she married Edgar Weaver, and that the defendant is the father of Connie Rogers, the prosecutrix.

The jury rendered a verdict of guilty, and from the judgment imposed the defendant appeals, assigning error.

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

Stanley J. Corne and Sheldon M. Roper for defendant.

DENNY, C.J. The indictment upon which the defendant was tried was based upon G.S. 14-178, which reads as follows: "In all cases of carnal intercourse between grandparent and grandchild, parent and child, and brother and sister of the half or whole blood, the parties shall be guilty of a felony, and shall be punished for every such offense

by imprisonment in the State's prison for a term not exceeding fifteen years, in the discretion of the court."

In *S. v. McDowell,* 101 N.C. 734, 7 S.E. 785, it is said: "When a child is born in wedlock the law presumes it to be legitimate, and unless born under such circumstances as to show that the husband could not have begotten it, this presumption is conclusive; but the presumption may be rebutted by the facts and circumstances which show that the husband could not have been the father, as that he was impotent or could not have had access. *S. v. Pettaway,* 3 Hawks, 623; *S. v. Wilson,* 10 Ired., 131; *S. v. Allison,* Phil. Law, 346." *Ewell v. Ewell,* 163 N.C. 233, 79 S.E. 509, Ann. Cas. 1915B 373; *West v. Redmond,* 171 N.C. 742, 88 S.E. 341; *Ray v. Ray,* 219 N.C. 217, 13 S.E. 2d 224; *S. v. Tedder,* 258 N.C. 64, 127 S.E. 2d 786.

"The wife is not a competent witness to prove the non-access of the husband, * * * nor may such be shown by evidence of declarations of the wife. * * * Her testimony and declarations are excluded not only as violative of the confidential relations existing between husband and wife but pursuant to a sound public policy which prohibits the parent from bastardizing her own issue. However, she is permitted to testify as to the illicit relations in actions directly involving the parentage of the child, for in such cases, proof thereof frequently would be an impossibility except through the testimony of the woman." *Ray v. Ray, supra,* and cited cases.

In this case, however, the State offered no evidence of the impotency or nonaccess of the husband. In fact, the State offered evidence tending to show access on the part of the husband and rebutted any inference of impotency by proving that three additional children were born of the marriage between Edgar Weaver and his wife, Dorothy Frye Weaver. Even so, we are confronted with this question: Is a man guilty of incest if he has sexual intercourse with his adopted daughter?

In *S. v. Wood,* 235 N.C. 636, 70 S.E. 2d 665, this Court said: "A father violates G.S. 14-178 and by reason thereof is guilty of the statutory felony of incest if he has sexual intercourse, either habitual or in a single instance, with a woman or girl whom he knows to be his daughter in fact, regardless of whether she is his legitimate or his illegitimate child. *S. v. Sauls,* 190 N.C. 810, 130 S.E. 848; *Strider v. Lewey,* 176 N.C. 448, 97 S.E. 398; *S. v. Laurence,* 95 N.C. 659; *Baumer v. State,* 49 Ind. 544, 19 Am. Rep. 691; *State v. Alexander,* 216 La. 932, 45 So. 2d 83; *State v. Ellis,* 74 Mo. 385; 41 Am.Rep. 321."

"Incest, although punished by the ecclesiastical courts of England as an offense against good morals, is not at common law an indictable offense." Anno: Incest * * *, 72 A.L.R. 2d 706.

The crime of incest is purely statutory, and our statute is based on consanguinity and, therefore, excludes affinity. Our statute is like the incest statute of Michigan and would not include the relationship between a stepfather and his stepdaughter, since their relationship would not be one of consanguinity. *Ex parte Bourne,* 300 Mich. 398, 2 N.W. 2d 439.

In the case of *S. v. Lee,* 196 Miss. 311, 17 So. 2d 277, the defendant was charged with having incestuous relations with his adopted daughter. The Court said: "And what we have here is a criminal prosecution as to which the rule is that the construction is one of strictness in favor of the defendant, and that whatever sense of detestation the court may entertain towards a party upon the facts, courts nevertheless may not impose punishment upon one not within the strict letter of the law. * * *

"It is, therefore, for the legislative department to include an adopted daughter by a plain statute, fixing punishment, not for us to engraft it or read it into one of the existing statutes by way of construction, however much we may think it ought to be somewhere there." *S. v. Winslow,* 208 Miss. 753, 45 So. 2d 574.

"The word 'daughter' means, and is generally understood to mean, 'an immediate female descendant,' and not an adopted daughter, a stepdaughter, or a daughter-in-law." *People v. Kaiser,* 119 Cal. 456, 51 P. 702; 25 C.J.S., page 1005.

In *S. v. Youst,* 74 Ohio App. 381, 59 N.E. 2d 167, the defendant was charged with having sexual relations with his adopted daughter. The Court said: "The relationship was not actually one of father and daughter, * * * but that of adopted daughter, and the fact that she was an adopted daughter could not by the wildest stretch of the imagination constitute her the natural daughter of the accused."

In the present case, Connie Rogers may be the natural daughter of the defendant, but this fact was not so established in the trial below in the manner required by law to establish such fact.

The defendant's conduct, however, in having sexual relations with his adopted daughter, is indeed detestable. It rests, however, within the power of the Legislature to make such conduct incestuous.

The verdict and judgment entered below are

Reversed.

RUTH K. LEWIS, WIDOW AND NEXT FRIEND OF MICHAEL RAY LEWIS; JAMES ELBERT LEWIS, ALPHONSO M. LEWIS, CHILDREN, AND MARY LOUISE LEWIS, CHILD, BY HER NEXT FRIEND, DORA TILLERY; ELBERT LEWIS, DECEASED, EMPLOYEE, v. W. B. LEA TOBACCO COMPANY, INC., EMPLOYER; FIDELITY & CASUALTY COMPANY OF NEW YORK, CARRIER.

(Filed 30 October 1963.)

1. Master and Servant § 53—

The Workman's Compensation Act is not intended to provide general health and accident insurance but to provide compensation only for such injuries to employees which arise out of and in the course of their employment.

2. Master and Servant § 54—

In order to arise out of the employment an injury must spring from the employment, and an injury by accident occurring while the employee is performing acts solely for his own benefit or the benefit of a third person, without any appreciable benefit to the employer, does not arise out of the employment.

3. Master and Servant § 58—

The fact that an employee continues to receive his pay while on an all expense paid pleasure trip does not entitle him to compensation for injuries received while on such trip if the trip is solely for his own benefit or that of a third person.

4. Same—

Evidence that an employee customarily acted as chauffer, cook and valet to an official of the company on the official's trips to his cottage at a resort and that while on such trip he went on a hunting trip with the official's sons and was fatally injured in an automobile accident occurring while he was riding on the back seat of the car owned and operated by one of the sons, *held* insufficient to support a finding that the accident arose out of the employment, the official merely consenting that the employee go on the hunting trip at the request of one of the sons, and the employee not being sent on the trip for the purpose of supervision or protection.

APPEAL by defendants from *Cowper, J.*, January 1963 Regular Civil Session of NASH.

This is a proceeding under the Workmen's Compensation Act.

Elbert Lewis, an employee of W. B. Lea Tobacco Company, Inc., died on 28 November 1959 as a result of injuries received in an automobile accident.

Lewis had been employed by the Tobacco Company for more than ten years. His primary job was to operate a fork lift truck at the Company's place of business at Rocky Mount, North Carolina. About one-fourth of the time he served as chauffeur and utility man for the Com-

pany and its executives. In November 1959 Thomas E. Taylor, office manager for the Tobacco Company, owned a cottage at Kill Devil Hills in Dare County which he had purchased from the Company about a year before. From 1951 until the death of Lewis in 1959 the Company had, on the occasions of Taylor's trips to the cottage at Kill Devil Hills, furnished Lewis as chauffeur, cook and valet for Taylor. Lewis made 15 to 20 trips a year to Kill Devil Hills with Taylor. His services on these occasions was an additional compensation to Taylor from the Company. The Company paid Lewis for an 8-hour day each day he was away from Rocky Mount acting in said capacity for Taylor. On 26 November 1959 Lewis drove Taylor to Kill Devil Hills in a Cadillac belonging to the Company. Lewis was acting pursuant to instructions from his immediate superior, Sterling C. Harris, factory superintendent for the Company. Two sons of Taylor drove to Kill Devil Hills in an automobile belonging to the elder son, Oscar Taylor, who was 21 years old. Taylor and his sons were on a pleasure trip which had no connection with the business of the Tobacco Company. On Saturday morning, 28 November 1959, Lewis and Taylor's sons went on a hunting trip to Engelhard in Oscar Taylor's car. Thomas E. Taylor did not accompany them. His younger son asked him to let Lewis go hunting with them. Lewis went because the son wanted him to go along. The boys knew more about hunting than Lewis did. If Lewis had not gone Taylor would have trusted his sons to go by themselves. Lewis used Taylor's hunting equipment on this occasion. On the return trip to Kill Devil Hills they were involved in an automobile accident and Lewis and the two sons were killed. Oscar Taylor drove the car at all times on this trip. Lewis was in the rear seat.

Dependents of Lewis filed a claim for compensation. The matter was heard by Deputy Commissioner Thomas. He denied compensation. On appeal the full Commission found that Lewis' death resulted from an accident which arose out of and in the course of his employment, and awarded compensation. The superior court affirmed and defendants appeal.

Teague, Johnson and Patterson by Grady S. Patterson, Jr., for defendants, appellants.
No counsel contra.

MOORE, J. The employee, Elbert Lewis, under orders from his employer, Tobacco Company, served as chauffeur, cook and valet for Thomas E. Taylor, office manager for the Tobacco Company, while the latter was on vacation at Nags Head for his own personal pleasure

and on no business for the Company. For the purposes of this appeal we assume, but do not decide, that such services to Taylor were performed in the course of Lewis' employment by the Tobacco Company, within the meaning of the Workmen's Compensation Act. Even so, it is our opinion that there is no competent evidence to support the Industrial Commission's finding that the fatal injury to Lewis arose out of his employment.

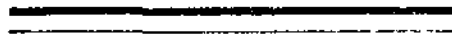
To obtain an award of compensation for an injury under the Workmen's Compensation Act it must be shown that the employee suffered a personal injury which *arose out of* and in the course of his employment. *Anderson v. Motor Co.,* 233 N.C. 372, 374, 64 S.E. 2d 265. The purpose of the act is to provide compensation benefits for industrial injuries; it is not intended to be general health and accident insurance. To be compensable the injury must spring from the employment. *Duncan v. Charlotte,* 234 N.C. 86, 66 S.E. 2d 22. An injury to an employee while he is performing acts for the benefit of third persons is not compensable unless the acts benefit the employer to an appreciable extent. It is not compensable if the acts are performed solely for the benefit or purpose of the employee or a third person. *Guest v. Iron & Metal Co,.* 241 N.C. 448, 85 S.E. 2d 596. The fact that a pleasure trip for the benefit of the employee is without expense to the employee does not entitle him to compensation for injury received while on such trip even if all or a portion of the expense is borne by the employer as a gesture of good will. *Berry v. Furniture Co.,* 232 N.C. 303, 60 S.E. 2d 97; *Hildebrand v. Furniture Co.,* 212 N.C. 100, 193 S.E. 294. Where an employee at the time of his injury is performing acts for his own benefit, and not connected with his employment, the injury does not arise out of his employment. This is true even if the acts are performed with the consent of the employer and the employee is on the payroll at the time. *Bell v. Dewey Brothers, Inc.,* 236 N.C. 280, 72 S.E. 2d 680. If employee's acts are not connected with his employment but are for the benefit of himself and third persons at the time of his injury, he is not entitled to compensation even if he is injured while he is required by his employer to be away from his home and place of regular employment for a period of time on a mission for his employer. *Sandy v. Stackhouse, Inc.,* 258 N.C. 194, 128 S.E. 2d 218.

Lewis was not serving Taylor as chauffeur, cook or valet at the time of the accident which produced his fatal injury. He was on a hunting trip for his own pleasure and the pleasure of Taylor's sons. He was not ordered by Taylor to go hunting. He went because the younger son "wanted him to go with them." Taylor gave his consent. Lewis "didn't go along to teach them (Taylor's sons) how to hunt

. . . the boys knew more about hunting than Elbert (Lewis.)." Taylor would have trusted his sons to go without Lewis. On the trip Lewis rode in the elder son's car. He did not operate the car; he was in the rear seat. He was not furnished as chauffeur, cook or valet for Taylor's sons. They were not agents of the Tobacco Company and had no connection with it. Taylor did not accompany Lewis and the boys on the trip. The hunting trip was no part of Lewis' employment.

It is true that Taylor consented for Lewis to go with his sons and furnished him a gun and other equipment for hunting. Lewis was on the payroll of the Tobacco Company for the day, and he was at Nags Head on orders of his employer. But, as stated above, these facts are not controlling and do not render the injury compensable. *Sandy v. Stackhouse, Inc., supra; Bell v. Dewey Brothers, Inc., supra; Berry v. Furniture Co., supra.* There was no causal connection between the accident and the employment; the accident was not a result of a risk involved in his employment.

The judgment below is
Reversed.



J. T. PARDUE v. BLACKBURN BROTHERS OIL & TIRE COMPANY AND SHELBY MUTUAL INSURANCE COMPANY.

(Filed 30 October 1963.)

1. Master and Servant § 63—

A back injury or hernia suffered by an employee while carrying on his usual and customary duties in the usual way does not arise by accident, but such injury does arise by accident only if there is an interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences.

2. Same—

Findings of the Industrial Commission disclosing what the employee was doing when he suffered a back injury, without findings as to whether such activities were a part of his usual and customary duties or whether they were being performed in the usual manner, or facts from which these matters may be inferred, *held* insufficient to support a finding that the back injury resulted from an accident.

3. Master and Servant § 93—

On appeal to the Superior Court from the Industrial Commission the findings of the Commission supported by competent evidence must be accepted as true and the Superior Court is limited to determining whether

such findings justify the legal conclusions and the decision of the Commission, but in no event may the Superior Court or the Supreme Court consider the evidence for the purpose of finding the facts for itself, and therefore if the findings of the Commission do not include all determinative facts the proceeding must be remanded.

APPEAL by defendants from *Gwyn, J.*, June 1963 Session of WILKES.

Proceedings pursuant to the Workmen's Compensation Act.

Plaintiff, J. T. Pardue, filed claim for compensation for an alleged injury to his back suffered by him in the course of his employment by defendant Tire Company.

Deputy Commissioner Thomas denied compensation. On review the full Commission allowed compensation. The superior court affirmed. Defendants appeal.

Daniel J. Park for plaintiff.
McElwee & Hall for defendants.

MOORE, J. Defendants except to the judgment below on the ground that the conclusions of law and award of the Commission are "not supported by sufficient findings of fact and evidence that appellee sustained an injury by accident."

With respect to plaintiff's duties and the occurrence from which the injury arose, the Commission made only the following findings of fact:

"1. Plaintiff . . . began working for defendant employer on December 28, 1961, his duties being to recap tires.

"2. On February 28, 1962, the plaintiff was mounting a tractor tire on a tractor; that the tire was a large tractor tire; that the plaintiff had taken the tire off the tractor and pumped approximately 50 gallons of fluid into the tire and then was engaging in putting the tire back on the tractor; that the plaintiff had hold of the heavy tire with his left hand up at the top of the tire and with his right hand down toward the bottom of the tire at about the level of his knee and was in a crouched position; that the plaintiff was trying to get the hole in the wheel lined up with the lug bolt in order to tighten the lug bolt; that the plaintiff pushed in with his right hand on the tire and pulled out with his left hand and while in this position he felt a pain in his back; that the plaintiff continued to work on the remainder of the day with his back paining him, but he thought that it soon would wear off.

. . . . . .

"4. The plaintiff sustained an injury by accident arising out of and in the course of his employment with the defendant employer on February 28, 1962, as described in Finding of Fact No. 2, . . ."

A back injury or hernia suffered by an employee does not arise by accident if the employee at the time was merely carrying out his usual and customary duties in the usual way. *Byrd v. Cooperative,* 260 N.C. 215, 132 S.E. 2d 348; *Harding v. Thomas & Howard Co.,* 256 N.C. 427, 124, S.E. 2d 109; *Turner v. Hosiery Mill,* 251 N.C. 325, 111 S.E. 2d 185; *Holt v. Mills Co.,* 249 N.C. 215, 105 S.E. 2d 614; *Hensley v. Cooperative,* 246 N.C. 274, 98 S.E. 2d 289.

In cases involving back injury or hernia the elements constituting accident are the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences. *Faires v. McDevitt and Street Co.,* 251 N.C. 194, 110 S.E. 2d 898; *Moore v. Sales Co.,* 214 N.C. 424, 199 S.E. 605. The following are some of such cases in which it was held that the injuries resulted from accident: *Davis v. Summitt,* 259 N.C. 57, 129 S.E. 2d 588; *Keller v. Wiring Co.,* 259 N.C. 222, 130 S.E. 2d 342; *Searcy v. Branson,* 253 N.C. 64, 116 S.E. 2d 175; *Faires v. McDevitt and Street Co., supra; Harris v. Contracting Co.,* 240 N.C. 715, 83 S.E. 2d 802; *Rice v. Chair Co.,* 238 N.C. 121, 76 S.E. 2d 311; *Smith v. Creamery Co.,* 217 N.C. 468, 8 S.E. 2d 231. Some of such cases in which the facts of the occurrence were held insufficient to constitute accident are listed in the preceding paragraph of this opinion.

The facts found by the full Commission are supported by competent evidence. But there are not sufficient findings to support the conclusion that plaintiff sustained an injury by accident. The Commission found that it was plaintiff's job to recap tires. It does not appear in the findings whether the activities in which plaintiff was engaged at the time of his injury were a part of his usual and customary duties or whether they were being performed in the usual manner, nor are there findings of fact from which these matters may be inferred. There are no findings of fact respecting plaintiff's job from which it may be seen with reasonable specificity what his usual and customary duties were, and from which it may be determined whether the occurrence which caused his injury involved an interruption of routine and the introduction thereby of unusual conditions likely to result in unexpected consequences.

If the findings of fact of the Industrial Commission are supported by competent evidence and are determinative of all of the questions at issue in the proceeding, the court must accept such findings as final

truth and merely determine whether they justify the legal conclusions and decision of the Commission. But in no event may the superior court or this Court consider the evidence in the proceeding for the purpost of finding the facts for itself. *Brice v. Salvage Co.*, 249 N.C. 74, 105 S.E. 2d 439. The Commission is not required to make a finding as to each detail of the evidence or as to every inference or shade of meaning to be drawn therefrom. But specific findings of fact by the Commission are required. These must cover the crucial questions of fact upon which plaintiff's right of compensation depends. *Guest v. Iron & Metal Co.*, 241 N.C. 448, 85 S.E. 2d 596. If the findings of fact of the Commission are insufficient to enable the Court to determine the rights of the parties upon the matters in controversy, the proceeding must be remanded to the end that the Commission make proper findings. *Brice v. Salvage Co., supra; Farmer v. Lumber Co.*, 217 N.C. 158, 7 S.E. 2d 376.

This cause is remanded to the superior court with direction that an order be entered consigning it again to the Industrial Commission for findings of fact determinative of all questions at issue.

Error and remanded.

WACHOVIA BANK & TRUST COMPANY, EXECUTOR OF THE WILL OF ERNEST LYNDON MCKEE, JR., DECEASED v. ERNESTINE N. MCKEE, ANN MCKEE, MINOR; ERNEST LYNDON MCKEE, III, MINOR; AND ARTHUR WILLIAM MCKEE, MINOR.

(Filed 30 October 1963.)

1. Wills § 32—

A will takes effect and speaks as of the date of testator's death.

2. Wills § 64—

Testator had three children, one living at the time of the execution of the will, one born some four days thereafter, and the third was born almost three years thereafter. Testator died more than eleven years after the birth of the third child. The will left all of testator's property to his wife without making any provision for testator's children and there was nothing in the will itself to show that testator's failure to make provision for the children was intentional. *Held:* The two afterborn children are entitled to share in testator's estate as though he had died intestate. G.S. 31-5.5.

APPEAL by guardian *ad litem* for Ernest Lyndon McKee, III, and Arthur William McKee from *Martin, S.J.*, January, 1963 Civil Term, BUNCOMBE Superior Court.

The plaintiff, executor of the Ernest Lyndon McKee will, instituted this civil action for the purpose of having the Court, by declaratory judgment, determine whether testator's two sons, above named, born after the execution of the will, are entitled to share in their father's estate as if he had died intestate.

The controversy involves the following holographic will:

> "I, Ernest Lyndon McKee, Jr., declare this to be my last will and testament.
>
> "I bequeath and devise all of my property and belongings to my beloved wife, Ernestine McKee.
>
> "I appoint Wachovia Bank and Trust Company, Asheville, N. C. my executor.
>
> "This the twenty-eighth day of January, 1949.
>
> "S/Ernest Lyndon McKee, Jr."

The testator and Ernestine N. McKee were married on July 11, 1942. They lived together until his death on April 9, 1961. A daughter, Ann McKee, was born June 20, 1945. Ernest Lyndon McKee, III, was born February 2, 1949. Arthur William McKee was born November 20, 1951.

Inventory of the testator's estate discloses probate assets amounting to $175,000.00. In addition, the widow was the beneficiary in life insurance policies amounting to $42,000.00. The home in Asheville, held by the entireties, went to her as survivor. Its value is not disclosed.

Judge Martin, upon the facts stipulated, concluded:

> "3. The omission of E. Lyndon McKee, Jr., to make provisions by his will for his then living child, Ann McKee, or for his child Ernest Lyndon McKee, III, then *enciente sa mere,* constituted a class exclusion of all his children, living or afterborn.
>
> "4. Neither Ann McKee, Ernest Lyndon McKee, III, nor Arthur William McKee is entitled to share in the distributive probate estate of E. Lyndon McKee, Jr., and Ernestine N. McKee is entitled to the whole of such distributive estate under the will of E. Lyndon McKee, Jr."

Upon the foregoing conclusions, the court entered judgment that the will devised the entire estate to the widow, Ernestine N. McKee, and ordered distribution accordingly. The guardian *ad litem* for the two

sons born subsequent to the execution of the will excepted and appealed.

Francis J. Heazel, Attorney and Guardian ad litem for Defendants Ernest Lyndon McKee, III, and Arthur William McKee, minors, appellant.

Adams & Adams by J. G. Adams, Jr., for defendant Ernestine N. McKee, appellee.

HIGGINS, J. A will takes effect and speaks as of the date of the testator's death. *Vandiford v. Vandiford,* 241 N.C. 42, 84 S.E. 2d 278. Ernest Lyndon McKee executed his will on January 28, 1949. He died on April 9, 1961. His will in unmistakeable terms gave all his property and belongings to his wife, Ernestine N. McKee. On the day the will was executed the testator and his wife had one child, a daughter Ann, then three years and eight months of age. Four days after the execution of the will, Ernest Lyndon McKee, III, was born. Less than two years thereafter, another son, Arthur William McKee, was born.

The law in effect at the testator's death provided: "A will shall not be revoked by the birth of a child . . . after the execution of the will, but any afterborn . . . child shall be entitled to such share in testator's estate as it would be entitled to if the testator had died intestate, unless: (1) the testator made some provision in the will for the child, whether adequate or not, or (2) it is apparent from the will itself that the testator intentionally did not make specific provision for such child." G.S. 31-5.5; *Johnson v. Johnson,* 256 N.C. 485, 124 S.E. 2d 172.

In simple terms, a child born after the will is executed takes as in case of intestacy, unless (1) provision is made for it in the will, or (2) it appears from the will itself that the testator's failure to make provision was intentional. Certain it is, that the testator in the will did not make provision for any afterborn child. It is equally certain the will itself does not disclose whether this failure was intentional or unintentional. Afterborn children, in fact all children, are ignored in the will. Hence we cannot say the will discloses an intent to exclude afterborn children. We are limited to the will as the source from which intent to exclude must appear. Such intent does not appear from the will. The law is so written. We must so apply it.

It appears from the foregoing analysis that the judgment of the Superior Court must be reversed and the case remanded for judgment that the two afterborn children take as in case of their father's intestacy.

The members of the Court enter with reluctance a judgment which excludes Ann from sharing in her father's estate. The mother in all likelihood will see to it that Ann's disadvantage is more apparent than real.

Reversed.

H. WELDON WAGONER v. ANNIE MAE EVANS

(Filed 30 October 1963.)

1. Wills § 56—

Testatrix, owning two tracts of land, devised the smaller by its name to her son, stating that it contained 100 acres, and also devised to him 10 acres to be cut from the larger tract, and devised the "remaining 110 acres" of the named larger tract to her daughter. The smaller tract actually contained 74.5 acres and the larger contained 118 acres. *Held:* The discrepancy in acreage is not controlling and each devisee took the named tract devised to him respectively, subject to the 10 acre adjustment.

2. Boundaries § 2—

The number of acres supposed to be contained in a tract is the least reliable of all descriptive particulars to ascertain boundaries and cannot control boundaries which are otherwise defined.

APPEAL by plaintiff from *Shaw, J.*, November 1962 Civil Session of YADKIN.

Action for a declaratory judgment to construe a will. Plaintiff and defendant, brother and sister, are the sole beneficiaries under the will of their mother, Mary Jane Wagoner who died in 1962. She devised the fee in her realty as follows:

". . . (I)t is my will and desire that my son, H. Weldon Wagoner, and my daughter, Annie Mae Evans, shall have the 220 acres of land now owned by me, and that the same shall be divided as follows: That H. Weldon Wagoner shall have and own in fee simple the 100 acres known as the W. F. Bryant farm, including the home place in which he now lives, and in addition thereto shall have laid off from the J. A. Wagoner tract of land adjoining the Bryant place 10 acres, and it is my will and desire that my daughter, Annie Mae Evans, shall have the remaining 110 acres of the J. A. Wagoner lands, including the home place where I now live. That in order to make myself clear, I desire that each

child shall have 110 acres of land in fee simple, H. Weldon Wagoner to have the old Bryant place, on which he now lives, plus 10 acres to be laid off adjoining the Bryant place, to be taken from the 120 acres known as the J. A. Wagoner land, but that this 10 acres shall not include any buildings, which 10 acres shall adjoin the Bryant place on the East, and that the remaining 110 acres of land, including the home place and all buildings, shall be and belong unto Annie Mae Evans in fee simple, to be hers absolutely to do with as she pleases."

Plaintiff contends that the will gives him a one-half undivided interest in all the lands devised. Defendant contends that plaintiff takes only the Bryant farm, plus ten adjoining acres without buildings, to be laid off from the J. A. Wagoner tract and that she takes the Wagoner place less those ten acres. The parties waived a jury trial. Judge Shaw heard the matter on the pleadings which incorporated the will and, by consent, entered a judgment on January 14, 1963 out of term and out of the district. His judgment construed the will in accordance with defendant's contentions. On January 23, 1963 plaintiff moved the court to find as an additional fact that Mrs. Wagoner died owning a total of 192.5 acres of real property consisting of 74.5 acres known as the W. F. Bryant place and 118 acres referred to in the will as the "J. A. Wagoner land." The judge ruled that all matters in controversy had been determined by the judgment already entered and denied the motion. Plaintiff appealed from the judgment and the denial of his motion.

Henderson & Yeager for plaintiff appellant.
Allen, Henderson & Williams for defendant appellee.

PER CURIAM. The additional facts which plaintiff requested the court to find appear in the record only in the plaintiff's unverified motion filed nine days after the judgment had been entered. The judge was correct in overruling this motion. However, even if we assume that the Bryant farm contains only 74.5 acres instead of the 100 acres the testator apparently thought it contained, this discrepancy in acreage makes no difference. It is clear from the will that the devisor intended that plaintiff should have the Bryant farm and the designated ten acres from the J. A. Wagoner place irrespective of the acreage contained in each. These two farms are distinct parcels. Mrs. Wagoner and her husband who predeceased her had owned them a number of years, and she was familiar with each. In her opinion, the Bryant farm plus ten acres made the plaintiff equal with the defendant.

A testator's misconception as to the number of acres in a specifically named tract cannot control the boundaries which define it. "The excess or the deficiency in the number of acres supposed to be in the tract, may, in doubtful cases, aid in determining the boundaries, but when at variance with them must be disregarded as a mistake of the party." *Lyon v. Lyon,* 96 N.C. 439, 2 S.E. 41; *Ellis v. Harris,* 106 N.C. 395, 11 S.E. 248; *Brown v. Hamilton,* 135 N.C. 10, 47 S.E. 128. In *Woods v. Woods,* 55 N.C. 420, it was held that a devise of "the tract of land whereon I now live and reside, containing two hundred and twenty-five acres, more or less" conveyed the testator's homeplace even though it contained between four hundred and five hundred acres. If a tract of land has a name by which it is known to the testator, his devise of the tract by that name will pass the title to it even though he erroneously stated its acreage. "Quantity is the least reliable of all descriptive particulars in a conveyance and is the last to be resorted to." 8 Am. Jur., Boundaries, § 63.

The judgment of the court that plaintiff owns the W. F. Bryant farm plus the specified ten acres from the J. A. Wagoner tract and that defendant owns the J. A. Wagoner tract less the ten acres to be laid off to the plaintiff is

Affirmed.

BIBB T. PRIDDY v. KERNERSVILLE LUMBER COMPANY, INC.

(Filed 30 October 1963.)

1. Estoppel § 4—

The fact that the mortgagee, after filing the last and highest bid at the sale of the property in the foreclosure of a materialman's lien, takes possession of the property has no bearing upon whether the mortgagee is estopped from attacking the materialman's lien for fraud, since after default the mortgagee is entitled to possession under his mortgage irrespective of any foreclosure sale.

2. Appeal and Error § 60—

Where the Supreme Court has held that a mortgagee was not estopped from attacking the validity of a materialman's lien, the decision becomes the law of the case, and an appeal from order of the Superior Court in conformity with the decision will be dismissed in the absence of new evidence sufficient to affect the ruling.

APPEAL by defendant from *Johnston, J.,* May 20, 1963, Session of FORSYTH.

Fred M. Parrish, Jr. and Weston P. Hatfield for plaintiff.
Frank C. Ausband and Clyde C. Randolph, Jr., for defendant.

PER CURIAM. W. A. Davis and wife began in 1959 the construction of a house on a lot owned by them. Defendant furnished some or all of the building materials. Plaintiff made loans to Davis and wife of $8500 on 19 October 1960, and $1500 on 15 June 1961, secured by deeds of trust on the house and lot, recorded on the dates of their execution. On 25 September 1961 defendant filed a materialman's lien against this property in the amount of $4995.88, setting out that the materials were furnished under an indivisible contract, that the first materials were furnished 14 May 1959, and the last 24 April 1961. The last three items were of insignificant value, furnished at intervals of almost six months apart—the final item was furnished almost six months before the lien was filed. On 21 February 1962 defendant instituted an action against Davis and wife to enforce the lien. Plaintiff was not made a party. Judgment by default was entered 28 March 1962. Execution issued and the sheriff offered the property for sale at public auction on 25 May 1962. Plaintiff was the highest bidder at the price of $6100.

On 29 May 1962 plaintiff instituted the present action to establish the priority of his deeds of trust over defendant's lien, alleging that, to defraud plaintiff, defendant had included in its claim of lien the last three items listed therein which were furnished subsequent to the completion of its contract for the mere purpose of extending the time for filing lien. Plaintiff prayed for an order restraining the completion of the execution sale. A temporary restraining order was issued to that end. Defendant entered a general denial, and pleaded that by bidding at the sale plaintiff was estopped to attack the sale and the judgment pursuant to which the sale was made.

The parties waived jury trial. The superior court found that defendant's lien was entitled to priority and dissolved the restraining order. Plaintiff appealed.

We heard the appeal at the Fall Term 1962. *Priddy v. Lumber Co.*, 258 N.C. 653, 129 S.E. 2d 256. Reference is made to the opinion, delivered by Justice *Sharp* and filed 1 February 1963, for a more detailed recital of the pleadings, evidence, judgment of superior court and opinion of this Court. We held, upon the evidence adduced at the trial in superior court, that the purpose of the disputed items in defendant's claim of lien (the last three items) was to extend the time for filing lien and not in good faith for completion of the contract, that defendant's attempts to extend the time for filing lien constituted

constructive fraud, and that defendant's plea of estoppel does not apply since defendant has not changed its position in reliance on plaintiff's bid. We decreed a new trial and suggested that plaintiff "would be well advised to move below to be allowed to withdraw his bid" (citing *Glass Co. v. Forbes*, 258 N.C. 426, 128 S.E. 2d 875).

Thereafter defendant filed motion and alleged that plaintiff had taken possession of the property, was collecting rents for which he had not accounted, and that this amounted to a ratification of the sale and his bid and worked an estoppel to attack the judgment under which the sale was made and rendered the question of priority of liens moot. Defendant prayed that the restraining order be dissolved, the sale be affirmed, and plaintiff's action be dismissed.

Following this, plaintiff moved for leave to withdraw his bid.

The court granted plaintiff's motion, denied defendant's motion, appointed a receiver for the property, and ordered plaintiff to account to the receiver for rents collected (less proper disbursements for expenses). Defendant appeals.

The new trial ordered by this court has not been held. There has been no material change in circumstances since the former appeal, so far as the record on the present appeal discloses. Apart from his bid at the sale, plaintiff as mortgagee had the right to possession of the mortgaged property subject to his duty to account for rents. In granting plaintiff's motion for leave to withdraw his bid, the court below was exercising a discretion that we had indicated was proper under the circumstances. Defendant's appeal is, in effect, a mere petition to rehear the former appeal. Defendant seeks only to establish its plea of estoppel—a matter we ruled on in our former opinion; our ruling must stand unless defendant is able to establish it upon the retrial by evidence which has not so far come to our attention.

Appeal dismissed.

THE REDEVELOPMENT COMMISSION OF WINSTON-SALEM v. S. O. HINKLE AND WIFE, FANNIE M. HINKLE.

(Filed 30 October 1963.)

1. Eminent Domain § 6—

Whether the price the owner paid for the property has any probative force in determining its value in condemnation proceedings is dependant upon the similarity of conditions at the time of purchase and at the time

of the inquiry, and when the evidence discloses the elapse of some ten years between the two dates and material changes in the property by enlargements and additions to buildings by the owner, the exclusion of evidence tending to show the price the owner paid for the property will not be held for error.

2. Eminent Domain § 5—

An instruction that just compensation must be full and complete and that respondent is entitled to be put in as good position pecuniarily as if the property had not been taken will not be held for error when the charge, construed contextually, makes clear that just compensation is the fair market value of the property as thereafter correctly defined by the court.

APPEAL by petitioner from *Johnston, J.*, July 8, 1963 Session of FORSYTH.

Petitioner, having the power of eminent domain, took possession of two tracts of land purchased by defendants in 1952. It instituted this action in 1962 to ascertain the amount it was required to pay for the property taken. Commissioners were appointed. They fixed defendants' damage at $37,000. The clerk ordered that sum paid. Petitioner and defendants excepted and appealed.

The jury in the Superior Court fixed the value of the property taken at $47,000. Judgment was entered on the verdict. Petitioner, having noted exceptions, appealed.

Weston P. Hatfield and C. Edwin Allman, Jr., for petitioner appellant.

Deal, Hutchins and Minor by Fred S. Hutchins for respondent appellees.

PER CURIAM. Petitioner offered in evidence deeds conveying the property to defendants. When the evidence was offered, counsel for petitioner, in response to an inquiry by the court as to the purpose for which the evidence was offered, said "for the purpose of showing from the stamps thereon what the respondents paid for the property." The court excluded the evidence. True, as argued by petitioner, the amount voluntarily paid by a purchaser is some evidence of value at that time. *Palmer v. Highway Comm.*, 195 N.C. 1, 141 S.E. 338. Its probative value at a later date depends upon similarity of conditions at the time of purchase and at the time of inquiry. Here nearly ten years had elapsed between the purchase and the time defendants were forced to sell. No evidence was offered tending to show similarity of conditions at the different times. To the contrary, petitioner's evidence shows some

enlargement and additions to the buildings made by defendants subsequent to their purchase. The exclusion of the evidence for the purpose offered was not erroneous.

The court charged the jury: "When private property is taken for public use, JUST COMPENSATION must be paid . . . . (The compensation must be full and complete and include everything which affects the value of the property that is taken and in relation to the property that is taken the respondent is entitled to be put in as good position pecuniarily, or monetarily speaking, as if the property had not been taken . . . .) Now, Members of the Jury, you are going to want to know what is meant by the term JUST COMPENSATION, just announced to you, and the Court instructs you that the FAIR MARKET VALUE of property is the yardstick by which compensation for the taking of the property is to be measured. FAIR MARKET VALUE is the price it will bring when it is offered for sale by one who desires but is not obliged to sell it and is bought by one who desires to purchase it but is under no necessity of having it."

Petitioner assigns as error that portion of the charge included in parenthesis. When the charge is read as a whole it is manifest the jury could not have misunderstood that this was but another way of saying to the jury that the condemnor would have to pay the fair market value as fair market value was defined by the court. The portion of the charge here assigned as error was likewise challenged in *Williams v. State Highway Comm.*, 252 N.C. 514, 114 S.E. 2d 340. It was there approved. Seemingly the language challenged had its origin in the opinion written by Mr. Justice Butler in *Olson v. U. S.*, 292 U.S. 246, 78 L. Ed. 1236. It was recently quoted approvingly by Mr. Justice Stewart in *U. S. v. Va. Electric & Power Co.*, 365 U.S. 624, 5 L. Ed. 2d 838. This assignment is not sustained.

We have examined the other assignments of error. We find nothing which would justify a new trial.

No error.

GEORGE L. BRANNOCK AND HOYT C. HOILMAN v. ZONING BOARD OF ADJUSTMENT: J. A. HANCOCK, CHAIRMAN; CARL DULL, JR., VICE CHAIRMAN; ROY SETZER; A. T. HARRINGTON; C. C. SMITHDEAL, JR.; DOUGLAS B. ELAM; AND WILLIAM F. THOMAS.

(Filed 30 October 1963.)

1. Administrative Law § 3; Municipal Corporations § 26—

The fact of changes in membership of a municipal board of adjustment between the date of the original hearing and the date of approval of an application granting a discretionary permit, is immaterial, since changes in membership of an administrative board do not break the continuity of the board.

2. Municipal Corporations § 25—

The issuance of a building permit by a municipal board of adjustment within its discretionary power under the zoning code will not be disturbed on appeal when the board makes ample findings to sustain the action.

APPEAL by petitioners from *Fountain, J.*, July 22, 1963 Civil Term (Second Week) FORSYTH Superior Court.

On May 28, 1962, J. C. Caudle, owner of a vacant lot on the south side of Cornwallis Street near the old Rural Hall Road in Winston-Salem, applied to the zoning authorities for a special permit to use the lot for automobile parking purposes. The lot is in an area zoned Residence A-2 but is adjacent to a Business B district. The Zoning Director approved the plan. After notice and hearing, the Zoning Board of Adjustment ordered that a special permit be issued.

The petitioners, owners of lots across the street, applied to the Superior Court for and obtained a *writ of certiorari* to review the order granting the permit. After hearing, the Superior Court remanded the proceeding to the Zoning Board of Adjustment for further consideration. After a further hearing and findings, the Board approved the plan and issued the permit. Upon review in the Superior Court, Judge Fountain made detailed findings and adjudged: ". . . (T)hat the action of the Zoning Board of Adjustment of Winston-Salem approving the issuance of a special use permit to J. C. Caudle to use the property referred to in the application as an automobile parking lot under section 48-13(a)(8) of the Winston-Salem City Code be and the same is hereby affirmed."

From this order the petitioners appealed.

Weston P. Hatfield, C. Edwin Allman, Jr., for petitioner appellants.

Womble, Carlyle, Sandridge & Rice by W. F. Womble for respondent appellees.

PER CURIAM. The petitioners raise a number of objections to the granting of the special use permit, among them that the membership of the Zoning Board of Adjustment changed between the original hearing and the final approval of the application. However, the changes in membership did not break the continuity of the Board. The new members had access to the minutes and records of the various hearings and the required majority participated and joined in all decisions. The Zoning Code provides the conditions under which special permits may issue. The findings are ample to sustain the action of the Zoning Board of Adjustment in issuing the special use permit under its discretionary powers. The order of Judge Fountain is

Affirmed.

MARY SAWYER WEAVER, ADMINISTRATRIX OF THE ESTATE OF JACKIE WEAVER v. R. J. BENNETT AND WELDON O. PARRISH.

(Filed 30 October 1963.)

1. Appeal and Error § 60—

Decision on appeal that the evidence was sufficient to be submitted to the jury on the issue of contributory negligence is the law of the case and requires the submission of the issue upon evidence at the retrial which is at least as favorable to defendant as that upon the original trial.

2. Negligence § 25—

In determining the sufficiency of evidence of contributory negligence to require the submission of that issue to the jury, the evidence must be considered in the light most favorable to defendant.

APPEAL by plaintiff from *Johnston, J.*, May 13, 1963 Session of FORSYTH.

At Spring Term 1963, this Court, on plaintiff's appeal, reversed the judgment of involuntary nonsuit entered at the conclusion of plaintiff's evidence upon trial at January 22, 1962 Term of Forsyth Superior Court. See *Weaver v. Bennett*, 259 N.C. 16, 129 S.E. 2d 610, for a discussion of the pleadings and factual background.

Upon retrial in the superior court, issues of negligence, contributory negligence and damages were submitted. The jury answered the negligence issue, "Yes," and answered the contributory negligence issue, "Yes." In accordance with this verdict, the court entered judgment providing that plaintiff recover nothing of defendants, dismissing the

action and taxing plaintiff with the costs. Plaintiff accepted, appealed and assigns errors.

Deal, Hutchins & Minor and W. Scott Buck for plaintiff appellant.
Hudson, Ferrell, Petree, Stockton, Stockton & Robinson for defendant appellees.

PER CURIAM. Plaintiff assigns as error the submission of the contributory negligence issue and stresses her contention that the evidence was insufficient to support a jury finding that her intestate was contributorily negligent.

On former appeal, it was contended by defendants that the judgment of involuntary nonsuit should be affirmed on the ground, *inter alia,* that plaintiff's evidence disclosed her intestate was contributorily negligent as a matter of law. This Court said: "Careful consideration impels the conclusion that the evidence, when considered in the light most favorable to plaintiff, is sufficient to require submission for jury determination of issues as to the alleged negligence of Parrish and as to the alleged contributory negligence of Weaver." It is well settled that "a decision of this Court on former appeal constitutes the law of the case in respect to the questions therein presented and decided, both in subsequent proceedings in the trial court and on subsequent appeal upon substantially the same evidence." *Glenn v. Raleigh,* 248 N.C. 378, 103 S.E. 2d 482; *Maddox v. Brown,* 233 N.C. 519, 64 S.E. 2d 864.

The evidence on retrial tending to show the alleged contributory negligence of plaintiff's intestate was at least as favorable to defendants as the evidence considered by this Court on former appeal. In some respects, the evidence on retrial was more favorable to defendants. Moreover, apart from the foregoing rule as to "the law of the case," we adhere to the view that the evidence was sufficient to require submission of the contributory negligence issue. In determining this question, the evidence must be considered in the light most favorable to defendants. Strong, N. C. Index, Negligence § 25, and cases cited.

The other assignments of error brought forward by plaintiff challenge certain of the court's rulings on evidence and instructions to the jury. Each has been carefully considered. However, these assignments of error do not disclose prejudicial error and discussion thereof is deemed unnecessary.

No error.

MARTHA BRADY BRUTON v. ROBERT R. BLAND, JR., T/A AND DOING BUSINESS AS BLAND MUSIC STORE.

(*Filed 30 October 1963.*)

1. Election of Remedies §§ 1, 4—

Within a reasonable time after the discovery of fraud inducing the purchase of a chattel the purchaser must either rescind the sale and recover the consideration paid or affirm the sale and recover the difference between the value of the chattel if it were as represented and its actual value at the time of the sale, and when the purchaser continues to use the chattel for two years after discovery of the misrepresentation the remedy of rescission is no longer available.

2. Sales § 15—

Where plaintiff's evidence is sufficient to take her case to the jury on the issue of actionable fraud inducing her purchase of a chattel, nonsuit is improperly entered even though plaintiff prays for the relief of rescission and plaintiff's evidence shows a delay barring that relief, since the prayer for relief is not controlling and plaintiff's allegation and evidence are sufficient to make out a case on the issue of actionable fraud and damages.

APPEAL by plaintiff from *McLaughlin, J.*, January 21, 1963 Session of FORSYTH.

Action to rescind a sale of personal property. Plaintiff, a piano teacher, alleged and offered evidence tending to show that on March 4, 1950 she purchased a Steinway Grand piano from defendant; that relying upon the representation of his salesman that the piano was a new one, she paid defendant $3,365.00, the price of a new piano; that in the fall of 1958 the veneer on the piano began to deteriorate and on March 23, 1959 she discovered that it was over eighteen years old at the time she purchased it and worth only $1,500.00. Defendant, who was not an authorized Steinway dealer, conceded that the piano was a used one but he denied that it was ever represented to be new. When called as an adverse witness by the plaintiff at the trial, defendant's testimony tended to show that the plaintiff had damaged the piano by the continuous application of lemon oil furniture polish and by moving it from Siler City to an upstairs garage apartment in Tabor City. Plaintiff testified that after March 23, 1959 she went to defendant and said: "I came to you as a customer that has paid a good fair price, and I feel like that you should do something in return." He referred her to his attorney.

On March 30, 1961 plaintiff instituted this action to rescind the sale contract on the grounds of fraud in its procurement and to re-

cover the purchase price of the piano. At the close of plaintiff's evidence the judge nonsuited the case and plaintiff appealed.

George W. Gordon for plaintiff appellant.

Deal, Hutchins & Minor by Fred S. Hutchins and Edwin T. Pullen for defendant appellee.

PER CURIAM. When a person discovers that he has been fraudulently induced to purchase property he must choose between two inconsistent remedies. He may repudiate the contract of sale, tender a return of the property, and recover the value of the consideration with which he parted; or, he may affirm the contract, retain the property, and recover the difference between its real and its represented value. He may not do both. Once made, the election is final. The election must be made "promptly and within a reasonable time after the discovery of the fraud, or after he should have discovered it by due diligence. . . ." *May v. Loomis,* 140 N.C. 350, 52 S.E. 728; *Hutchins v. Davis,* 230 N.C. 67, 52 S.E. 2d 210; *Parker v. White,* 235 N.C. 680, 71 S.E. 2d 122.

In this case, plaintiff regularly used the piano for over nine years before she discovered it was not a new instrument. Thereafter she continued to use it in teaching for two more years before instituting this action to recover the full purchase price. By such continued use she thereby elected to affirm the contract. She may not now rescind. Hence, she is not entitled to the relief prayed for in the complaint.

However, it is well settled that where the facts *alleged and proven* do not entitle the party to the only relief prayed but do give him a right to other relief, he may recover the judgment to which he is entitled. *Woodley v. Combs,* 210 N.C. 482, 187 S.E. 762; *Board of Education v. Board of Education,* 259 N.C. 280, 130 S.E. 2d 408. In *Knight v. Houghtalling,* 85 N.C. 17, defendants sought to rescind their contract for the purchase of land in plaintiffs' action to foreclose a purchase money mortgage. The answer contained but a single prayer for relief—rescission for fraudulent misrepresentations. A jury verdict established the fraud. The Court held that defendants' failure to act promptly after they discovered the fraud barred their right to rescind the contract, but the case was remanded in order that defendants' damages resulting from the fraud might be determined. The Court said:

> "But we understand that, under the Code system, the demand for relief is made wholly immaterial, and that it is the case made

by the pleadings and the facts proved, and not the prayer of the party, which determines the measure of relief to be administered, the only restriction being that the relief given must not be inconsistent with the pleadings and proofs."

Although she may not now rescind her contract of purchase, plaintiff's complaint and evidence were sufficient to take her case to the jury on the issues of actionable fraud and damages. The judgment of nonsuit is

Reversed.

NEWTON ALLEN, MRS. BESSIE ALLEN JACKSON AND MRS. HILDA ALLEN WHITE v. JOYCE NEWTON ALLEN, A MINOR.

(Filed 30 October 1963.)

Deeds § 13—

A deed to the grantee for life and at her death to her children does not include a child adopted by the grantee after execution of the deed as one of the members of the class to take by remainder. G.S. 48-23(a) has no application since the deed was executed prior to its enactment.

APPEAL by defendant from *Hobgood, J.*, at Chambers April 6, 1963, in Louisburg, North Carolina. From PERSON.

Action pursuant to the Declaratory Judgment Act for construction of a deed.

Burns, Long & Burns for plaintiffs.
R. B. Dawes, Jr., and Charles B. Wood for defendants.

PER CURIAM. On 15 December 1922 A. E. Newton executed and delivered to his daughter, Maggie Newton Allen, a deed conveying a tract of land "to Maggie Newton Allen, during her life, and at her death to her children." At the time of the execution and delivery of the deed Maggie Newton Allen was married and had three young children, the plaintiffs in this action. The grantor, A. E. Newton, died in 1943. On December 20, 1959, Maggie Newton Allen and her husband legally adopted Joyce Newton Allen, the defendant in this action. Joyce Newton (Allen) is the natural niece of Maggie Newton Allen and the natural granddaughter of A. E. Newton—at the time of her adoption her natural father was dead and her natural mother incom-

petent. Maggie Newton Allen died intestate on 11 March 1962 leaving surviving her the plaintiffs, who are her natural children, and the defendant, her adopted child.

The complaint presents only one question for decision: "Does the defendant, who is a child adopted after the execution and delivery of the . . . deed, fall within the term 'children' as used in said deed?"

The facts, as set out above, were stipulated by the parties. The court adjudged that the plaintiffs "are the owners in fee simple of the property described in . . . the complaint . . ., and that the defendant, Joyce Newton Allen, has no right, title or interest therein by virtue of the . . . deed."

The judgment of the court below is affirmed under authority of *Thomas v. Thomas*, 258 N.C. 590, 129 S.E. 2d 239. See also *Smyth v. McKissick*, 222 N.C. 644, 24 S.E. 2d 621. The second sentence of G.S. 48-23(a) was not enacted until 1955, and has no application to this deed executed in 1922.

Affirmed.

BILLY FRANKLIN RUSSELL v. HAZEL WHITE.

(Filed 30 October 1963.)

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

This is a civil action instituted by the plaintiff to recover damages for property loss and personal injuries alleged to have been caused by the negligent acts of the defendant's son while operating a family purpose automobile.

The collision occurred on 6 February 1962 about 8:50 a.m. at the intersection of Cox Avenue and Burton Streets in the City of Thomasville, North Carolina. The plaintiff was traveling east on Burton Street and the defendant's son was driving her car north on Cox Avenue. Defendant's son entered the intersection on plaintiff's right.

The defendant answered and denied negligence, pleaded contributory negligence, and set up a counterclaim against the plaintiff for certain medical expenses incurred by passengers in the defendant's automobile and for property damages to her automobile.

At the close of plaintiff's evidence the court allowed defendant's motion for judgment as of nonsuit and proceeded to hear the defendant's evidence on the counterclaim.

The jury returned a verdict in favor of the defendant, and from the judgment entered on the verdict the plaintiff appeals, assigning error.

Wilson & Saintsing for plaintiff appellant.
Deal, Hutchins & Minor for defendant appellee.

PER CURIAM. The sole assignment of error is to the ruling of the court below in sustaining the defendant's motion for judgment as of nonsuit at the close of plaintiff's evidence.

A careful review of the evidence leads us to the conclusion that the ruling of the court below was proper and should be sustained.

Affirmed.

H. AUBREY FORD, JR. v. BARBARA DALE FORD.

(Filed 30 October 1963.)

APPEAL by defendant from *Clark (Edward B.)*, Special Judge, August Term 1962 of LEE.

This appeal was argued at the Fall Term 1962 as Case No. 525. The decision of this Court has been delayed pending an appeal to the Supreme Court of the United States on a decision rendered by the Supreme Court of South Carolina, involving the custody of the three minor children born of the marriage between the plaintiff and the defendant. See *Ford v. Ford,* 239 S.C. 305, 123 S.E. 2d 33, 371 U.S. 187, 9 L. Ed. 2d 240.

Prior to 25 August 1959, the parties were residents of this State, domiciled in Sanford, North Carolina. Due to an adulterous affair on the part of the defendant wife, the parties separated and the wife went to the home of her mother in Richmond, Virginia. On 27 August 1959, the wife took the minor children of the marriage from North Carolina to the home of her mother in Richmond, Virginia, without the permission of the husband.

The husband, on 28 August 1959, filed in the Law and Equity Court of Richmond, Virginia, a petition for *habeas corpus,* alleging that the wife had the children and that she "has recently been guilty of acts which were not only of the nature that would justify the petitioner seeking a divorce from her but which render her unfit to have custody of said children," etc.

Thereafter, negotiations took place between the parties, both being represented by counsel, and they agreed that the husband was, with minor exceptions, to have custody of the children during the school year and that the wife was to have custody during summer vacations and on some holidays. When notified of this agreement, the Richmond court entered an order dismissing the case upon representation that the parties had agreed concerning custody of the infant children. This agreement will be referred to hereinafter as the Virginia agreement.

On 10 August 1960, while the minor children were in the custody of the wife, pursuant to the Virginia agreement, the wife moved to Greenville, South Carolina, and instituted an action for the custody of the children. The wife was awarded custody and the husband was given visitation rights to be agreed upon by the parties. On appeal to the Supreme Court of South Carolina by the husband, the Court held that the South Carolina courts were bound by the Virginia proceeding and must give full faith and credit to it. The wife appealed to the Supreme Court of the United States, and that Court held that the Virginia proceeding was not *res judicata* and was neither binding on the courts of Virginia nor the courts of South Carolina.

In *Ford v. Ford,* .... S.C. ...., 130 S.E. 2d 916, the Supreme Court of South Carolina, in an exhaustive opinion, sets out a complete history of the litigation and directs the lower court to enter judgment in accordance with the Virginia agreement.

The judgment in the court below, based on the issues answered by the jury, granted the plaintiff in this action an absolute divorce and awarded custody of the minor children of the marriage in conformity with the Virginia agreement.

The parties to this litigation agreed at the hearing in the trial below, and in this Court when the case was argued here, that there has been no change in conditions since the parties entered into the Virginia agreement with respect to custody.

Clawson L. Williams, Jr.; Leatherwood, Walker, Todd & Mann; Hoyle & Hoyle for plaintiff appellee.

McDermott, Cameron & Harrington; Allen Langston for defendant appellant.

PER CURIAM. Since there is no appeal from the judgment entered below except as to custody, and it appearing that the order to be entered by the lower court in South Carolina pursuant to the mandate of the Supreme Court of South Carolina, as well as the judgment entered in the Superior Court of Lee County, North Carolina, conform

to the custody agreement entered into by the parties in Virginia, the judgment below is

Affirmed.

EMILY COLEMAN TAYLOR AND MARY MOODY COLEMAN, SISTERS; NETTIE COLEMAN, WIDOW OF ANDREW COLEMAN, DECEASED, EMPLOYEE, v. TWIN CITY CLUB, EMPLOYER; INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, CARRIER.

(Filed 6 November 1963.)

1. Appeal and Error § 38—

An assignment of error not brought forward and discussed in the brief will be deemed abandoned. Rule of Practice in the Supreme Court No. 28.

2. Master and Servant § 53—

A claimant under the Workmen's Compensation Act has the burden of showing injury from an accident which arose out of and in the course of the employment. G.S. 97-2(6).

3. Same—

A fall is in itself an unusual and unforeseen occurrence which is an accident within the purview of the Compensation Act, and it is not essential that there be evidence of any unusual or untoward occurrence causing a fall.

4. Same—

An accident occurs in the course of the employment if it occurs during the time and at the place the employee is required to be at work and if he is engaged in the performance of his duties or in activities incidental thereto.

5. Same—

"Arising out of" as used in the Compensation Act relates to the origin or cause of the accident, and the accident arises out of the employment if there is some causal relation between the accident and the performance of some service of the employment, so that it may be seen that the accident had its origin in the employment.

6. Master and Servant § 64—

Where there is evidence that the injured employee died from angina and also evidence that he died from loss of blood resulting from an accidental injury to his head, the finding of the Industrial Commission that the death resulted from the accident, being supported by evidence, is binding on the court.

7. Master and Servant § 93—

A finding of the Industrial Commission is conclusive on the courts if there is evidence to support it, notwithstanding there may also be evidence which would support a contrary finding.

8. Master and Servant § 53—

Where there is evidence that the employee died as a result of loss of blood from a head injury received in a fall occurring while he was at the place he was required to be in his employment and while engaged in the performance of his duties or in activities incidental thereto, without any evidence as to the immediate cause of the fall, such evidence permits the inference that the fall had its origin in the employment and is sufficient to support a finding of the Industrial Commission that the fall arose out of the employment.

APPEAL by defendants from *Copeland, S.J.*, June 17, 1963, Session of FORSYTH.

This is a proceeding under the Workmen's Compensation Act.

A claim for compensation was filed by the sisters of Andrew Coleman who died 21 December 1959. On said date and for several months prior thereto deceased was employed as a waiter by Twin City Club, Inc. The business area of the Club consisted of a dining room, kitchen and reading room.

After hearing, Deputy Commissioner Shuford found the following pertinent facts:

> "1. On 21 December 1959 the deceased employee fell at a doorway in defendant employer's establishment. Such doorway led into the kitchen at the establishment, and was in the immediate area that deceased performed his work for defendant employer. When he so fell in the doorway deceased struck his head upon a sharp edge of a door, which caused a deep, long laceration extending from above one of deceased's eyes to the top of his head. A portion of the skin on deceased's head was also peeled back from the scalp. Such laceration was approximately seven inches long and went to the bone. The peeled back portion of skin was approximately the size of a hand.
>
> "2. Deceased sustained, as described above, an injury by accident arising out of and in the course of his employment with defendant employer.
>
> "3. Deceased was rendered unconscious by the accident and he lay face down on the floor at defendant employer's establishment, while an ambulance was called. Deceased bled profusely and by the time assistance arrived to carry deceased to a hospital, a pool of blood approximately forty inches in diameter had formed around deceased's head.
>
> "4. Upon being carried to the Kate Bitting Reynolds Memorial Hospital, deceased was seen in the emergency room by Dr. Charles

L. Curry. Such doctor pronounced deceased dead. The doctor examined deceased and was of the opinion that the cause of death was deceased's bleeding to death, secondary to the scalp laceration. Deceased's body was thereafter seen by Dr. D. C. Speas, Coroner of Forsyth County. Dr. Speas first expressed the opinion that deceased had died by accidental injury and told Charles H. Pace, Detective Sergeant of the Winston-Salem Police Department to investigate the matter. Dr. Speas thereafter expressed the opinion that the cause of death was 'angina.'

"5. Deceased died as a direct result of the injury by accident giving rise hereto."

There was an award of compensation. Upon review, the Full Commission adopted as its own the Deputy Commissioner's findings of fact, opinion and award. The superior court affirmed. Defendants appeal.

W. Scott Buck for plaintiffs.
Hudson, Ferrell, Petree, Stockton, Stockton & Robinson for defendants.

MOORE, J. Defendants make two assignments of error. The first is not brought forward and discussed in the brief, and it is therefore deemed abandoned. Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 810; *Power Co. v. Currie, Commissioner of Revenue,* 254 N.C. 17, 118 S.E. 2d 155. The second assignment of error presents only the question whether the facts found by the Commissioner are sufficient to support the award of compensation. *Glace v. Throwing Co.,* 239 N.C. 668, 80 S.E. 2d 759; *Worsley v. Rendering Co.,* 239 N.C. 547, 80 S.E. 2d 467.

To be compensable under the Workmen's Compensation Act an injury must result from an accident arising out of and in the course of the employment. G.S. 97-2(6). Claimant has the burden of showing such injury. *Henry v. Leather Co.,* 231 N.C. 477, 479, 57 S.E. 2d 760.

The deceased employee was injured by accident. To prove an accident in industrial injury cases it is not essential that there be evidence of any unusual or untoward condition or occurrence causing a fall which produces injury. The fall itself is the unusual, unforeseen occurrence which is the accident. *Robbins v. Hosiery Mills,* 220 N.C. 246, 17 S.E. 2d 20. A fall is usually regarded as an accident. *Cole v. Guilford County,* 259 N.C. 724, 727, 131 S.E. 2d 308.

The accident occurred in the course of the employment. "In the course of" employment refers to the time, place and circumstances

under which the injurious accident occurred. Deceased was on the premises of his employer where the duties of his employment required him to be; the accident occurred during his working hours; he was engaged in the performance of his duties or in activities incidental thereto. *DeVine v. Steel Co.*, 227 N.C. 684, 44 S.E. 2d 77; *Brown v. Aluminum Co.*, 224 N.C. 766, 32 S.E. 2d 320; *Conrad v. Foundry Co.*, 198 N.C. 723, 153 S.E. 266.

Defendants contend that there is no showing that the accident arose out of the employment. "Arising out of" employment relates to the origin or cause of the accident. *Lockey v. Cohen, Goldman & Co.*, 213 N.C. 356, 196 S.E. 342. Defendants insist that the cause of the fall was idiopathic, that the death of deceased was caused by "angina" and was not connected with the employment. There was competent evidence that the cause of death was "angina"; there was also competent evidence that death was caused by accidental injury, that it resulted from hemorrhage "secondary to the scalp laceration." The Industrial Commission accepted the latter theory and found as a fact that "deceased died as a direct result of the injury by accident giving rise hereto." Where the evidence before the Commission is such as to permit either one of two contrary findings, the determination of the Commission is conclusive on appeal to superior court and in this Court. *DeVine v. Steel Co., supra; Rewis v. Insurance Co.*, 226 N.C. 325, 38 S.E. 2d 97. The findings of the Commission as to the cause of death takes the instant case out of that category of cases in which the cause of injury is idiopathic, or partially so. For cases falling within such category see: *Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 117 S.E. 2d 476; *Vause v. Equipment Co.*, 233 N.C. 88, 63 S.E. 2d 173; *Rewis v. Insurance Co., supra.* In the instant case the immediate cause of the accident is unknown or undisclosed.

An injury is said to arise out of the employment when it occurs in the course of the employment and is a natural and probable consequence or incident of it, so that there is some causal relation between the accident and the performance of some service of the employment. *Vause v. Equipment Co., supra.* An injury arises out of the employment when it comes from the work the employee is to do, or out of the service he is to perform, or as a natural result of one of the risks of the employment; the injury must spring from the employment or have its origin therein. *Bolling v. Belk-White Co.*, 228 N.C. 749, 46 S.E. 2d 838. There must be some causal relation between the employment and the injury; but if the injury is one which, after the event, may be seen to have had its origin in the employment, it need not be shown that it is one which ought to have been foreseen or expected. Compensability is

not dependent upon negligence or fault of the employer. *Conrad v. Foundry Co., supra.* On the other hand, workmen's compensation is not equivalent to general health and accident insurance. *Vause v. Equipment Co., supra.*

If a fall and the resultant injury arise solely from an idiopathic cause, or a cause independent of the employment, the injury is not compensable. *Vause v. Equipment Co., supra.* But the effects of a fall are compensable if the fall results from an idiopathic cause and the employment has placed the employee in a position which increases the dangerous effects of the fall. *Allred v. Allred Gardner, Inc., supra; Rewis v. Insurance Co., supra.*

In the instant case the immediate cause of the fall is unknown. We have held that where an employee, while about his work, suffers an injury in the ordinary course of his employment, the cause of which is not explained, but which is a natural and probable result of a risk thereof, and the Commission finds from all of the attendant facts and circumstances that the injury arose out of the employment, an award will be sustained. *Robbins v. Hosiery Mills, supra.* In the *Robbins* case the employee, while reaching up to take some objects from a rack in the course of her employment, lost her balance and fell for some undisclosed reason. There was no evidence tending to show that the fall was caused by a hazard to which the employee was exposed apart from the employment. An award of compensation was upheld. Larson, commenting on the *Robbins* decision, says: ". . . (T)he North Carolina Supreme Court in effect said that when an accident occurred in the course of employment, and there is no affirmative evidence that it arose from a cause independent of the employment, an award would be sustained." Larson's Workmen's Compensation Law, Vol. 1, s. 10.31, p. 99. There is no material difference between the *Robbins* case and the one at bar. See also: *DeVine v. Steel Co., supra; Morgan v. Cloth Mills,* 207 N.C. 317, 177 S.E. 165. ". . . (M)ost courts confronted with the unexplained-fall problem have seen fit to award compansation." 1 Larson, s. 10.31, p. 97. "There is surprisingly little contra authority." *Ibid,* p. 100.

This rule in unexplained-fall cases, which is applied in North Carolina and in most jurisdictions, was first declared in an English case —*Upton v. Great Central Railway Company* (1924) A.C. 302 (H.L.). In that case an employee fell on a railway platform in the course of a business errand. The platform was not slippery or defective in any way; the cause of the fall was completely unknown. Lord Atkinson said: "Having been done in the course of the employment of deceased, and the accident having been caused by the doing of it even incau-

tiously, it must, I think, be held that the accident arose out of the employment of the deceased." The decision of the House of Lords was unanimous.

It has been suggested that this result in unexplained-fall cases relieves claimants of the burden of proving causation. We do not agree. The facts found by the Commission in the instant case permit the inference that the fall had its origin in the employment. There is no finding that any force or condition independent of the employment caused or contributed to the accident. The facts found indicate that, at the time of the accident, the employee was within his orbit of duty on the business premises of the employer, he was engaged in the duties of his employment or some activity incident thereto, he was exposed to the risks inherent in his work environment and related to his employment, and the only active force involved was the employee's exertions in the performance of his duties.

The judgment below is

Affirmed.

ELISABETH ANN JACOBS FEHL v. AETNA CASUALTY & SURETY COMPANY.

(Filed 6 November 1963.)

Insurance § 57—

Where the evidence discloses that a prospective purchaser was permitted to drive the dealer's vehicle seven miles to the purchaser's home to show it to his wife and was to return the vehicle within two and one-half hours, but that he actually drove 70 miles to another municipality and had an accident resulting in plaintiff's injury more than 20 hours after he should have returned the vehicle, *held* the evidence does not bring the claim within the coverage of the dealer's liability policy.

APPEAL by plaintiff from *MacRae, S.J.*, January, 1963 Session, WAKE Superior Court.

The plaintiff instituted this civil action to recover the sum of $3,-300.00, the amount fixed by judgment to be due for the bodily injuries she sustained in an accident as a result of the negligent operation of a 1959 Buick automobile owned by Smith Buick Company, Inc., Fuquay Springs, North Carolina, and operated by Cleno Harris, of Apex, North Carolina. The accident occurred on September 10, 1961.

At the time of the accident the Smith Buick Company, Inc., a dealer in second-hand automobiles, held a policy of liability insurance issued to it by the defendant in conformity with the Motor Vehicle Safety and Responsibility Act of 1953, as amended. The Omnibus Clause of the policy provided coverage for the insured's automobiles when operated with its permission, express or implied.

The evidence disclosed that about 3:00 or 3:30 p.m., on September 9, 1961, Cleno Harris sought to purchase from the insured a 1959 used Buick. He and a salesman of the insured tried out the Buick on the road, returned to the insured's place of business where Harris requested and was given permission to drive the vehicle to his home, approximately seven miles away, so that his wife might approve the purchase. The insured instructed Harris to return the vehicle before six o'clock, at which time the purchase was to be completed or possession was to be surrendered to the owner. Instead of going home to show the vehicle to his wife, Harris drove to Rocky Mount, spent the night, and at about 3:00 p.m. on September 10, Sunday, had the accident in which the plaintiff sustained injuries.

At the close of the evidence the court entered judgment of involuntary nonsuit, from which the plaintiff appealed.

Everett, Everett & Everett, by Robinson O. Everett for plaintiff appellant.

Spears, Spears & Barnes by Marshall T. Spears for defendant appellee.

PER CURIAM. For a full analysis of the cases in which liability is upheld or denied on the ground the use of the insured vehicle at the time of an accident was with or was without the owner's permission, see *Hawley v. Ins. Co.*, 257 N.C. 381, 126 S.E. 2d 161. In this case, Harris had permission to drive the Buick seven miles to his home but he was instructed to return it within two and one-half hours. Actually he drove 70 miles to Rocky Mount where he spent the night. While driving the vehicle more than 20 hours after he should have surrendered it, he became involved in the accident in which the plaintiff sustained her injuries. These facts show a major—not a minor—deviation from the permitted use. The rules to which this Court is committed (Hawley) require us to hold Harris's use at the time of the accident was without the permission of the owner. Consequently the defendant's policy does not cover plaintiff's injury. The judgment of the Superior Court of Wake County is

Affirmed.

CARA ANN MARTIN, PLAINTIFF v. YATEN WILLIAM MARTIN, DEFENDANT, AND ANNIE LAURIE BRADY, ADDITIONAL DEFENDANT.

(Filed 6 November 1963.)

Automobiles § 49—

Evidence that the driver, turning left and stopping in the crossover in the median separating the lanes in a four-lane highway, waited for several cars to pass, asked his passenger if there were any more cars coming, that the passenger, without looking, said no and that the driver drove into the highway and was struck about 25 feet from the crossover, *held* to show contributory negligence as a matter of law on the part of the passenger.

APPEAL by plaintiff from *Williams, J.*, May 1963 Civil Session of WAKE.

Civil action to recover damages for injuries sustained in an automobile collision. Plaintiff's evidence tends to show the following facts:

About 10:00 p.m. on June 3, 1960 plaintiff and her two children were passengers in the front seat of a 1941 Chevrolet being operated by her husband, the defendant Yaten William Martin. The automobile was proceeding in an easterly direction toward Raleigh on Highway No. 70, a four-lane highway with a fifteen-foot median strip separating eastbound and westbound lanes of traffic. About five miles west of Raleigh, the defendant Martin turned left into a crossover between the opposing lanes and stopped. There was a small hill one hundred and fifty feet to the east, then a dip and another hill. The glow of headlights approaching from the east could be seen from four hundred to six hundred feet from the crossover, but an automobile itself would be momentarily out of sight in the dip beyond the first hill. The posted speed limit for the area was sixty miles per hour. After waiting in the crossover for several car to pass by, the defendant Martin pulled out into the westbound lanes in order to go back toward Durham. As the front of his car entered the outside lane, the left rear was struck by a 1959 Ford which was being operated by the additional defendant Annie Laurie Brady. At the time defendant Martin pulled out into the highway, the additional defendant Brady was crossing the crest of the hill one hundred and fifty feet away at a speed of fifty-five to sixty miles per hour. She did not attempt to apply her brakes but swerved to the left. The impact occurred about twenty-five feet from the crossover on the dividing line between the two westbound lanes. Plaintiff sustained personal injuries in the collision.

Plaintiff did not see the Brady car before the collision. She testified that she was in a good position to have seen it but that neither she nor her husband looked to the east towards Raleigh to see if any traffic

was approaching; that her husband asked her before proceeding if there were any more cars coming and she said "No."

Plaintiff originally instituted this action against Annie Laurie Brady only. Later she made her husband a party defendant to the action alleging, *inter alia,* in an amended complaint, that his negligence in failing to keep a proper lookout was a concurring proximate cause of her injuries. The defendant Martin denied the allegations of negligence and plead the contributory negligence of the plaintiff in failing to warn him of the approach of the Brady automobile. Thereafter the plaintiff, in consideration of a cash payment, gave Miss Brady a covenant not to sue and took a voluntary nonsuit as to her. Defendant Martin thereupon had her made an additional party defendant for contribution. At the close of all the evidence, the defendant's motion for judgment as of nonsuit was allowed and the plaintiff appealed.

Everett, Everett & Everett for plaintiff appellant.
Smith, Leach, Anderson & Dorsett for defendant appellee.

PER CURIAM. Ordinarily a guest in an automobile is justified in assuming that the driver will maintain a proper lookout for approaching traffic and is required to warn him of danger only if a reasonably prudent person would, under the same circumstances, realize the danger and give warning of it. *Watters v. Parrish,* 252 N.C. 787, 115 S.E. 2d 1. However, the rule is different when, as here, the driver delegates to the guest the duty to look and the latter assumes to do so. In this event, a proper regard for his own safety requires the guest to watch for approaching traffic. Should he, without looking, erroneously inform the driver that it is safe to proceed, he is guilty of negligence which will bar his recovery if a collision results. Such are the facts of this case.

The judgment of nonsuit is
Affirmed.

SARAH FURR WESTON, F. L. FURR, F. S. FURR, L. W. FURR, JESSIE F. HARTSELL, C. B. FURR, R. H. FURR, SELMA FURR SAMS, JULIA FURR FREEMAN, HELEN H. SUTTON, J. ROBERT HOWIE, HENRY H. HOWIE, BRICE G. HOWIE, LOUELLA H. BIVENS, ELIZABETH HOWIE, ROBERT HUNTLEY AND FRIEDA HUNTLEY v. CLARENCE HASTY AND WIFE, CALLIE LUCILLE HASTY; BRONS HASTY AND WIFE, MARGIE MARIE HASTY; C. W. DRAKE AND WIFE, IRIS ELIZABETH DRAKE.

(Filed 6 November 1963.)

Appeal and Error § 3; Judgments § 2—

Where, after agreement that the court might enter judgment out of term and out of the district, plaintiff's counsel, who was to prepare the judgment, becomes ill and no judgment is tendered until some year and four months after the term, the judge may properly refuse to sign the judgment and properly directs that the action be heard *de novo*, and an appeal from his refusal to sign the judgment will be dismissed, there being no judgment from which an appeal might be taken. Further, the Supreme Court, in the exercise of its general supervisory jurisdiction, will order that the cause be heard *de novo* in the county in which it was instituted.

PURPORTED appeal by plaintiffs in an action pending in UNION Superior Court.

Carswell & Justice and Kermit Caldwell for plaintiff appellants.
Richardson & Dawkins and Coble Funderburk for defendant appellees.

PER CURIAM. In this action, which was instituted October 22, 1957, plaintiffs and defendants, in their respective pleadings, assert ownership of certain lands in Goose Creek Township, Union County.

A stipulation dated November 9, 1961, sets forth that "(u)pon the hearing of the above controversy without action before the Honorable Allen H. Gwyn, Judge Presiding at the October 1961 Criminal and Civil Term of the Superior Court of Union County," plaintiffs and defendants, through their attorneys of record, "in open court hereby stipulate and agree that the Judgment in the above controversy without action may be signed by the presiding judge out of term and out of district."

The attorney for plaintiffs who was to prepare and submit a proposed judgment to Judge Gwyn became sick. No judgment was prepared and presented during the period (Fall Term 1961) Judge Gwyn was the superior court judge holding in regular rotation the courts of the Twentieth Judicial District. On February 23, 1963, plaintiffs' at-

torneys tendered to Judge Gwyn at Chambers in Reidsville, North Carolina, a proposed judgment which contains what purports to be an "agreed statement of facts" and an adjudication of the respective rights of the parties. Judge Gwyn, being uncertain as to precisely what had been said and done at said October Term 1961 of Union Superior Court and being of opinion he had no jurisdiction after December 31, 1961, to conduct a hearing or enter judgment, declined to sign the proposed judgment tendered February 23, 1963, and refused to hear and pass upon the matter *de novo*.

No judgment has been entered. Plaintiffs attempt to appeal from Judge Gwyn's refusal to act further in the matter. Under the circumstances, without reference to whether he had jurisdiction, Judge Gwyn's refusal to act further was permissible and proper.

The purported appeal is dismissed; and, in the exercise of its power "to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the other courts" (North Carolina Constitution, Article IV, Section 10(1)), this Court orders that the cause be heard *de novo* in regular course in the Superior Court of Union County. It is noted that Judge Gwyn suggested that plaintiffs should proceed as this Court now directs.

Appeal dismissed.

DEWITT WHITE, PLAINTIFF, v. MRS. LUCY PHELPS AND JOSEPH PHELPS, DEFENDANTS.

(Filed 6 November 1963.)

1. Automobiles §§ 17, 46—

Where both parties introduce evidence that the intersection at which the collision occurred had electric control signals and the municipal ordinance is pleaded by the one party and its existence admitted by the other, the fact that the ordinance is not introduced in evidence is not fatal and G.S. 20-155 is not applicable, and an instruction defining the right-of-way in terms of which vehicle was *on the right* is error.

2. Trial § 33—

An instruction which presents an erroneous view of the law on a substantive phase of the case is prejudicial error.

APPEAL by defendants from *Williams, J.*, January 1963 Regular Civil Session of WAKE.

Smith, Leach, Anderson & Dorsett for plaintiff.
Manning, Fulton, Skinner & Hunter and Young, Moore & Henderson for defendants.

PER CURIAM. An automobile, owned and being operated by plaintiff, and an automibile, owned by male defendant and being operated by *feme* defendant, collided at the intersection of Hillsboro and Dawson Streets in the City of Raleigh on 1 December 1960. Plaintiff was proceeding eastwardly on Hillsboro, and *feme* defendant was driving southwardly on Dawson. Plaintiff sues for property damage; defendants counterclaim for personal injury and property damage. Verdict and judgment were in favor of plaintiff.

At the intersection in question traffic was controlled by automatic electric signals which alternately displayed green, yellow and red lights. Each of the parties alleged and testified that they entered the intersection on a green light.

The court in instructing the jury, after giving the contention of plaintiff that defendant entered the intersection on a red light, recited the provisions of G.S. 20-155 that "When two vehicles approach an intersection . . . at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right," and then charged the jury as follows:

> ". . . (I)f you are satisfied from the evidence in the case that on this occasion the vehicle driven by the plaintiff and the vehicle driven by the defendant Mrs. Phelps approached the intersection at approximately the same time and that the vehicle of the defendant approached it on the left of the vehicle driven by the plaintiff it became the duty of the driver of the vehicle on the left to yield the right-of-way to the vehicle operated by the plaintiff and if you find by the greater weight of the evidence that she failed to do so and further find that because she failed to do so that that was the proximate cause or one of the proximate causes resulting in the collision and resulting injury and damage, if you find that by the greater weight of the evidence, you would answer this first issue 'yes;' otherwise you would answer it 'no.' "

Where by reason of automatic traffic lights, stop or caution signs or other devices one street at an intersection is favored over the other, and one street is thereby made permanently or intermittently dominant and the other servient, G.S. 20-155 has no application. *Jordan v. Blackwelder*, 250 N.C. 189, 108 S.E. 2d 429; *Primm v. King*, 249 N.C. 228, 106 S.E. 2d 223. An instruction which presents an erroneous view of

the law upon a substantive phase of the case is prejudicial error. *Parker v. Bruce*, 258 N.C. 341, 128 S.E. 2d 561. In the instant case plaintiff was "on the right;" the verdict was in his favor. The instruction was clearly prejudicial.

The ordinance of the City of Raleigh providing for the installation and maintenance of traffic lights is pleaded by the plaintiff, and defendants admit the existence of the ordinance. The ordinance itself was not introduced in evidence. The failure to offer the ordinance in evidence does not make G.S. 20-155 applicable. The evidence of the presence of traffic lights was not without effect. *Wilson v. Kennedy*, 248 N.C. 74, 102 S.E. 2d 459.

New trial.

STATE v. ERNEST KIRK, JR.

(Filed 6 November 1963.)

Criminal Law § 111—

Where defendant introduces evidence of ill will between himself and his brother-in-law, the deputy sheriff who arrested him for drunken driving and the principle witness for the State, it is error for the court, after charging on defendant's contentions that the prosecution arose out of a family dispute, to charge that the jurors should disabuse their minds of any family connection and all that had been said about the family connection, since the evidence of bias of the witness was proper for the consideration of the jury in passing upon his credibility.

APPEAL by defendant from *McConnell, J.*, 22 July 1963 Session of RICHMOND.

Criminal prosecution upon a warrant charging defendant with unlawfully operating an automobile upon a highway within the State while under the influence of intoxicating liquor, heard on appeal from a conviction and sentence by the Richmond County special court.

Plea: Not guilty. Verdict: Guilty as charged.

From a sentence of imprisonment, defendant appeals.

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

Leath, Blount & Hinson for defendant appellant.

PER CURIAM. The State's evidence shows the following: James Harding, a deputy sheriff of Richmond County, whose sister defendant

married, on 1 June 1963 was driving an automobile on Highland Pines Road between the towns of Rockingham and Hamlet. He met the defendant, who was driving across the center line and on the shoulder and back on the pavement. He turned around to stop him. Defendant turned into Dawkins Street, ran over some shrubbery in a man's yard, and then ran into a tree which stopped him. Harding came up, put him in his car, and carried him to jail. Defendant had a strong odor of alcohol on his breath, staggered on his feet, and in Harding's opinion was drunk. Deputy Sheriff Cockman saw Harding put defendant in jail, and, in his opinion, defendant was drunk.

Defendant offered evidence as follows: He had been drinking earlier in the day, but was not drunk when arrested. He was not driving the truck. One Sellars was in the truck with him and was driving. There has been ill will between him and his brother-in-law Harding for a long time. His wife, to whom he had been married 19 years, told him the reason they could not get along was because of her family. Every time his wife went to her family's home they would brainwash her, like they did in Korea. His wife had him indicted once for an assault, and her brother talked her into it. About 2:20 p.m. on 1 June 1963 his wife came home after work. He had had something to drink. She stayed about ten minutes and went to her brother's house for help.

The court in its charge stated the contentions of defendant substantially as follows: Defendant contends this is a family affair; Deputy Sheriff Harding, his brother-in-law, had it in for him. He was not drunk. He had been drinking that morning at 11:00 a.m., and he and his wife had some dispute. She went to her brother, and for that reason Harding was out looking for him, was mad with him, and had ill feeling against him. He was not intoxicated and was not driving the truck. Then the court instructed the jury, which defendant assigns as error, "Now, you should disabuse your minds, if you can, of any family connection and all the things said about the family connection." Defendant further assigns as error this part of the charge: "This has been a difficult case. As I stated, there was some family connection."

Defendant contends that the first challenged part of the charge, quoted above, was to the effect, and was so understood by the jury, that they should not consider any bias or prejudice or ill will on the part of his brother-in-law Harding against him in weighing his testimony, that without Harding's testimony the State's evidence was not sufficient to carry the case to the jury, and that this challenged part of the charge was not only highly prejudicial, but disastrous. This assignment of error to the charge is good.

The Court, in an opinion by Ervin, J., said in *S. v. Hart,* 239 N.C. 709, 80 S.E. 2d 901:

> "Truth does not come to all witnesses in naked simplicity. It is likely to come to the biased or interested witness as the image of a rod comes to the beholder through the water, bent and distorted by his bias or interest. The law is mindful of this plain psychological principle when it fashions rules of evidence to aid jurors in their search after truth. As a consequence, the law decrees that 'any evidence is competent which tends to show the feeling or bias of a witness in respect to the party or the cause,' and that jurors are to consider and weigh evidence of this character in determining the credibility of the witness to whom it relates. *S. v. Sam,* 53 N.C. 150."

For error in the charge it is ordered that there be a
New trial.

NANCY ANN MESSICK, BY HER NEXT FRIEND D. F. MESSICK v. NELL LONG SCOTT; KATIE LOUISE HICE, A MINOR; NELL LONG SCOTT, GUARDIAN AD LITEM FOR KATIE LOUISE HICE; WALTER E. MARTIN; MARILOU MARTIN, A MINOR, AND ELLEN C. MARTIN, GUARDIAN AD LITEM FOR MARILOU MARTIN.

AND

D. F. MESSICK v. NELL LONG SCOTT; KATIE LOUISE HICE, A MINOR; NELL LONG SCOTT, GUARDIAN AD LITEM FOR KATIE LOUISE HICE; WALTER E. MARTIN; MARILOU MARTIN, A MINOR, AND ELLEN C. MARTIN, GUARDIAN AD LITEM FOR MARILOU MARTIN.

(Filed 6 November 1963.)

APPEAL by plaintiffs from *McLaughlin, J.,* 21 January 1963 Session of FORSYTH.

Two civil actions consolidated by consent for trial. The first is an action by Nancy Ann Messick, by her next friend, to recover damages for grievous and permanent injuries allegedly caused by the actionable negligence of all defendants; the second is an action by her father to recover for necessary medical and hospital expenses expended by him for treatment of her injuries allegedly caused by the actionable negligence of all defendants.

About 7:00 p.m. on 27 May 1959 Nancy Ann Messick was a passenger in a Buick automobile owned and maintained by defendant Walter

E. Martin for the general use of members of his family, and driven by his minor daughter, defendant Marilou Martin. Other girls were in the automobile. All of these girls were members of the graduating class of Southwest High School. The Martin car was traveling eastwardly on the Lewisville Road about two miles west of the city limits of Winston-Salem at a speed of about 45 or 50 miles an hour in, according to a stipulation as stated in the charge, a 55 miles per hour speed zone.

The residence of defendant Nell Long Scott is on the south side of the Lewisville Road about two miles west of the city limits of Winston-Salem. About 250 feet west of the straight driveway from the Scott residence to the Road there is a small crest of a hill. The Road slopes downward from the crest to the driveway. The Scott driveway was visible to traffic going eastwardly on Lewisville Road for over 500 feet.

When the Martin automobile approached the vicinity of the Scott driveway, the minor defendant Katie Louise Hice, with her mother, defendant Nell Long Scott, as sole passenger, drove her mother's automobile out of the driveway into the Lewisville Road in front of the approaching Martin automobile. Katie Louise Hice was not a licensed driver. She drove the automobile onto the north side of the Road headed west, turned back across to the south side, and at a point some 50 feet west of the driveway her automobile collided with the Martin automobile. Marilou Martin testified that she never saw the automobile operated by Hice until she was about 250 feet west of the Scott driveway. She further testified the Scott car was completely in the north lane, and then instantly it turned back into her lane of traffic.

The jury found by its verdict that Nancy Ann Messick was injured by the negligence of the defendants Scott and Hice as alleged, that she was not damaged by the negligence of the defendants Martin as alleged, and awarded her damages in the sum of $140,000. The jury answered similar issues as to negligence the same way in D. F. Messick's case, and awarded him damages in the sum of $12,888.49.

From a judgment in each case entered on the verdict in each case, each plaintiff appeals.

Weston P. Hatfield and C. Edwin Allman, Jr., for plaintiffs.
Deal, Hutchins and Minor by Roy L. Deal for defendants Martin.
No counsel for defendants Scott and Hice.

PER CURIAM. Plaintiffs, who have filed a joint brief, by their appeal are seeking a new trial only as against the defendants Martin. All of their assignments of error, except a formal one as to the signing of the judgment, relate to the charge in respect to the second issue in

each case. In each case the second issue reads: "Was the plaintiff damaged by the negligence of the defendants Walter E. Martin and Marilou Martin, a minor, as alleged?" The jury answered the second issue in each case, "No."

The jury, under application of settled and relevant principles of law as stated in the charge, resolved the issue of fact on the second issue in each case against the plaintiff. A careful examination of their assignments of error discloses no new question or feature requiring extended discussion. Prejudicial error has not been made to appear. The verdict and judgment will be upheld in each case.

No error.

J. A. SHINGLETON v. STATE OF NORTH CAROLINA AND NORTH CAROLINA WILDLIFE RESOURCES COMMISSION.

(Filed 20 November 1963.)

1. Easements § 1—

An easement appurtenant is incident to and exists only in connection with a dominant estate owned by the same person, and passes with the title to the dominant estate; an easement in gross is a mere personal interest or right to use the land of another, is not appurtenant to any estate and attaches only to the person, and ends with the death of the owner of the easement.

2. Same—

Whether a deed creates an easement appurtenant or in gross must be determined by a construction of the language of the contract to ascertain the intention of the parties aided, if necessary, by the situation of the parties and the surrounding circumstances, and an easement which in its nature is appropriate and a useful adjunct of land owned by the grantee of the easement, in the absence of a showing that the parties intended a mere personal right, will be declared an easement appurtenant, regardless of the form in which such intention is expressed.

3. Same—

The fact that the words "heirs and assigns" are not entered after the name of the grantee of an easement is not controlling in determining whether the easement granted is an easement appurtenant or in gross. G.S. 39-1.

4. Same— Deed held to convey easement appurtenant and not merely in gross.

Suit involving dispute between plaintiff and the Wildlife Resources Commission in regard to the ownership of certain lands was settled by an

agreement under which plaintiff conveyed to the State a portion of the land in dispute and the State conveyed to plaintiff a portion, and thereafter a consent judgment was entered reciting generally the execution and delivery of the deeds, the payment of a sum of money by the State in settlement, and the action was dismissed. The State's conveyance was by quitclaim deed to plaintiff, his heirs and assigns and, after the description, provided that the State reserved the right to use the roads existing on the tract conveyed and that plaintiff was granted the right to use roads existing on the other lands of the Commission for the purpose of ingress and egress by the most direct route. *Held:* The easement granted was an easement appurtenant and not in gross.

5. Easements § 8—

An easement will ordinarily be construed to embrace all uses which are reasonably necessary and convenient in connection with the enjoyment of the dominant estate not only for those purposes to which it is devoted at the time of the grant but also those to which it may thereafter be reasonably devoted, without unnecessarily burdening the servient estate.

6. Same—

The grant of an easement appurtenant for ingress and egress to lands owned by the grantee, in the absence of a showing that the lands of the grantee were used for business purposes, does not embrace the right of ingress and egress by the public generally, but only to the grantee, his agents, servants, employees and licensees, and it is no violation of the grantee's rights that he be required to give permission to those who use the easement in connection with the use and enjoyment of the dominant estate.

7. Easement § 6; State § 4—

In an action under the Declaratory Judgment Act to construe an easement granted by the State, judgment may not be entered enjoining the State and its employees from interfering with the easement as defined by the court, since no action may be maintained against the State or any agency thereof in tort or to restrain the commission of a tort.

8. State § 4; Public Officers § 9—

A public officer, even though he assumes to act under the authority and pursuant to the direction of the State, may be held personally liable by an individual whose rights are invaded by such officer in disregard of law.

9. State § 4; Courts § 3—

Controversy between an individual and the State as to the extent of an easement granted to the individual by the State may be made the basis of a suit against the State in the Superior Court under the Declaratory Judgment Act, since such suit involves title to realty within the purview of G.S. 41-10.1.

APPEAL by defendants from *Parker, J.*, April-May 1963 Session of PENDER.

Action to construe the easement provisions of a deed under the Declaratory Judgment Act, G.S., Ch. 1, Art. 26.

Isaac C. Wright and George Rountree, Jr., for plaintiff.
Attorney General Bruton (by Parks H. Icenhour, Real Property Attorney); Corbett & Fisler; and White and Aycock for defendants.

MOORE, J. The State of North Carolina owns a large body of land in Pender County, known as the Holly Shelter Wildlife Area. It is managed by the North Carolina Wildlife Resources Commission. No public roads or highways adjoin or cross any portion of the Wildlife Area involved in this action. The roads within the area are owned by defendants and used in connection with wildlife management.

There was a dispute between defendants and plaintiff Shingleton with respect to the ownership and location of certain lands within the boundaries of the Area. A suit was instituted, but before trial a compromise settlement was reached. Pursuant to the compromise agreement, plaintiff herein conveyed to the State a portion of the land in dispute and the State deeded to Shingleton a portion. After these deeds were executed and delivered, a consent judgment was entered reciting generally the execution and delivery of the deeds, the payment of a sum of money by the State, and the satisfactory settlement of the matters in controversy, and the action was dismissed.

The said conveyance by the State to plaintiff herein was by quitclaim deed. It conveyed to J. A. Shingleton and "his heirs and assigns" 110 acres situate in Topsail Township, Pender County. This land is described by metes and bounds, and lies entirely within, and a considerable distance from, the boundaries of the Wildlife Area. Immediately below the description are the following easement provisions:

"The party of the first part reserves from this conveyance the right to maintain and use the roads existing on the above described lands; and the said J. A. Shingleton is hereby granted the right to use the roads existing on other lands of the Wildlife Resources Commission for the purpose of ingress and egress to and from the above described lands by the most direct route."

The present controversy "arose when the plaintiff's (J. A. Shingleton's) brother and other kinsmen were attempting to go over (the) road in question which leads from the public road through the Wildlife Refuge of the defendants by the most direct route to the plaintiff's land and . . . defendants placed a locked gate at the entrance to the road in question and mounted armed guards to keep out all persons except plaintiff."

Plaintiff contends the right-of-way granted him by the State is an easement appurtenant. Defendants contend it is an easement in gross and may be used and enjoyed only by J. A. Shingleton personally. J. A. Shingleton instituted the present action to have determined his rights under the grant of easement, and makes allegations which, he contends, entitles him to injunctive relief.

Trial by jury was waived and the judge made findings of fact and conclusions of law and entered judgment. It was adjudged that the easement granted by the State to the plaintiff "is an unlimited easement appurtenant to plaintiff's land, given to plaintiff for his use and the use of his agents, servants, employees, licensees, and the public generally who have not been refused permission to use the easement by the plaintiff," and "that the defendants, their agents, servants and employees . . . are enjoined from interfering by gate or otherwise with the use of said easement or road as herein provided."

An appurtenant easement is one which is attached to and passes with the dominant tenement as an appurtenance thereof; it is owned in connection with other real estate and as an incident to such ownership. An easement in gross is not appurtenant to any estate in land and does not belong to any person by virtue of his ownership of an estate in other land, but is a mere personal interest in or right to use the land of another; it is purely personal and usually ends with the death of the grantee. *Davis v. Robinson,* 189 N.C. 589, 127 S.E. 697. An easement appurtenant is incapable of existence apart from the particular land to which it is annexed, it exists only if the same person has title to the easement and the dominant estate; it must bear some relation to the use of the dominant estate, and it must agree in nature and quality to the thing to which it is claimed to be appurtenant. An easement appurtenant is incident to an estate, and inheres in the land, concerns the premises, pertains to its enjoyment, and passes with the transfer of the title to the land, including transfer by descent. 17A Am. Jur., Easements, ss. 9, 11, pp. 624, 625, 627. If an easement is in gross there is no dominant tenement; an easement is in gross and personal to the grantee because it is not appurtenant to other premises. *Ibid,* pp. 626-7. An easement in gross attaches to the person and not to land. 89 A. L. R. 1189.

The easement in the instant case is by deed, which is of course a contract. "The controlling purpose of the court in construing a contract is to ascertain the intention of the parties as of the time the contract was made, and to do this consideration must be given to the purpose to be accomplished, the subject-matter of the contract, and the situation of the parties." *Weyerhaeuser Co. v. Light Co.,* 257 N.C. 717,

127 S.E. 2d 539. "If there is any doubt entertained as to the real intention, we should reject that interpretation which leads to injustice and adopt that one which conforms more to the presumed meaning, because it does not produce unusual and unjust results." *Patrick v. Insurance Co.,* 176 N.C. 660, 97 S.E. 657; *Hine v. Blumenthal,* 239 N.C. 537, 547, 80 S.E. 2d 458. "Whether an easement is appurtenant or in gross is controlled mainly by the nature of the right and the intention of the parties creating it, and must be determined by the fair interpretation of the grant . . . creating the easement, aided if necessary by the situation of the property and the surrounding circumstances. If it appears from such a construction of the grant . . . that the parties intended to create a right in the nature of an easement in the property retained for the benefit of the property granted, . . . such right will be deemed an easement appurtenant and not in gross, regardless of the form in which such intention is expressed. On the other hand, if it appears from such a construction that the parties intended to create a right to be attached to the person to whom it was granted . . ., it will be deemed to be an easement in gross. An easement is appurtenant to land, if it is so in fact, although it is not declared to be so in the deed or instrument creating it; and an easement, which in its nature is appropriate and a useful adjunct of land owned by the grantee of the easement, will be declared an 'easement appurtenant,' and not 'in gross,' in the absence of a showing that the parties intended it to be a mere personal right." 28 C. J. S., Easements, s. 4c, pp. 636-7. In case of doubt, an easement is presumed to be appurtenant, and not in gross. 17A Am. Jur., Easements, s. 12, p. 628.

Defendants contend that the easement of ingress and egress granted by them is in gross and personal to J. A. Shingleton. The grant does not use the term "appurtenant" nor the term "in gross." It does not qualify plaintiff's right by use of such terms as "personally" or "in person." The language of the grant is that "the said J. A. Shingleton is hereby granted the right . . ." The fact that the words "heirs and assigns" are not inserted after the name of the grantee does not control interpretation. G.S. 39-1; 28 C. J. S., Easements, s. 4c, p. 637. Defendants insist that the consent judgment indicates that the easement was a right personal to plaintiff. We do not so interpret it. The consent judgment makes no direct reference to the easement, it merely refers to the deed from the State to plaintiff. The only writing bearing upon the question is the provision in the deed. It will be observed that the deed, in addition to the grant of easement to the plaintiff, reserves the right to the State to "Maintain and use the roads existing on" the land conveyed to plaintiff. We do not understand that defendants con-

tend that the roads across plaintiff's 110-acre tract can be used only by the individual members of the Wildlife Resources Commission and that the agents, servants, employees and licensees of the Commission are excluded. Yet the reservation and the grant are written in parallel modes of expression. It seems clear that the reservation of easement is appurtenant to the lands retained by the State. In the absence of express provision in the grant restricting the easement to the personal use of plaintiff, the presumption is that it is an easement appurtenant to plaintiff's 110-acre tract. Moreover, the situation of the property and the surrounding circumstances indicate beyond question that an easement appurtenant was intended. The original controversy, in the settlement of which the deed was given, arose from conflicting claims of rights and title to lands. The record does not disclose that plaintiff has ever claimed any personal rights, apart from land ownership, in the Wildlife Area. The deed conveys to plaintiff a tract of land which, without some adequate access over defendants' lands, would be completely cut off from any public or private road. The grant of easement was so clearly connected with the conveyance of the 110-acre tract that in the deed it follows immediately the description of the land. The words "ingress" and "egress" as used in the grant of easement show clearly it was intended that the easement is connected with and is to be used for the benefit of the land. The road in question is appurtenant to the land in fact, and leads from the land across the Wildlife Area to the public road beyond. Apart from the ownership of the 110-acre tract, the easement is worthless. If plaintiff did not own this land he would have no business or interest of any kind within the Wildlife Area. The land was conveyed to plaintiff in fee. It is not reasonable to conclude that the State would undertake to grant and plaintiff to accept a right of access to land which would end at the death of plaintiff and render the land thereafter inaccessible and worthless. Furthermore, it is not reasonable to suppose that plaintiff could, acting alone, cut and remove timber from his land or cultivate, harvest and remove crops, or make other beneficial use of the land. Certainly the parties did not intend that plaintiff's heirs, devisees or assigns should have no access to the property. We hold that the easement granted by the State to plaintiff is appurtenant to plaintiff's land described in the deed.

The court below adjudged that the State granted "an unlimited easement appurtenant to plaintiff's land . . . for his use and the use of his agents, servants, employees, licensees, and the *public generally* who have not been refused permission to use this easement by plaintiff." In our opinion the record in this case does not show that the general public should be permitted to use the road. "It is an established principle

that the unrestricted grant of an easement gives the grantee all such rights as are incidental or necessary to the reasonable and proper enjoyment of the easement. A grant . . . of an easement in general terms is limited to a use which is reasonably necessary and convenient and as little burdensome to the servient estate as possible for the use contemplated. An unlimited conveyance of an easement is in law a grant of unlimited reasonable use. Such grant is not restricted to use merely for the purposes of the dominant estate as are reasonably required at the date of the grant, but the right may be exercised by the owners of the dominant estate for any use to which the latter estate may be subsequently devoted. Thus there may be an increase in the volume and kind of use of such an easement during the course of its enjoyment." 12A Am. Jur., Easements, s. 113, pp. 720, 721. "The reasonable use and enjoyment of an easement is to be determined in the light of the situation of the property and the surrounding circumstances." What is a reasonable use is a question of fact. *Ibid.*, p. 721.

In determining what uses of the easement are reasonably necessary and convenient, consideration must be given to the purposes for which the easement was granted. *Sparrow v. Tobacco Co.*, 232 N.C. 589, 61 S.E. 2d 700. The owners of the servient estate may make any use of their property and road not inconsistent with the reasonable use and enjoyment of the easement granted. *Light Co. v. Bowman*, 229 N.C. 682, 51 S.E. 2d 191. The easement was granted for the purpose of ingress and egress to and from plaintiff's 110-acre tract of land. The ingress and egress must have some relation, directly or incidentally, to the actual use of the land by the owner. The record is silent as to what use is being made of the land, but it is safe to assume that in its position of isolation it is not being used for any business which would reasonably require that the general public have access thereto. It is suggested in plaintiff's brief that it is timberland or farmland. Plaintiff has made no showing which justifies the use of the easement by the general public. Furthermore, defendants are maintaining a wildlife refuge on the lands over which the road passes. Access by the general public is inimical to the maintenance of such refuge. It is no violation of plaintiff's rights under his easement that he be required to give permission to those who travel the road in connection with the use and enjoyment of the dominant estate. The words "and the public generally who have not been refused permission to use this easement by the plaintiff," will be stricken from the judgment below.

The court below decreed "that the defendants, their agents, servants and employees, be, and they are hereby enjoined from interfering by locked gate or otherwise with the use of said easement or road as here-

in provided." This portion of the judgment is not sustained. The owner of property cannot maintain an action against the State or any agency of the State in tort for damages to property (except as provided by statute, G.S., Ch. 143, Art. 31). It follows that he cannot maintain an action against it to restrain the commission of a tort. However, the landowner is not without a remedy. When public officers whose duty it is to supervise and direct a State agency attempt or threaten to invade the property rights of a citizen in disregard of law, they are not relieved of responsibility by the immunity of the State from suit, even though they act or assume to act under the authority and pursuant to the directions of the State. *Schloss v. Highway Commission,* 230 N.C. 489, 492, 53 S.E. 2d 517. In the instant action none of the officers or agents of the State are parties. And even if they were parties, it should be borne in mind that the plaintiff in the use of the road in question may not impose unnecessary and unreasonable burdens upon the servient tenement. In the light of the meagre facts presented by the record, it would seem that defendants' officers would be acting within defendants' rights in intercepting and questioning users of the road to ascertain their identity and status, and to determine whether they have permission for such use, and in preventing them from molesting or taking game, wildlife or trees from the lands of defendants, should such be attempted. Furthermore, the maintenance of a gate, even a locked gate, would not necessarily be inconsistent with plaintiff's rights so long as the use of the road by himself and his agents, servants, employees and licensees is not unreasonably interfered with thereby. We are not called upon on this appeal to promulgate rules for the guidance of the parties. But reasonable men can most certainly arrive at an understanding that will protect the rights of all.

Defendants demur *ore tenus* to the complaint on the ground that the superior court is without jurisdiction of the subject-matter of this action. They contend that the State has not consented to be sued in an action such as that alleged. The demurrer is overruled. G.S. 41-10.1, in pertinent part, provides that "Whenever the State of North Carolina or any agency or department thereof, asserts a claim of title to land which has not been taken by condemnation and any individual . . . likewise asserts a claim of title to said land, such individual . . . may bring an action in the superior court . . . against the State or any such agency or department thereof for the purpose of determining such adverse claims."

An easement is an interest in land and is generally created by deed. *Weyerhaeuser Co. v. Light Co., supra; Morganton v. Hudson,* 207 N.C. 360, 177 S.E. 169; *Combs v. Brickhouse,* 201 N.C. 366, 160 S.E. 355. An

easement appurtenant to property is property. *Williams v. Highway Commission,* 252 N.C. 772, 114 S.E. 2d 782. A private right-of-way is an easement and is land. *United States v. Welch,* 217 U.S. 333 (1910). Every right to land is a title. If a person has the actual or constructive possession of property, or the right of possession, he has a title thereto, though another person may be the owner. *Roberts v. Wentworth,* 59 Mass. 192 (1849); *Brady v. Cartaret Realty Co.,* 90 A. 257 (N.J. 1914). In the instant case there are adverse claims of title to land.

The judgment below will be modified in accordance with this opinion.

Modified and affirmed.

SHEILA MANGUM STEGALL, ADMINISTRATRIX OF THE ESTATE OF COY LEE STEGALL v. CATAWBA OIL COMPANY OF N. C.; SHELL OIL COMPANY AND ROY BROOME.

(Filed 20 November 1963.)

1. Pleadings § 12—

A demurrer admits the truth of all factual averments contained in the amended complaint and such relevant inferences as may be reasonably drawn therefrom, liberally construing the pleadings with a view to substantial justice between the parties, but the demurrer does not admit inferences or conclusions of law. G.S. 1-151.

2. Evidence § 3—

The court will take judicial notice that gasoline, either alone or mixed with kerosene, constitutes a flammable commodity and a highly explosive agent.

3. Negligence § 4—

The basic duty to use ordinary or reasonable care under the circumstances requires a person handling an inherently dangerous instrumentality to use increased caution commensurate with the exceptional danger.

4. Same; Sales § 16—

The manufacturer and the distributor of an inherently dangerous chattel, with actual or constructive knowledge of the danger, are under duty to give warning of such danger to persons for whose use the commodity is supplied when the manufacturer or distributor has reason to believe that they would not realize such danger, so that injury to them is reasonably forseeable in the absence of such warning.

5. Same— Complaint held insufficient to state cause of action against manufacturer for fatal injury in explosion of fuel.

Allegations to the effect that the manufacturer sold to a wholesaler or distributor a mixture of kerosene and gasoline or a mixture of kerosene and other highly flammable fuel with flash point below the minimum set by G.S. 119-16.1, but without allegation that it sold such mixture as standard kerosene, or that the manufacturer had either actual or constructive knowledge that the mixture was delivered to a retailer by the wholesaler and put in an underground tank used by the retailer solely for the storage of kerosene, *is held* insufficient to state a cause of action against the manufacturer for the death of a person fatally injured in an explosion resulting when he used the mixture as kerosene in attempting to start a fire.

6. Same— Complaint held insufficient to state cause of action against distributor for fatal injury in explosion of fuel.

Allegations to the effect that a distributor delivered to a retailer a mixture of kerosene and gasoline, or a mixture of kerosene and other highly flammable fuel with flash point below the minimum set by G.S. 119-16.1, and that the distributor put the fuel in an underground tank used by the retailer solely for the storage of kerosene, but without allegation that the distributor knew, or in the exercise of due care should have known, that the fuel was other than standard kerosene, *is held* insufficient to state a cause of action against the distributor for the death of a person fatally injured in an explosion resulting when he used the mixture as kerosene in attempting to start a fire.

7. Pleadings § 19—

Upon sustaining a demurrer for failure of the complaint to allege the facts essential to plaintiff's cause of action, plaintiff may move to amend. G.S. 1-131.

APPEAL by plaintiff from *Johnston, J.*, May 1963 Mixed Session of UNION.

Civil action to recover damages for the alleged wrongful death of plaintiff's intestate, heard upon separate demurrers filed to the amended complaint by defendants Catawba Oil Company of North Carolina and Shell Oil Company.

From a judgment sustaining the separate demurrer of each oil company, plaintiff appeals.

J. Max Thomas for plaintiff appellant.

Smith & Griffin by C. Frank Griffin and Richardson & Dawkins by O. L. Richardson for defendant appellees Catawba Oil Company of N. C. and Shell Oil Company.

PARKER, J. This is a summary of the crucial allegations of the amended complaint:

In April 1961 defendant Roy Broome was operating a country store and service station on N. C. Highway #205 about seven miles north of

Marshville, where he sold, *inter alia,* kerosene and regular and premium gasoline which were solely sold and delivered to him by Catawba Oil Company of North Carolina, hereafter called Catawba. The underground storage tanks and pumps at Broome's store and service station were owned and maintained by Catawba. Shell Oil Company, hereafter designated as Shell, was, and is, the sole supplier of kerosene and regular and premium gasoline delivered to Catawba.

A few days before 20 April 1963 Pernay Stegall, father of plaintiff's intestate Coy Lee Stegall, bought from Broome's store and service station three gallons of fuel represented by an employee of Broome there as being kerosene. This fuel was pumped by this employee from an underground storage tank used for the storage of kerosene only into an empty five-gallon can brought to Broome's store and service station by Pernay Stegall. This can had never contained any substance other than kerosene. Pernay Stegall carried the can and the fuel poured therein to his home to be used by persons residing there to start fires. At that time Coy Lee Stegall and his family were residing in Pernay Stegall's home as members of the household.

On the evening of 20 April 1961, plaintiff requested her intestate Coy Lee Stegall, who was her husband, to start a fire in a wood stove to heat the house. The stove had had no fire in it that day. After placing several pieces of wood in the stove, he lighted a piece of paper and put the burning paper in the stove. He then took the five-gallon can containing the fuel purchased from Broome's store and service station by Pernay Stegall and started pouring some of the fuel therein into the stove. The fuel in the can exploded, blowing the entire bottom out of the can and throwing burning fuel over his body causing first, second, and third degree burns from his face to his shoe tops, and resulting in his death the following day.

The fuel which was sold to and represented to Pernay Stegall by an employee of defendant Broome as kerosene was not in fact kerosene as defined by the statutes of the State of North Carolina, but was in fact a highly combustible fuel with a flash point far below the minimum set by the statutes of the State of North Carolina, and contained a high percentage of gasoline or other highly explosive substance.

Plaintiff alleges on information and belief that Catawba negligently and unlawfully sold and delivered to defendant Broome the defective fuel or mixture, which was ultimately used by her intestate and proximately caused his death; that defendant Broome negligently and unlawfully sold to Pernay Stegall the defective fuel ultimately used by her intestate contrary to the statutes of the State of North Carolina, and particularly G.S. 119-34; that Shell was the sole supplier of pe-

troleum products to Catawba, and delivered to it regular and premium gasoline and kerosene or a mixture of both.

The separate acts of negligence of all the defendants concurring together proximately caused the explosion and her intestate's death, and for such death she prays for a recovery of damages from the defendants, severally and jointly.

Shell demurred to the amended complaint on the ground that it does not allege facts sufficient to constitute a cause of action against it, in that no facts are alleged to show that Shell was negligent in any respect. Catawba filed a substantially similar demurrer to the amended complaint.

The court entered one judgment sustaining both demurrers on the grounds specified in the demurrers.

Catawba and Shell, in the joint brief they have filed, state that they do each demur to the amended complaint on the further ground that it shows affirmatively on its face that plaintiff's intestate was clearly guilty of contributory negligence.

G.S. 1-151 requires that the allegations of the amended complaint, challenged by the demurrers here, shall be liberally construed by us with a view to substantial justice between the parties. *Lynn v. Clark,* 254 N.C. 460, 119 S.E. 2d 187. It is a trite aphorism that the demurrers here admit, for the purpose of testing the sufficiency of the amended complaint, the truth of all factual averments therein well stated and such relevent inferences as may be reasonably drawn therefrom, but they do not admit any legal inferences or conclusions of law asserted by the pleader. *McKinney v. High Point,* 237 N.C. 66, 74 S.E. 2d 440.

We take judicial notice of the fact that gasoline either alone or mixed with kerosene constitutes a flammable commodity and a highly explosive agent. *McLawson v. Paragon Refining Co.,* 198 Mich. 222, 164 N.W. 668.

This is said in *Bradley v. Fowler,* 210 S.C. 231, 42 S.E. 2d 234: "The evidence showed, and it is a matter of general knowledge, that gasoline is highly volatile and gives off fumes and vapors which readily ignite when in the proximity of a flame, and at lower temperature or flash point than kerosene, and hence is more inflammable and explosive than is kerosene."

In respect to Shell we are confronted with the question of the liability of a manufacturer and seller to Catawba, a distributor or middleman, of an alleged defective commodity intrinsically dangerous to life and limb, to wit, a mixture of kerosene and gasoline, for the death of a third person, an ultimate consumer of such mixture purchased by his father, in whose house he lived, as kerosene from Broome, a retail

merchant, who purchased from Catawba, a distributor or middleman. We are also confronted with the liability of Catawba to the ultimate consumer under such circumstances.

It was the duty of Shell, the manufacturer and seller to Catawba, and of Catawba, the distributor or middleman and seller to Broome, to exercise a degree of care commensurate with the risk of injury from negligence, not to deliver for sale and use as standard kerosene, in lieu of standard kerosene, a mixture of kerosene and gasoline or a mixture of kerosene and other highly combustible fuel with a flash point below the minimum set by G.S. 119-16.1, "Kerosene Defined," which either knows, or, in the exercise of a degree of care commensurate with the risk of injury from negligence, should know, is not standard kerosene, but a more flammable commodity than standard kerosene and a highly explosive agent, and has no reason to believe that those for whose use the commodity is supplied as standard kerosene will realize it is not standard kerosene, but is a more flammable commodity than standard kerosene and a highly explosive agent, without apprising the purchaser of such fact. If either Shell or Catawba failed in the performance of such duty, it becomes responsible if injury or damage proximately results to another, who is free from contributory negligence, by reason of an explosion, when such more highly dangerously flammable and explosive commodity is used by the ultimate purchaser or a member of his household as and for standard kerosene. The liability does not arise out of contract or deceit, but is based upon the fundamental proposition that a negligent act, which was inherently dangerous to the life and safety of an ultimate consumer or a member of his household, has been done or permitted by him who is charged with the duty of exercising a degree of care commensurate with the risk of injury from negligence. One who puts on the market articles inherently or intrinsically dangerous to life and limb owes the duty of due care to all those persons who ought reasonably to have been foreseen as likely to use them. And such an article is a mixture of gasoline and kerosene to be sold as standard kerosene. *Ramsey v. Oil Co.*, 186 N.C. 739, 120 S.E. 331; *Waters-Pierce Oil Co. v. Deselms*, 212 U.S. 159, 53 L. Ed. 453; *Merchants' Bank v. Sherman*, 215 Ala. 370, 110 So. 805; *Gatliff Coal Co. v. Hohlman*, 157 Ky. 778, 164 S.W. 76; *Kentucky Independent Oil Co. v. Schnitzler*, 208 Ky. 507, 271 S.W. 570, 39 A. L. R. 979; *McLawson v. Paragon Refining Co., supra; Kearse v. Seyb*, 200 Mo. A. 645, 209 S.W. 635; *Fleming v. Arkansas Fuel Oil Co.*, 231 S.C. 42, 97 S.E. 2d 76; *Gulf Refining Co. v. Jinright*, 10 F. 2d 306; Exhaustive Annotation 80 A. L. R. 2d 488-590, entitled "Liability of manufacturer or seller for injury caused by firearms, explosives and flammables."

The duty of ordinary or reasonable care under the circumstances lies at the foundation of the law of negligence. It is a legal truism that this principle of law generally comprehends a duty to warn of danger, the nonperformance of which will, when it is the proximate cause of injury, give rise to liability. Consequently, a manufacturer or seller of a product, which to his actual or constructive knowledge involves danger to users has a duty to give warning of such dangers. Annotation 76 A. L. R. 2d p. 16 *et seq.*, where cases are cited from a large number of jurisdictions.

This Court in *Wyatt v. Equipment Co.*, 253 N.C. 355, 117 S.E. 2d 21, states the same principle of law, quoting from Restatement, Torts, § 388:

> " 'One who supplies directly or through a third person a chattel for another to use, is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be in the vicinity of its probable use, for bodily harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier (a) knows, or from facts known to him should realize, that the chattel is or is likely to be dangerous for the use for which it is supplied; (b) and has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition; and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be so'."

The only allegations of fact in the amended complaint as to Shell are to the effect that at all times complained of Shell was the sole supplier of petroleum products to Catawba, and delivered to it, among other products, regular and premium gasoline and kerosene or a mixture of the same. Admitting, for the purpose of the demurrer filed by Shell, that the above factual averments are true, there is no allegation of fact in the amended complaint that Shell sold such a mixture to Catawba as standard kerosene to be used as standard kerosene, or that Shell sold to Catawba as standard kerosene a fluid to be used as standard kerosene that did not meet the requirements of the definition of kerosene as set forth in G.S. 119-16.1. If Catawba did put in an underground tank owned and maintained by it at Broome's store and service station for the storage of standard kerosene a mixture of gasoline and kerosene or a mixture of kerosene and other highly explosive substance to be sold and used as standard kerosene, there is no allegation of fact to the effect that Shell had either actual or constructive knowledge of it, or participated in it in any way.

G.S. 119-34 states: "The retail dealer shall be held responsible for the quality of the petroleum products he sells or offers for sale," and contains a proviso not relevant on this appeal. Plaintiff in her brief states, G.S. 119-34 "places the responsibility upon the retailer for the quality of the product sold." Shell is not a retail dealer here, and this statute has no application to it. The same is true as to Catawba.

The Court said in *Shives v. Sample,* 238 N.C. 724, 79 S.E. 2d 193: "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."

It is our opinion, and we so hold, the amended complaint alleges no facts which show negligence, or facts which would permit a fair inference to be reasonably drawn therefrom of negligence, on the part of Shell as the proximate cause, or as one of the proximate causes, of the death of plaintiff's intestate. The mere sale and delivery of a mixture of kerosene and gasoline by Shell to Catawba does not impose on Shell a liability for the death of plaintiff's intestate here resulting from the use thereof in the absence of any negligence on Shell's part. *McLamb v. E. I. DuPont De Nemours & Co.,* 79 F. 2d 966; *Wyllie v. Palmer,* 137 N.Y. 248, 33 N.E. 381, 19 L. R. A. 285; *Hercules Powder Co. v. Calcote,* 161 Miss. 860, 138 So. 583. Consequently, the trial court was correct in sustaining Shell's demurrer.

Conceding that Catawba's demurrer to the amended complaint admits, for the purpose of testing the sufficiency of the pleading, the truth of factual averments from which a fair inference can be reasonably drawn that Catawba put in an underground tank owned and maintained by it for standard kerosene only at Broome's store and service station not standard kerosene but, in lieu thereof, a mixture of gasoline and kerosene or a mixture of kerosene and other highly explosive substance, with a flash point far below the minimum set by G.S. 119-16.1, and that Catawba ought reasonably to have foreseen that ultimate purchasers of such commodity from Broome were likely to use such commodity as standard kerosene, yet the amended complaint contains no factual allegations to the effect that Catawba sold and delivered to Broome as standard kerosene what it knew, or, in the exercise of care commensurate with the risk of injury from negligence, should have known, was not standard kerosene but was a mixture of gasoline and

kerosene or a mixture of kerosene and other highly explosive substance, or that if it did have actual or constructive knowledge of such fact, it failed to notify Broome, the retailer.

Plaintiff contends that *Ramsey v. Oil Co.*, 186 N.C. 739, 120 S.E. 331, is authority for his contention that his allegations of fact are sufficient. With this contention we do not agree. An examination of the well-drafted complaint in the *Ramsey* case, on file in the office of the clerk of this Court, plainly shows a vast difference between the allegations there and in the instant case. The allegations of fact in the complaint in the *Ramsey* case are to this effect: One Len Henderson was a retail dealer of kerosene and general merchandise, and purchased his supplies of kerosene from the Standard Oil Company of New Jersey, hereafter called Standard Oil. During November and December 1922, Standard Oil knowing Henderson to be such a retailer negligently sold to him a large quantity of a very dangerous and explosive liquid, which was, as plaintiff is informed and believes, an unlawful mixture of gasoline and kerosene, for the purpose of being retailed as standard kerosene by Henderson in the regular course of his business to the public in that community for use as an illuminant and for kindling fires, according to the custom prevailing in that community, Standard Oil well knowing it to be the purpose of Henderson to retail said liquid as standard kerosene and to be so burned. Standard Oil well knew, or by the exercise of reasonable care should and would have known, that the admixture sold by it to Henderson for resale as kerosene was explosive and dangerous to life when so used. The complaint then alleges at length statutes of this State and rules and regulations of the Department of Agriculture, as authorized by statutes, in respect to the standards, rules and regulations in relation to petroleum products sold and delivered in this State, and particularly as to the flash test of illuminating oils, which shall not be less than 100 degrees Farenheit, as tested by the Elliott method, and avers that Standard Oil negligently violated these statutes, rules and regulations in its transactions with Henderson. The complaint then avers in substance that Standard Oil sold and delivered such admixture to Henderson as standard kerosene, the flash test of such admixture being greatly less than 100 degrees Farenheit, as tested by the Elliott method—closed cup—according to the directions prepared by the State Oil Chemist, and being a very dangerous and explosive liquid. Henderson, not knowing said mixture to be dangerous and explosive, on 18 December 1922 retailed a gallon thereof to plaintiff for use as an illuminant and to kindle fires. On 21 December 1922, at about 7:30 a.m., Carrie Lee Ramsey, mother of plaintiff's intestate Edna E. Ramsey, an eight-year-old child, was using

said admixture for kindling a fire in the kitchen stove, not knowing said admixture contained gasoline or that it was dangerous and explosive, and the admixture ignited and exploded and burned plaintiff's intestate, his eight-year-old daughter, which burns proximately caused her death. The *Ramsey* case was for the recovery of damages for the wrongful death of plaintiff's intestate, his eight-year-old daughter. In this explosion plaintiff's wife and his little son were horribly burned, and both died in a few hours after the explosion.

The opinion in the *Ramsey* case does not state the relation of plaintiff's intestate to plaintiff. In Annotation 80 A. L. R. 2d p. 505 and p. 525, it is erroneously stated that the *Ramsey* case was an action for the death of plaintiff's wife. A similar error appears in Michie's North Carolina Digest (1937), Vol. 9, p. 325.

Shell was the sole supplier of petroleum products to Catawba. The amended complaint does not allege sufficient facts to show actionable negligence, or facts which would permit a fair inference to be reasonably drawn of actionable negligence, on the part of Catawba to withstand the challenge of its demurrer. To repeat what we said before as to Shell, the mere sale and delivery of a mixture of kerosene and gasoline by Catawba to Broome does not impose on Catawba a liability for the death of plaintiff's intestate resulting from the use thereof in the absence of negligence on Catawba's part. To hold that actual or constructive knowledge of the danger of the mixture sold by Catawba is not a requisite to the duty to warn on its part, would make Catawba an insurer. The lower court properly sustained Catawba's demurrer.

The term "contributory negligence," *ex vi termini,* implies or presupposes negligence on defendant's part. *Owens v. Kelly,* 240 N.C. 770, 84 S.E. 2d 163. By reason of what we have said above, we do not reach the serious question as to whether on the face of the amended complaint itself contributory negligence on the part of plaintiff's intestate is so patent and unquestionable as to bar recovery by plaintiff. *Boykin v. Bennett,* 253 N.C. 725, 118 S.E. 2d 12.

The lower court properly sustained the demurrers of Shell and Catawba. This is without prejudice to plaintiff's right to move in the court below for leave to amend his amended complaint under the provisions of G.S. 1-131.

Affirmed.

PERNAY STEGALL v. CATAWBA OIL COMPANY OF N. C.; SHELL OIL COMPANY AND ROY BROOME.

(Filed 20 November 1963.)

APPEAL by plaintiff from *Johnston, J.*, May 1963 Mixed Session of UNION.

Civil action to recover damages for the destruction by fire of furniture in a house allegedly caused by plaintiff's son Coy Lee Stegall pouring a mixture of gasoline and kerosene or a mixture of kerosene and another highly explosive substance on a live fire in a wood stove, which resulted in an explosion, heard upon seperate demurrers filed to the amended complaint by defendants Catawba Oil Company of North Carolina and Shell Oil Company.

From a judgment sustaining the separate demurrer of each oil company, plaintiff appeals.

J. Max Thomas for plaintiff appellant.

Smith & Griffin by C. Frank Griffin and Richardson & Dawkins by O. L. Richardson for defendant appellees Catawba Oil Company of N. C. and Shell Oil Company.

PARKER, J. The amended complaint here is identical with the amended complaint in the case of Sheila Mangum Stegall, Administratrix of the Estate of Coy Lee Stegall, against the same defendants here, the opinion in which is filed this day ante 459, with the single exception that in the case of Sheila Mangum Stegall, Administratrix of the Estate of Coy Lee Stegall, there are allegations as to the burns and death of Coy Lee Stegall, her qualification as administratrix of his estate, and a prayer for recovery of damages for his death, and that here there are allegations as to the destruction by fire of plaintiff's furniture and of the house, and a prayer for recovery of damages for the destruction of his furniture. In each case it is the same explosion, and allegedly caused the same way.

The separate demurrer of each oil company here is identical with the separate demurrer of each oil company in the case of Sheila Mangum Stegall, Administratrix of the Estate of Coy Lee Stegall, and the judgment here is identical with the judgment entered in that case. The briefs in both cases are identical, with the exception that in the case of Sheila Mangum Stegall, Administratrix of the Estate of Coy Lee Stegall, the joint brief of the defendant oil companies contends that on the face of the amended complaint itself contributory negligence on the part of plaintiff's intestate Coy Lee Stegall is so patent and un-

questionable as to bar recovery by plaintiff. In addition, counsel in both cases are the same.

The judgment below is affirmed upon authority of the case of Sheila Mangum Stegall, Administratrix of *Coy Lee Stegall v. Catawba Oil Company of N. C., Shell Oil Company and Roy Broome, ante,* 459. This is without prejudice to plaintiff's right to move in the court below for leave to amend his amended complaint under the provisions of G.S. 1-131.

Affirmed.

BOYCE STEGALL v. CATAWBA OIL COMPANY OF N. C.; SHELL OIL COMPANY AND ROY BROOME.

(Filed 20 November 1963.)

APPEAL by plaintiff from *Johnston, J.,* May 1963 Mixed Session of UNION.

Civil action to recover damages for the destruction by fire of a house allegedly caused by Coy Lee Stegall pouring a mixture of gasoline and kerosene or a mixture of kerosene and another highly explosive substance on a live fire in a wood stove, which resulted in an explosion, heard upon separate demurrers filed to the amended complaint by defendants Catawba Oil Company of North Carolina and Shell Oil Company.

From a judgment sustaining the separate demurrer of each oil company, plaintiff appeals.

J. Max Thomas for plaintiff appellant.

Smith & Griffin by C. Frank Griffin and Richardson & Dawkins by O. L. Richardson for defendant appellees Catawba Oil Company of N. C. and Shell Oil Company.

PARKER, J. The explosion and fire here is the same explosion and fire as alleged in the amended complaint in the case of Sheila Mangum Stegall, Administratrix of Coy Lee Stegall, against the same defendants here, the opinion in which is filed this day *ante,* 459, and the same explosion and fire as alleged in the amended complaint in the case of Pernay Stegall against the same defendants here, the opinion in which is filed this day ante 468. The explosion and fire caused the

death of Coy Lee Stegall, the destruction in the house of the furniture of Pernay Stegall, and the destruction of a house owned by the plaintiff, in which his brother Pernay Stegall lived as his tenant.

The amended complaints in all three cases are identical, with the exception that one alleges the death of Coy Lee Stegall, and the other two property damage. The demurrers filed in all three cases are identical. The single judgment in all three cases is identical. The briefs filed by counsel in all three cases are identical, with the exception that in the death case defendants' joint brief contends that on the face of the amended complaint itself contributory negligence on the part of plaintiff's intestate Coy Lee Stegall is so patent and unquestionable as to bar recovery by plaintiff. In addition, counsel in all three cases are the same.

The judgment below is affirmed upon authority of the case of Sheila Mangum Stegall, Administratrix of *Coy Lee Stegall v. Catawba Oil Company of N. C., Shell Oil Company and Roy Broome, ante,* 459. This is without prejudice to plaintiff's right to move in the court below for leave to amend his amended complaint under the provisions of G.S. 1-131.

Affirmed.

HENRY P. BREWER v. ROBERT ELKS, JESSIE B. ELKS, R. V. KEEL, AND BERTHA C. KEEL.

(Filed 20 November 1963.)

1. **Partnership § 4—**

For the payee to establish as a partnership liability a note not signed in the partnership name, it is required that he show that the partner signing the note acted on behalf of the partnership in procuring the loan and was authorized to so act, or that the other partners, with knowledge of the transaction, thereafter ratified the act of the maker.

2. **Same—**

The mere fact that a partnership ultimately benefits from a contract made by a partner in his own name does not create a partnership obligation.

3. **Partnership § 9—**

Where a receiver is appointed to take possession of partnership assets for dissolution, the creditors must file and prove their claims against the partnership as directed by the court or be barred, G.S. 1-507.6, and upon

the filing of such claim any partner may challenge the validity of the claim as a partnership liability. G.S. 1-507.7.

4. Partnership § 4— Failure to except to finding that notes were partnership liabilities held an admission of such liability.

Plaintiff instituted a suit on a note as a partnership liability. The note was not executed in the name of the partnership and there was no evidence that the partners not signing the note authorized the partner signing the note to borrow funds for the partnership, but there was evidence that in proceedings for the dissolution of the partnership the notes were asserted and allowed as a partnership liability and that the partners who did not sign the note failed to except to the receiver's finding to this effect. *Held:* The failure to except to the receiver's findings of partnership liability is competent as an admission of partnership liability, and therefore nonsuit on the ground that the evidence was insufficient to establish a partnership liability is error.

5. Judgments § 38; Pleadings § 2—

It is not required that the complaint allege evidentiary matters, therefore the failure to except to a judicial determination that the claim asserted was a partnership liability may be competent as evidence of an admission, notwithstanding that the judgment in the partnership proceedings is not pleaded as an estoppel.

APPEAL by plaintiff from *Bone, J.*, March 1963 Civil Session of WILSON.

Defendants were partners trading as Friendly Furniture Company. On 1 February 1958 Friendly Furniture Company executed a note for $2,000, payable on demand to the order of plaintiff. This note was also signed by defendants Elks.

On 17 February 1959 plaintiff and defendants Elks executed a note payable, on 15 January 1960, to Guaranty Bank & Trust Co. Plaintiff alleged this note evidenced a loan to the partnership; he signed for the accommodation of Friendly Furniture Company. Defendant Robert Elks was the manager of Friendly Furniture Company. He acted in that capacity for fourteen years and was so acting when the notes were executed.

Neither of the notes was paid by the partnership. Plaintiff, on 28 June 1960, paid the note dated 17 February 1959.

In 1960 defendants Elks instituted an action in the Superior Court of Pitt County against defendants Keel for a dissolution of the partnership. By consent a receiver was appointed. Plaintiff filed a claim with receiver for $4,000 and accrued interest, basing his claim on the two notes. His claim was allowed by the receiver. He was paid from the sale of partnership assets the sum of $1,371.85. He applied this sum as

a credit on the note dated 1 February 1958, leaving a balance owing on that note of $963.15.

Defendants Elks did not deny liability for the amounts claimed. Judgment was entered against them for the balance owing on the two notes.

Defendants Keel by answer denied their liability to plaintiff in any sum. During the trial they admitted liability for $963.15, the balance claimed to be owing on the note signed in the name of Friendly Furniture Company.

The court, being of the opinion that plaintiff's evidence was not sufficient to establish liability of the partnership for the note dated 17 February, payable to Guaranty Bank & Trust Co., rendered judgment against defendants Keel for $963.15 in accordance with their admission and non-suited plaintiff's cause of action on the other note. Plaintiff excepted and appealed.

Moore & Moore by Robert G. Webb for plaintiff appellant.
M. E. Cavendish and L. W. Gaylord, Jr., for defendant appellees.

RODMAN, J. It is provided by statute "all partners are jointly and severally liable for the acts and obligations of the partnership." G.S. 59-45. Hence the admission of defendants Keel that they were general partners in the business conducted under the name of Friendly Furniture Company, coupled with the testimony that Guaranty Bank & Trust Co. discounted the note of 17 February 1959 which on its face bore no evidence that it was an obligation of the partnership, purporting merely to be the obligation of defendants Elks and plaintiff, presents for determination this question: Did plaintiff offer any evidence on which a jury should be permitted to find that the note was in fact a partnership obligation?

Where a contract apparently made for the purpose of carrying on partnership business is executed in the partnership name by a partner, the partnership is liable for a breach of the contract even though the partner was not authorized to so contract, unless the other parties to the contract had knowledge of the lack of authority; but "an act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners." G.S. 59-39.

Here the note was not signed in the partnership name; it did not on its face purport to be for the benefit of the partnership. To establish liability, plaintiff must show that the partner was acting on behalf of the partnership in procuring the loan and was authorized to so act; or

that the partners, with knowledge of the transaction, thereafter ratified the acts of their partner.

Defendant Robert Elks testified that he was, on 17 February 1959, the managing partner of the Friendly Furniture Company, having served in that capacity for fourteen years. He asked plaintiff "to sign some notes at the bank for the company with me. Mr. Brewer said that he would and on February 17, 1959, Mr. Brewer and my wife and I went to the Guaranty Bank and Trust Company to sign the notes. Mr. Brewer signed the notes with me and my wife at my request because the Company needed the money." He testified that the proceeds of the loan were by mistake deposited in his personal account; he immediately wrote a check transferring the funds to the credit of Friendly Furniture Company.

The mere fact that a partnership ultimately benefits from a contract made by a partner in his own name does not create a partnership obligation. *Willis v. Hill*, 19 N.C. 231; *Queen City Petroleum Products Co. v. Norwood-Hyde Park Bank & Trust Co.*, 197 N.E. 357; *Lemon v. Montgomery*, 288 P. 2d 407; *Bank of America Nat. Trust & Savings Assn. v. Kumle*, 160 P. 2d 875; *First State Bank of Riesel v. Dyer*, 254 S.W. 2d 92; Partnership, 40 Am. Jur. sec. 149, 68 C.J.S. sec. 146.

Partnership contracts are not usually made in the names of the individual partners. The usual way for a partnership to indicate its liability for money borrowed is to execute the note in its name. Since the note here sued on was not executed in the name of the partnership, plaintiff had the burden of showing defendants Keel had authorized the transaction. We find nothing in the testimony of plaintiff or defendants Elks to warrant a finding that defendants Keel had authorized Elks, in their individual names, to borrow for the partnership.

Plaintiff does not, however, limit his claim of partnership liability to the facts testified to by him and Elks. He alleged an original partnership indebtedness of $4,000 evidenced by two notes of $2,000 each, a payment of $1,371.85 by Hite, receiver of Friendly Furniture Company, on the partnership indebtedness of plaintiff, which payment he applied as a credit on one of the notes.

Defendants Keel admitted the allegation that Hite, receiver, had paid plaintiff $1,371.85.

To show partnership liability for the sum sued for, plaintiff offered in evidence the judgment roll in a civil action instituted in Pitt County on 22 February 1960 entitled *"Robert Elks and wife, Jessie B. Elks Against R. V. Keel and wife, Bertha C. Keel."* The record consisted of (1) summons showing service 23 February 1960, (2) complaint alleging plaintiffs and defendants had since January 1949, as partners, con-

ducted a retail furniture business under the firm name of Friendly Furniture Company, that the partnership was indebted to various creditors and was without funds to meet its obligations, that a receiver should be appointed and the partnership dissolved; (3) an order made 23 February 1960 with the consent of defendants Keel appointing Hite as receiver of the partnership assets; (4) a consent order for the sale of partnership assets and for notice to creditors to file within the time fixed their claims against the partnership; (5) an affidavit of plaintiff asserting that the partnership was indebted to him in the sum of $4,000, which indebtedness was evidenced by the two notes here sued on; (6) report of the receiver filed 12 September showing (a) expenses of the receivership, (b) preferred claims and unpaid expenses of the receivership, (c) "claims filed with receiver having no preference," (d) claims filed which the receiver disallowed.

The receiver reported the partnership was indebted to plaintiff in the sum claimed. On 11 November 1960 an order was entered approving and confirming the report of the receiver with directions to disburse the funds in his hands in the manner set out in his report.

On 14 November 1960 the receiver filed his report showing his disbursements as directed by the court. Included in his disbursements was the sum of $1,371.85 paid plaintiff. The amount paid unsecured creditors was 34.2963% of their claims. This report was received, approved, and the receiver discharged.

When a partner seeks a dissolution of a partnership and with the consent of the other partners a receiver is appointed to take possession of partnership assets for distribution to the parties entitled thereto, the law contemplates a judicial determination of the liabilities of the partnership. Until the liabilities of the partnership have been determined there can be no distribution to the partners. G.S. 59-70; *Lackner v. McKechney*, 252 F. 403; *Thompson v. Thompson*, 142 N.E. 2d 265; *Carter v. Carter*, 24 So. 2d 759.

When the court so directs, creditors must file and prove their claims or be barred. G.S. 1-507.6; *Surety Corp. v. Sharpe*, 233 N.C. 83, 62 S.E. 2d 501. The receiver must "pass upon and allow or disallow" the claim. He must report his findings to the court. Any interested party may by exception to the receiver's report challenge his findings. The validity of the claim so asserted must then be determined by the court. G.S. 1-507.7. A partner individually liable for partnership debts, if the partnership assets are insufficient to discharge the claim, is unquestionably an "interested person" who may challenge the validity of the asserted partnership obligations. *Surety Corp. v. Sharpe*, 232 N.C. 98, 59 S.E. 2d 593; 68 C.J.S. pp. 991-2.

It has been held that where the partnership assets are insufficient to discharge the partnership obligations, claimant may, in the proceeding in which the receiver was appointed, have judgment against the individual partners for the balance of his claim. *Lackner v. McKechney, supra.*

Plaintiff did not move in the action instituted in Pitt County for the dissolution of the partnership for a judgment against the individual partners for the balance owing to him after crediting on his claim the payment made by the receiver. We need not decide whether the complaint is sufficient to allege a judicial determination of partnership liability. Defendants' failure to except to the receiver's finding that the partnership was liable to plaintiff for the full $4,000 may be shown as an admission that the partnership was either originally liable because the partners had authorized defendants Elks to execute the note, or, if they had not originally authorized the execution of the note, the partnership had thereafter ratified the act of Elks in borrowing in his own name for the benefit of the partnership. Here the plaintiff did not rely on the judgment roll which he offered as an estoppel. He used it as an admission, an evidentiary matter. Parties are not required to plead evidentiary matters. "The purpose of the complaint is to allege the substantive and constituent facts of the cause of action, not to narrate the evidence supporting them." *Thomas & Howard Co. v. Insurance Co.*, 241 N.C. 109, 84 S.E. 2d 337; *Daniel v. Gardner*, 240 N.C. 249, 81 S.E. 2d 660; *Foust v. Durham,* 239 N.C. 306, 79 S.E. 2d 519; *Thorpe v. Parker,* 199 N.C. 451, 154 S.E. 674; *Stancill v. James,* 126 N.C. 190.

Reversed.

ROBERT D. STEWART, ADMINISTRATOR C.T.A. OF THE ESTATE OF WORTH STEWART, DECEASED V. HARRIET S. ROGERS.

(Filed 20 November 1963.)

1. Death § 2—

The continuous and unexplained absence of a person from his domicile for a period of seven years, without being heard from by those who would naturally expect to hear from him if he were alive, raises a presumption that such person is dead, and the period at which it is presumed that life ceased may be shortened by proof of facts and circumstances from which a jury may reasonably infer, by the test of reason and experience, that death ensued at an earlier date.

2. Same; Marriage § 2— Evidence held to support finding that missing person was dead some three years after disappearance.

Evidence tending to show that a person alone in a flight on a return trip to his home in this State was not qualified or licensed to pilot a plane in bad weather, that there was a storm in his path of flight, that his intended path of flight was along the coast line for a considerable distance, that the wind was of such velocity and direction as to blow him out to sea, that he did not land at or communicate with any airport within the flying range of his plane, that thorough and exhaustive searches were made for him along the line of flight, etc., and that he had not been heard from since he began his journey, *is held* sufficient to sustain a finding that such person was dead at the time of the remarriage of his widow more than three years after his disappearance.

3. Trial § 57—

In a trial by the court under agreement of the parties, the findings of the court are as conclusive as the verdict of a jury when the findings are supported by competent evidence.

4. Marriage § 2—

A second or subsequent marriage is presumed legal until the contrary is proved, and the burden is upon the person asserting a property right based upon the invalidity of the second marriage to prove its invalidity.

APPEAL by plaintiff from *Mallard, J.*, 12 August 1963 Schedule "C" Session of MECKLENBURG.

It was agreed and stipulated by the parties to this action that the trial judge should conduct the trial without a jury, hear the evidence, and render judgment upon his findings of fact and conclusions of law as authorized by G.S. 1-185.

The defendant and Worth Stewart were married on 11 September 1932. Thereafter they lived together as husband and wife until 26 February 1953.

There were two children born of the marriage between the defendant and Worth Stewart. Both of these children, Robert D. Stewart, the plaintiff, and Gabe S. Stewart, are now living and are *sui juris*.

During the period of this marriage, Worth Stewart accumulated substantial properties, including cash, stocks in closely held theatre corporations, partnership interests in theatre companies, real estate held by the entireties with the defendant, and policies of insurance upon his life payable to the defendant as named beneficiary.

All the evidence tends to show that Worth Stewart had no marital, financial, or health problems of any consequence. He disappeared under the circumstances hereinafter set out on 26 February 1953. The evidence raises no inference or suggestion of any motive on the part of Worth Stewart to leave his family and business. Although he had

over $25,000 in his personal checking account, he had no more than $300.00 in cash when he disappeared. Furthermore, he never drew any checks on this account after his disappearance.

Worth Stewart owned a single-engine Beech Bonanza airplane which he sometimes flew himself, although he was neither qualified nor licensed to fly in bad weather, and his plane was not equipped for operating in instrument-weather conditions.

On 21 February 1953, Worth Stewart departed from Charlotte, North Carolina, with two companions aboard this plane, with the intention of flying to an airfield near Fort Pierce, Florida. On the way down, however, they encountered bad weather and when it became apparent that Stewart was having considerable difficulty in navigating and handling the aircraft under these conditions, his friends prevailed upon him to land at Jacksonville, Florida, and from there they proceeded to their destination by commercial airliner.

After several days of fishing, Worth Stewart announced his intention to return to his family and business in Charlotte, North Carolina. He had his plane flown to him from Jacksonville, and on the return trip he stopped over at Jacksonville to drop off the pilot who had flown the plane to him. He then left Jacksonville, alone, at approximately 11:40 a.m., 26 February 1953. Although the weather was clear at Jacksonville, there was a broad arc of turbulent weather extending across his intended path of flight. Nothing has been heard of Worth Stewart since he left Jacksonville. Extensive air and ground search along his intended path of flight turned up no trace of him or his plane. Civil Air Patrol units in North Carolina, South Carolina, Georgia and Florida, including units from the United States Marine Air Wing, the United States Navy, and Air Rescue Service from Elgin Air Force Base in Florida, flew 380 search missions in an effort to locate Worth Stewart and his plane. The search began on 27 February 1953 and continued for eleven days. Likewise, all airports were checked within the possible flying range of the Beech Bonanza Aircraft piloted by Stewart, and it was determined that he never landed at or contacted any of these airports.

The defendant managed Worth Stewart's property and business as his guardian until 29 May 1956. On that date she was appointed collector of his estate and continued to manage his affairs until 9 September 1960.

On 30 May 1956, the defendant and Thomas S. Rogers were married. On 15 September 1960, the will of Worth Stewart was admitted to probate after it had been judicially determined that Worth Stewart was dead. The plaintiff, son of Worth Stewart, was appointed administra-

tor c.t.a. The defendant dissented from the will on 31 October 1960. Subsequently, a partial distribution was made to the defendant with the express understanding that it would be returned to the estate if defendant had forfeited her right to share in the estate by her remarriage.

Plaintiff, as administrator, brings this action to recover such partial distribution on the ground that the defendant's remarriage before Worth Stewart was declared dead is equivalent to an elopement with an adulterer and bars the defendant's right to share in the estate.

From the foregoing evidence the court found as a fact, among other things, that "There is no evidence that, at the time of the defendant's marriage to Thomas S. Rogers on May 30, 1956, Worth Stewart was alive, all of the circumstances surrounding his disappearance indicating that he did not continue in life to that date, and for the purpose of resolving the issues before the court in this case, he is considered as having died prior to May 30, 1956."

The court below concluded as a matter of law that, "The defendant was lawfully married to and residing with Worth Stewart as his wife at the time of his disappearance, and the defendant has never abandoned the said Worth Stewart, has never refused to live with him, has never been divorced from him, and has never eloped or committed any other act which would, under any law of this State, bar her from sharing in the estate of Worth Stewart as his surviving spouse."

The court further concluded that, "The defendant's marriage to Thomas S. Rogers on May 30, 1956, was lawful, and the defendant has not forfeited, either by said marriage or by living with Thomas S. Rogers as his wife since said marriage, her right to dissent from the will of Worth Stewart, to share in the distribution of the estate of Worth Stewart as his surviving spouse * * *."

Upon the facts found and the conclusions of law drawn therefrom, the court below ordered, adjudged and decreed that (1) the plaintiff take nothing of the defendant in this action; (2) that the defendant is the owner and entitled to the proceeds of the policies of insurance described in the complaint; (3) that the defendant as surviving tenant by the entirety is the owner of the real estate described in the complaint; (4) that the defendant is entitled to share, as dissenting widow, in the estate of Worth Stewart; and (5) that the defendant recover her costs in this action.

The plaintiff appeals, assigning error.

Richard A. Cohan for plaintiff appellant.
Blakeney, Alexander & Machen for defendant appellee.

DENNY, C.J. The determinative question on this appeal is whether or not the marriage of the defendant to Thomas S. Rogers on 30 May 1956, is a valid marriage.

In the case of *Spencer v. Moore,* 33 N.C. 160, Ruffin, C.J., speaking for the Court, said: "The rule as to the presumption of death is that it arises from the absence of the person from his domicile without being heard of for seven years. But it seems rather to be the current of the authorities that the presumption is only that the person is then dead, namely, at the end of seven years; but that the presumption does not extend to the death having occurred at the end or any other particular time within that period, and leaves it to be judged of as a question of fact, according to the circumstances, which may tend to satisfy the mind that it was at an earlier or later day."

In *Spencer v. Roper,* 35 N.C. 333, the same Court adopted and quoted the identical language set out above, and added: "So much of the opinion in the above case is transferred to this, because what was then but intimated we now express as our confirmed opinion. The cases governing this were then examined and referred to. We have again examined them, and after full deliberation see no cause to alter our opinion." *Bragaw v. Supreme Lodge,* 124 N.C. 154, 32 S.E. 544; *Beard v. Sovereign Lodge,* 184 N.C. 154, 113 S.E. 661. The cases of *Spencer v. Moore, supra,* and *Spencer v. Roper, supra,* have been cited with approval in the following jurisdictions. *Davie v. Briggs,* 97 U.S. 628, 24 L. Ed. 1086; *Whiteley v. Equitable Life Assur. Soc.,* 72 Wis. 170, 39 N.W. 369; *Lukens v. Camden Trust Co.,* 2 N.J. Super. 214, 62 A 2d 886; *Solomon v. Redona,* 52 Cal. App. 300, 198 P. 643; *Glassock v. Weare,* 192 Ky. 654, 234 S.W. 216; *Tobin v. United States Railroad Retirement Board* (U.S.C.A. 6th), 286 F. 2d 480.

In *Trust Co. v. Deal,* 227 N.C. 691, 44 S.E. 2d 73, this Court said: "When in a judicial proceeding it is necessary to ascertain as a material fact whether a person is living or dead, the fact of death may be established by circumstantial evidence.

" 'The absence of a person from his domicile, without being heard from by those who would be expected to hear from him if living, raises a presumption of his death—i.e., that he is dead at the end of seven years.' *Carter v. Lilley,* ante, 435, and cited cases.

"The mere absence of a person from a place where his relatives reside but which is not his own place of residence, without being heard from by them for a period of seven years, is not sufficient to create a presumption. 25 C.J.S., 1058-9. It is the proof of the continued and unexplained absence of a person from his home or place of residence without any intelligence from or concerning him for the required period

which gives rise to the application of the rule. 16 A.J., 19; 25 C.J.S., 1057.

"This rule of evidence is a procedural expedient sired by necessity and is based on the generally accepted fact that a normal person will not, if alive, remain from his home for seven years without communicating with family or friends. 16 A.J., 19.

"The strength of this presumption varies with the circumstances; its force depends on the character of the person, his attachment to his home, and the circumstances under which he left. 25 C.J.S., 1056, 1061; 16 A.J., 21."

Likewise, in *Fidelity Mutual Life Association v. Mettler,* 185 U.S. 308, 46 L. Ed. 922, the Supreme Court of the United States approved the following instruction to the jury: "While death may be presumed from the absence, for seven years, of one not heard from, where news from him, if living, would probably have been had, *yet this period of seven years during which the presumption of continued life runs, and at the end of which it is presumed that life ceases, may be shortened by proof of such facts and circumstances connected with the disappearance of the person whose life is the subject of inquiry,* and circumstances connected with his habits and customs of life, as, submitted to the test of reason and experience, would show to your satisfaction by a preponderance of the evidence that the person was dead." (Emphasis added.)

The evidence adduced in the trial below shows a complete lack of motive on the part of Worth Stewart to disappear and abandon his business and family.

We hold that the evidence was sufficient to have supported a finding that Worth Stewart died soon after he left Jacksonville, Florida, on 26 February 1953, at approximately 11:40 a.m. He flew a small plane into weather conditions constituting a hazard to a pilot of his experience flying a plane equipped as his was; his intended path of flight would have carried him along the coast line for a considerable distance, at a time when the wind was of such velocity and direction as to blow him out to sea; and it has been determined that he did not land at or communicate with any airport within the flying range of his plane. The search for him was thorough and exhaustive. From these facts, the trial judge found that Worth Stewart was dead on 30 May 1956, over three years after his disappearance.

Where facts are found by the court, if supported by competent evidence, such findings are as conclusive as the verdict of a jury. *Goldsboro v. R.R.,* 246 N.C. 101, 97 S.E. 2d 486, and cited cases.

There is another presumption involved in this case. This is the presumption that a second marriage is valid. There can be no question about the performance of a second marriage ceremony in the instant case. The plaintiff alleged in paragraph 5 of his complaint, "That, * * * the defendant participated in a purported marriage ceremony with Thomas S. Rogers on the 30th day of May, 1956, and has lived as wife with the said Thomas S. Rogers since that date." The defendant in answering this paragraph of plaintiff's complaint said, "That it is admitted that the defendant was married to Thomas S. Rogers on the 30th day of May, 1956, and since that time has lived with him as his wife."

In *Kearney v. Thomas*, 225 N.C. 156, 33 S.E. 2d 871, the plaintiff, as in the instant case, was seeking to have a second marriage declared null and void. This Court said: "We are of opinion that when the plaintiff attempts to assert a property right which is dependent upon the invalidity of a marriage, he must, as the attacking party, make good his cause by proof. Upon proof that a marriage ceremony took place, it will be presumed that it was legally performed and resulted in a valid marriage. Chamberlayne, Trial Evidence, p. 432, sec. 475. * * *

"We find in *Chamberlayne's Trial Evidence, supra*, p. 376, sec. 416: 'A second or subsequent marriage is presumed legal until the contrary be proved, and he who asserts its illegality must prove it. In such case the presumption of innocence and morality prevail over the presumption of the continuance of the first or former marriage.' This statement is so abundantly supported by well considered cases, so consonant with reason, and so consistent with analogous practices, as to justify its adoption. See, also, Jones on Evidence, Civil Cases, sec. 14, and cases cited."

The appellant contends that the case of *Williams v. Williams*, 254 N.C. 729, 120 S.E. 2d 68, has eliminated the *Kearney* case as authority for the defendant's position. We do not so hold.

We hold that the findings of fact by the trial judge in the hearing below are supported by competent evidence. Furthermore, there was no evidence offered by the plaintiff tending to show that the marriage of Thomas S. Rogers on 30 May 1956, is invalid.

The judgment of the court below is, in all respects,

Affirmed.

IN THE MATTER OF: THE WILL OF WILLIE SPAIN WILSON, DECEASED; FRANK SPAIN, INDIVIDUALLY, AND AS ADMINISTRATOR C.T.A. OF THE ESTATE OF WILLIE SPAIN WILSON, AND WIFE, MATTIE W. SPAIN, ROBERT W. SPAIN AND WIFE, PEARL M. SPAIN, FRANKLIN H. SPAIN AND WIFE, JEAN S. SPAIN AND WILLIAM M. SPAIN AND WIFE BARBARA W. SPAIN, PETITIONERS v. ROBERT W. SPAIN, JR., (MINOR), THOMAS MOODY SPAIN (MINOR), AND JOHNNY CLAUDE SPAIN (MINOR), CHILDREN OF ROBERT W. SPAIN, DAPHNE GAY SPAIN (MINOR) AND MARSHA LYNN SPAIN (MINOR), CHILDREN OF FRANKLIN H. SPAIN, WILLIAM M. SPAIN, JR., (MINOR), CHILD OF WILLIAM M. SPAIN, AND ANY UNBORN CHILDREN OF ROBERT W. SPAIN, ROBERT W. SPAIN, JR., FRANKLIN H. SPAIN AND WILLIAM M. SPAIN, MATTIE W. REAVIS, WIDOW, ROSA S. STAINBACK AND HUSBAND, T. G. STAINBACK, FLORENCE S. PREDDY AND HUSBAND, WILL PREDDY, LEWIS W. SPAIN AND WIFE, ELIZABETH P. SPAIN, W. J. COOPER, JR., UNMARRIED, MARY C. HAMLET AND HUSBAND, SWAYNE HAMLET, MARY W. BASKETT AND HUSBAND, CHARLES B. BASKETT, MATTIE W. PUCKETT, LUCY W. BALL AND HUSBAND, R. T. BALL, DAVE E. WIGGINS AND WIFE, LOLA WIGGINS, JOHN B. WIGGINS AND WIFE, RUTH T. WIGGINS, BETTY W. HIGHT AND HUSBAND, HARTWELL HIGHT, EDDIE JEAN WIGGINS (MINOR), ROBERT B. WIGGINS, JR., (MINOR), WILLIAM B. BARTHOLOMEW AND WIFE, MRS. WILLIAM B. BARTHOLOMEW, DEFENDANTS.

(Filed 20 November 1963.)

1. Wills § 27—

The intent of testatrix is her will and must be given effect unless contrary to some rule of law.

2. Same—

There is a presumption that a will was intended to dispose of all of testatrix' property without leaving a residue to pass under the laws governing intestacy.

3. Same—

It must be presumed that each word used by testatrix has a meaning and the court may not reject words which by reasonable interpretation may be given effect.

4. Wills § 42—

The word "children" is ordinarily a word of purchase and not of limitation and means immediate offspring, but the word must be construed as "heirs" or "heirs of the body" when such meaning is clearly intended from the content of the instrument.

5. Wills § 32—

Testatrix stated she "wanted" the land in question to go to her brother and at his death to his three sons and his named grandson, with further provision that at their deaths testatrix "wanted" the land to go to their "children & so on." *Held:* The brother took a life estate with remainder to his children and the named grandson in fee under the Rule in *Shelley's*

Case, since it is apparent that testatrix used the word "children" in the sense of an indefinite line of succession so as to attract the Rule in *Shelley's* Case and create an estate tail converted into a fee by the statute. G.S. 41-1.

APPEAL by defendants from *Walker, S.J.*, March Civil Session 1963 of VANCE.

This action was instituted to obtain a judicial interpretation of a written instrument heretofore adjudged to be the holographic will of Willie Spain Wilson. *In re Will of Wilson,* 258 N.C. 310, 128 S.E. 2d 601.

The will dated 6 June 1950 reads:

"This is my Will—

"I Willie Spain Wilson wants my brother Frank H. Spain to have at my death the home place given to me by my brother R. Claude Spain at his death—Known as the Spain place. At my brother Frank H. Spain's death I want the place to go to his three Son's Robert W. Spain, Franklin H. Spain and William M. Spain. I also want Robert W. Spain Jr. to have an equal share in the place. If all can't live and farm then sell it to the one that can at a reasonable price. At there death I want the place to go to there children & so on—I would love for it to always be the Spain place.

"What money bonds & etc I have at my death after all debts are paid I want my Sister Rosa Spain Stainback to have. I also want her to have what pecies of furniture I have, also want her to have all my personal belongings. I want a descent burial and marker put to my grave—I have two Ins. policys which I want my Sister Rosa Spain Stainback to have. I have one policy that I want my neice Claude Stainback Sharpe to have it is made payable to her."

Mrs. Spain died in March 1960. Her heirs were her brother, Frank Spain, her sisters, Rosa Stainback and Mattie Reavis, and nephews, nieces, great-nephews and great-nieces, descendants of her deceased brother, John S. Spain, and her deceased sister, Lou Wiggins. Subsequent to the institution of the action Mrs. Reavis died. Her heirs were made parties.

Mrs. Wilson's husband died in 1943. She then went to live with her brother Frank, named as a devisee. She continued to live with him and his family until her death in 1960. Frank Spain had three children, viz., Robert W., Franklin H., and William, named as devisees. Robert W. Spain, Jr., also named as a devisee, is the son of Robert W. Spain.

Mrs. Spain owned at her death a farm in Vance County containing 130 acres. This is the land referred to in the will as the "Spain place."

The court adjudged that Frank H. Spain took an estate in the farm for his natural life, that Robert W. Spain, Franklin H. Spain, Jr., William M. Spain, and Robert W. Spain, Jr., each took an estate for their respective lives in an undivided one-fourth, subject to the life estate of Franklin H. Spain, and subject to such life estates, the children of Robert W. Spain took an estate in fee in remainder in the one-fourth in which he had a life estate, the children of Franklin H. Spain, Jr. took an estate in fee in remainder in his one-fourth, the children of William W. Spain took an estate in remainder in fee in his one-fourth, and the children of Robert W. Spain, Jr. took an estate in fee in remainder in his one-fourth.

Zollicoffer & Zollicoffer for appellees and Sterling G. Gilliam and George T. Blackburn, guardians ad litem.

Waddell Gholson, guardian ad litem for Eddie Jean Wiggins and Robert B. Wiggins, Jr., and William T. Watkins, Charles M. Davis, and I. Beverly Lake for respondents.

RODMAN, J. As said by SHARP, J., in *Trust Co. v. Bryant,* 258 N.C. 482, 128 S.E. 2d 758: "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'." MOORE, J., said in *Poindexter v. Trust Co.,* 258 N.C. 371, 128 S.E. 2d 167: "The intent of the testatrix is her will and must be carried out unless some rule of law forbids it."

Testratrix did not "give," "bequeath," or "devise" her property. She "wants" (used in nine different places) certain designated persons to have designated parts of her estate. Except where she expressly "wants" a beneficiary to have a life estate in her realty, the will does not particularize the estate the beneficiary acquires.

It is, we think, apparent from the writing that Mrs. Wilson intended a complete disposition of her properties. Where one undertakes to make a will, the presumption is that the instrument disposes of all of testator's property, not leaving a residue to pass under laws governing intestacy. *Poindexter v. Trust Co., supra; Little v. Trust Co.,* 252 N.C. 229, 113 S.E. 2d 689. "Having undertaken to make a will at all, it is not consistent with sound reasoning that the testator would have left his estate dangling." *Coddington v. Stone,* 217 N.C. 714, 9 S.E. 2d 420.

Here the intent of the testatrix to limit the estate in the realty given her brother Frank is apparent. At his death she wants the place to go to three named nephews and a great-nephew. Had the will stopped

there, the named devisees would have taken an estate in fee. G.S. 31-38; *Morris v. Morris*, 246 N.C. 314, 98 S.E. 2d 298. But the will did not stop with the gift to the nephews and great-nephew who take on the termination of the life estate given to testatrix' brother Frank. She said: "At *there* death I want the place to go to *there* children & so on . . ." The language used in making the gift to the nephews and great-nephew is similar to the language used with respect to the gift to her brother. At their death she wants "the place to go to *there* children." Had she stopped with the word "children" the intent to give an undivided fourth to each of the named devisees with a remainder in that fourth to each devisee's children would be apparent. The children would take the fee. G.S. 31-38. But that interpretation would give no significance to the phrase "& so on." To reject those words would be to make a will for the testatrix and not interpret what she said. An interpretation requires an ascertainment of the meaning of the words used—each presumably has some meaning. *Maxwell v. Grantham*, 254 N.C. 208, 118 S.E. 2d 426; *Clark v. Connor*, 253 N.C. 515, 117 S.E. 2d 465; *Morris v. Morris, supra.*

What did testatrix mean by the phrase "& so on"? The phrase is equivalent to "continuing in the same manner." *Jones v. Assurance Society*, 147 N.C. 540, 61 S.E. 388, 25 L.R.A. 803. What Mrs. Wilson meant was that each succeeding generation would take the property on the death of the ancestor—an indefinite line of succession by the children upon the death of the parent. She intended that each beneficiary should take an estate for life with remainder to heirs of his body.

Layton, C.J., said in *Farrell v. Faries*, 22 A. 2d 380; "The words 'child and children' are primarily and presumptively words of purchase. Their technical and legal meaning is the immediate offspring and not an indefinite line of heirs . . . . In their natural import they are not words of limitation unless it is to comply with the intention of the testator, when they cannot take effect in any other way . . . . They are properly descriptive of a particular class or generation of issue, and point at individual acquisition, not at heritable succession . . . . Both in law and in common parlance they have only one meaning, *although they may be shown by the context to have been improperly used in the sense of descendants.*" (Emphasis added.)

The same thought was expressed in *Dodson v. Ball*, 60 Pa. St. 492, 100 Am. Dec. 586, where it is said: "The decisions in all the cases show the undoubted tendency of the judicial mind in this state to follow the true intention of the donor, and whenever he means to limit an estate to the heirs of the life tenant, no matter how his intent is expressed, an estate of inheritance will vest in the tenant for life; but when he in-

tends his bounty to vest in certain persons, though they may be the same as the heirs at law, the life estate will not be enlarged . . ."

Similar statements and applications of the legal principles may be found in *Mason v. Ammon*, 11 A. 449; *Shapley v. Diehl*, 53 A. 374; *Pifer v. Locke*, 55 A. 790; *Simpson v. Reed*, 54 A. 499; *Beall v. Beall*, 162 N.E. 152; *Gould v. Ledbetter*, 150 A. 375; *In re Court's Estate*, 91 N.Y.S. 2d 881; *In re Tone's Will*, 174 N.Y.S. 391; *In re Guthrie's Appeal*, 37 Pa. St. 9. See also 47 Am. Jur. 805 and cases cited in note 19.

An important factor in ascertaining the meaning of the word "children" is, as noted in several of the cases, the fact that if the word "children" is not interpreted to mean heirs or heirs of the body, the devise may violate the rule against perpetuities, thereby resulting in at least partial intestacy. *Poindexter v. Trust Co., supra.*

Having reached the conclusion that Mrs. Wilson used the word "children" in the sense of "heirs of the body" it follows that each nephew and the great-nephew took an estate tail by virtue of the rule in *Shelley's* case, which by the statute of 1784 (G.S. 41-1) is converted into an estate in fee simple.

We conclude that Frank H. Spain, brother of testatrix, took an estate for his life in the property known as the Spain place and, subject to said life estate, his three sons, to wit, Robert W. Spain, Franklin H. Spain, and William W. Spain, and his grandson, Robert W. Spain, Jr., each took an undivided one-fourth in fee in remainder. The judgment appealed from will be modified to conform with this opinion, and as so modified, the judgment is affirmed.

Modified and affirmed.

CHARLES F. STEELE v. MOORE-FLESHER HAULING COMPANY, A CORPORATION; W. FLOYD COCHRAN, TRADING AND DOING BUSINESS UNDER THE NAME AND STYLE OF W. FLOYD COCHRAN STEEL ERECTION AND RIGGING COMPANY; WILLIAM JAECKLEIN, AND WILLIAM H. WENDELL.

(Filed 20 November 1963.)

1. Negligence § 20; Indemnity § 3; Pleadings § 8—

In an action by an injured person against two employers to recover for negligent injury inflicted by their common employees, the one employer may not file a cross-action against the other on a contract indemnifying the first for any loss resulting from the performance of the work out of which the injuries arose, since plaintiff is not privity thereto and such

cross-action is not germane to plaintiff's cause and is properly stricken on motion even though all references therein to liability insurance are deleted.

2. Negligence §§ 8, 20; Pleadings § 8; Master and Servant § 31.1—

In an action by an injured person against an employer and employee for injuries resulting from the negligence of the employee in the performance of the work, the employer is entitled to file a cross-action for indemnity against the employee under the doctrine of primary-secondary liability.

3. Appeal and Error § 1—

Where appellee moves to strike a defendant's amendment setting out a cross-action solely on the ground that the allegations contained therein are incompetent and irrelevant, and the motion is heard and the appeal prepared solely with the view of presenting this question, appellee may not assert on appeal that the amendment should be stricken on the ground that there was no leave to amend and that at the time of the amendment the defendant had no right to amend as a matter of course, since an appeal will be determined in accordance with the theory of the hearing below.

4. Appeal and Error § 3—

Ordinarily an appeal will lie only from a final judgment, and an appeal from an interlocutory order will be dismissed as fragmentary and premature unless it affects some substantial right and will work injury to appellant if not corrected before appeal from final judgment.

5. Same—

An appeal will lie immediately from an order allowing motion to strike a defendant's entire cross-action, since such motion is in effect a demurrer to the cross-action.

APPEAL by defendant, Moore-Flesher Hauling Company, from *Walker, S.J.*, January 21, 1963, Special "A" Civil Session of MECKLENBURG.

Bailey & Booe for plaintiff appellee.

Boyle, Alexander & Wade for defendant W. Floyd Cochran, trading and doing business under the name and style of W. Floyd Cochran Steel Erection and Rigging Company, appellee.

Pierce, Wardlow, Knox and Caudle for defendant William H. Wendell, appellee.

Kennedy, Covington, Lobdell & Hickman for defendant Moore-Flesher Hauling Company, appellant.

MOORE, J. This action was instituted by plaintiff to recover damages for injury to his person caused by the alleged negligence of defendants.

The complaint alleges in substance the following facts:

On 1 June 1960 Moore-Flesher Hauling Company, a corporation (Moore-Flesher), and W. Floyd Cochran, trading as W. Floyd Cochran Steel Erection and Rigging Company (Cochran), among others, were engaged in constructing a building in a real estate development in Charlotte, North Carolina, known as Arrowood. Plaintiff, an employee of B. F. Todd, trading as B. F. Todd Electrical Contractor, was at work on said date installing electrical conduit pipe in the building. He was working inside the building at a point about 20 feet above the ground, standing on a steel girder. On this steel girder, and on another steel girder parallel to, and about 40 feet from, the one on which plaintiff was standing, were tracks upon which a 5-ton crane was operated for the purpose of moving heavy equipment in the bay below. Plaintiff's work required him to be on the girder and track at the time of his injury. William A. Pulley, the crane operator, pursuant to the instructions and directions of defendants William Jaecklein and William H. Wendell, who assisted him and directed the course, direction and movement of the crane, placed the crane in operation. The crane approached plaintiff from his rear and its wheels ran over his feet, crushing them, and inflicted upon plaintiff serious and permanent injuries. Plaintiff was injured by reason of the active negligence (specifically set out) of Pulley, Jaecklein and Wendell, all of whom were employees of both Moore-Flesher and Cochran, and at the time of plaintiff's injury were acting within the scope and course of their employments and in furtherance thereof. Moore-Flesher and Cochran are liable to plaintiff under the doctrine of *respondeat superior,* and Jaecklein and Wendell are liable to plaintiff because of their active concurrent negligence.

Defendants filed answers denying plaintiff's allegations of negligence and setting up affirmative defenses.

Moore-Flesher filed an amendment to its answer and set up therein two cross-actions, stating: (1) That Pulley and Wendell were not its employees and any negligence of Pulley and Wendell is not imputable to it, that Cochran had entered into a contract with Moore-Flesher by the terms of which Cochran agreed to indemnify and save harmless Moore-Flesher against loss by reason of injuries to other persons caused by the negligent acts or omissions of Pulley and Wendell by providing public liability insurance to the extent of $10,000 for injuries sustained by one person in an accident, and that Cochran is liable over to Moore-Flesher up to $10,000 if plaintiff recovers against the latter by reason of any negligence on the part of Pulley and Wendell, and if any part of the judgment up to $10,000 is not discharged by lia-

bility insurance; (2) that any negligence of Wendell is not imputable to Moore-Flesher under the doctrine of *respondeat superior,* but, if it should be determined to the contrary, Wendell would be primarily liable and Moore-Flesher would be only secondarily liable and the latter would be entitled to recover judgment in this action over against Wendell for any amount which plaintiff recovers of Moore-Flesher by reason of the negligent acts or omissions of Wendell.

Plaintiff, Cochran and Wendell moved to strike Moore-Flesher's entire amendment to its answer, that is, the two cross-actions. The court allowed the motions and struck the amendment, both cross-actions. Moore-Flesher appeals.

(1). The court ruled correctly in striking the cross-action against Cochran. In an action against two defendants to recover for negligent injury, a cross-action against one defendant by the other may not be maintained when the cross-action is based on an express contract between the defendants obligating the one to indemnify the other from losses resulting from the activities of indemnitor in performing or supervising the work out of which plaintiff's injuries arose. The indemnity contract concerns the defendants only. "Plaintiff is not privy thereto. Therefore, it is not germane to plaintiff's cause of action, and the determination of the rights and liabilities of the defendants with respect to this agreement of indemnity is not necessary to a conclusion of plaintiff's cause of action. Only matters relevant to the original or primary action in which all parties have a community of interest may be litigated." *Greene v. Laboratories, Inc.*, 254 N.C. 680, 688, 120 S.E. 2d 82, and cases therein cited and discussed. In the instant case, as in *Greene*, the cross-action recites a provision of the indemnity contract requiring the maintenance of liability insurance and specifying the limits thereof. Evidence of such insurance would be incompetent upon trial, and disclosure of policy limits to the jury might be extremely prejudicial to plaintiff where he has suffered serious injury. ". . . (I)n an action by an injured party against insured all references to such (liability) insurance is prejudicial, and all such references should be stricken from the pleadings." *Greene v. Laboratories, Inc., supra,* at page 687. Moore-Flesher moves in this Court for leave to delete all references in the cross-action to liability insurance. However, such deletion would not save the cross-action. The cross-action, for the reasons stated above, may not be maintained in the present action even without the references to insurance.

The case of *Newsome v. Surratt*, 237 N.C. 297, 74 S.E. 2d 732, relied on by Moore-Flesher, does not support its contention that it is entitled to maintain the cross-action against Cochran for indemnity. In the

Newsome case, the liability of defendants to plaintiff and the amount of plaintiff's recovery had been determined and was stipulated, no motion to strike the cross-action based on the indemnity agreement was before the Court, the sole question for decision was liability as between the defendants.

(2). The court below erred in striking Moore-Flesher's cross-action against Wendell. Simply stated, the cross-action asserts that if plaintiff was injured by the negligence of Wendell and if it is determined that Wendell at the time of the accident was the agent and employee and about the business of Moore-Flesher, the liability of the former is primary and of the latter secondary, and Moore-Flesher is entitled to recover over against Wendell. "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, 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." *Ingram v. Insurance Co.,* 258 N.C. 632, 635, 129 S.E. 2d 222. See *Gadsden v. Crafts & Co.,* 175 N.C. 358, 363, 95 S.E. 610; *Smith v. Railroad,* 151 N.C. 479, 66 S.E. 435. The inquiry as to primary and secondary liability, when properly pleaded and supported by evidence, is germane to plaintiff's cause of action. *Greene v. Laboratories, Inc., supra; Clothing Store v. Ellis Stone & Co.,* 233 N.C. 126, 63 S.E. 2d 118. The doctrine of primary-secondary liability is based upon a contract implied in law. *Hunsucker v. Chair Co.,* 237 N.C. 559, 75 S.E. 2d 768. Where two alleged tortfeasors are sued by the injured party, one may set up a cross-action against the other for indemnity, under the doctrine of primary-secondary liability, and have the matter adjudicated in that action. *Ingram v. Insurance Co., supra.*

Appellees contend that the judgment below striking the cross-action should be sustained in any event, for that Moore-Flesher did not obtain leave to amend, and at the time the amendment, setting out the cross-actions, was filed Moore-Flesher had no right to amend as a matter of course. This appears to be an after-thought. Appellees moved to strike only on the ground that the "allegations . . . are incompetent, irrelevant, immaterial, redundant and prejudicial." There is nothing to indicate that the court considered Moore-Flesher's right to amend or exercised any discretion pertaining to the allowance or de-

nial of the act of amending; and it is clear that the case on appeal was not prepared with a view to presenting this question. There is every indication that the court ruled upon the content of the allegations. We consider the matter only upon the theory of the hearing below.

(3). Plaintiff-appellee filed in this Court a motion to dismiss the appeal on the ground that it is fragmentary and premature. The motion is not sustained. Ordinarily, an appeal will lie only from a final judgment. *Perkins v. Sykes,* 231 N.C. 488, 57 S.E. 2d 645. An appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from final judgment. *Veazey v. City of Durham,* 231 N.C. 354, 57 S.E. 2d 375. Conversely, an appeal will lie from an interlocutory order that does affect a substantial right and will work injury if not corrected before final judgment. G.S. 1-277; *Jenkins v. Trantham,* 244 N.C. 422, 94 S.E. 2d 311. The motions to strike are addressed to Moore-Flesher's cross-actions in their entirety. In effect, the sole ground of the motions is that the facts alleged do not constitute legal defenses or causes for affirmative relief. In substance, if not in form, the motions constitute a demurrer to the cross-actions. The court's ruling amounts to a sustaining of such demurrer. *Jenkins & Co. v. Lewis,* 259 N.C. 85, 130 S.E. 2d 49; *Mercer v. Hilliard,* 249 N.C. 725, 107 S.E. 2d 554.

As to the cross-action against Cochran—Affirmed.

As to the cross-action against Wendell—Reversed.

MRS. INA H. ROUSE, CARL B. RICHARDSON, CHARLES H. RICHARDSON, MRS. MARTHA R. WHITE, MRS. CHRISTINE R. JOYNER, MRS. JOSEPHINE R. WRIGHT, BRUCE M. RICHARDSON, E. E. RICHARDSON, W. H. MANN, WILLIAM H. MANN, JR., MAE MANN, ANNIE J. MANN, CAROLYN MANN, BEULAH MANN v. JACKSON W. STRICKLAND, SR., AND B. R. ALFORD AND J. M. ALFORD, PARTNERS TRADING AS ALFORD BROTHERS LUMBER COMPANY.

(Filed 20 November 1963.)

1. Deeds § 11—

Unless in conflict with some canon of construction or settled rule of law, a deed must be construed to effectuate the intent of the parties as expressed in the instrument, giving effect to each part thereof if this can be done by any fair and reasonable interpretation.

2. Deeds § 13—

The deed in this case from the heirs at law to the widow stated that grantors did "bargain and sell" to the widow "all our right, title, and interest in fee simple" in three described tracts of land, and, that the grantors did convey to the widow for and during her natural life certain other lands described, in satisfaction of all dower rights of the widow in the lands of the estate. *Held:* The deed contained two separate granting clauses, each complete within itself, and the deed conveyed only an estate for life to the widow in the fourth tract.

3. Same—

The heart of a deed is the granting clause, and if there is a repugnacy between the granting clause and the habendum and warranty, the granting clause prevails.

APPEAL by defendants from *Bickett, J.*, April-May 1963 Session of FRANKLIN.

Plaintiffs alleged they owned in remainder, after a life estate for the life of Mrs. Ella S. Mann, a tract of land in Franklin County, N. C., known as the J. T. Mann homeplace, containing 218 acres, more or less; that defendant Strickland acquired said life estate by deed from Mrs. Ella S. Mann; and that defendant Strickland and defendants Alford, jointly, committed waste upon said land by cutting and removing timber. Plaintiffs prayed (1) that they be adjudged the owners of said land, (2) that said life estate be adjudged forfeited on account of waste, and (3) that they recover damages in an amount not less than $5,000.00.

Answering, defendants denied all allegations as to plaintiffs' ownership of said land and alleged that defendant Strickland, by virtue of the deed from Mrs. Mann, became and is now the sole owner in fee of said land.

It was stipulated that the value of said J. T. Mann homeplace had been reduced in the amount of $3,500.00 by reason of the cutting and removal of timber "as alleged in the complaint."

Upon waiver of jury trial, the court made findings of fact, stated conclusions of law and entered judgment. The pertinent facts are not in dispute and are set forth below.

J. T. Mann died April 7, 1936, intestate, seized and possessed of the four tracts of land described in deed dated October 21, 1936, recorded in Book 330, Page 593, Franklin County Registry, quoted (omitting particular descriptions) below and referred to hereafter as the 1936 deed. J. T. Mann was survived by his widow, Mrs. Ella S. Mann, and by two sisters and two brothers, his heirs at law, namely, Mrs. Kate Mann Richardson, Mrs. Ina Mann Harriss, T. W. Mann and W. Y.

Mann. The said heirs at law are grantors and Mrs. Ella S. Mann is grantee in the 1936 deed.

Plaintiffs are the successors in interest of said heirs at law of J. T. Mann. Mrs. Ella S. Mann is still living.

The said J. T. Mann homeplace, the only land in controversy, is the "4th TRACT" described in the 1936 deed.

The 1936 deed provides:

> "THIS DEED AND CONVEYANCE, made this 21st day of October 1936, by and between Mrs. Kate M. Richardson and husband, C. F. Richardson, Mrs. Ina M. Harris, Widow, of Franklin County, North Carolina, T. W. Mann and wife, Bettie U. Mann, of Wake County, North Carolina, and W. Y. Mann and wife, Mary N. Mann, of the City of Carlisle, State of Arkansas, parties of the first part, to Mrs. Ella S. Mann, of Franklin County, North Carolina, party of the second part:
>
> "WITNESSETH: That whereas, the aforesaid parties of the first part are the heirs at law and next of kin of J. T. Mann, deceased intestate, and the said party of the second part is the widow of said J. T. Mann, deceased; and whereas, said tenants in common and widow of said J. T. Mann have mutually agreed on a disposition of the real estate of which the said J. T. Mann died seized and possessed, and said parties of the first part are desirous of conveying said property hereinafter described to the said party of the second part:
>
> "NOW, THEREFORE, WITNESSETH, that said Mrs. Kate M. Richardson and husband, C. F. Richardson, Mrs. Ina M. Harris, widow, T. W. Mann and wife, Bettie U. Mann, W. Y. Mann and wife, Mary N. Mann, for and in consideration of the sum of $1175.00, which has been mutually agreed upon as the purchase price to be paid by the party of the second part to the parties of the first part, the receipt of which is hereby acknowledged, have bargained and sold, and by these presents do grant, bargain, sell and convey unto the said Ella S. Mann, her heirs and assigns, the following described land:
>
> "1st TRACT: All of our right, title and interest in fee simple in and to that certain tract or parcel of land situate in the County of Franklin, State of North Carolina, adjoining the lands of Floyd Harris and others, . . .
>
> "2nd TRACT: All of our right, title and interest in fee simple in and to that certain tract or parcel of land lying and being in

Harris Township, Franklin County, bounded on the North, East and West by the land of Dr. R. P. Floyd and on the South by the Joe C. Baker land, . . .

"3rd TRACT: All of our right, title and interest in fee simple in and to that certain tract or parcel of land in Franklin County, State of North Carolina, adjoining the lands of Blanche Timberlake and others, . . .

"4th TRACT: The parties of the first part convey to the party of the second part a life estate for and during the natural life of Ella S. Mann in and to the J. T. Mann homeplace, said conveyance of a life estate in said homeplace being mutually agreed to and accepted by Ella S. Mann, Widow, in full and complete satisfaction and settlement of any and all dower rights in and to the lands of which J. T. Mann died seized. Said homeplace described by metes and bounds as follows, to-wit: . . .

"TO HAVE AND TO HOLD the aforesaid tracts or parcels of land and all privileges and appurtenances thereto belonging, to the said Ella S. Mann, her heirs and assigns, to her only use and behoof forever.

"And the said Mrs. Kate M. Richardson and husband, C. F. Richardson, Mrs. Ina M. Harris, Widow, T. W. Mann and wife, Bettie U. Mann, W. Y. Mann and wife, Mary N. Mann, for themselves and their heirs, executors and administrators, covenant with said Ella S. Mann, party of the second part, her heirs and assigns that they are seized of the interest conveyed in said premises in fee and have the right to convey the respective interests conveyed under this deed in fee simple; that the same are free and clear from all encumbrances, and that they do hereby forever warrant and will forever defend the title hereunder conveyed to the said premises as conveyed against the claims of all persons whomsoever.

"IN TESTIMONY WHEREOF, the said Mrs. Kate M. Richardson and husband, C. F. Richardson, Mrs. Ina M. Harris, widow, T. W. Mann and wife, Bettie U. Mann, W. Y. Mann and wife, Mary N. Mann, have hereunto set their respective hands and seals, the day and year first above written."

By warranty deed dated September 17, 1960, recorded in Book 569, Page 62, said Registry, Mrs. Ella S. Mann conveyed or purported to convey to defendant Strickland, his heirs and assigns, the land described as the "4th TRACT" in the 1936 deed.

Judge Bickett, based upon the foregoing facts and his conclusions of law, entered judgment as follows:

"NOW, THEREFORE, IT IS BY THE COURT ORDERED, ADJUDGED AND DECREED:

"1. That the plaintiffs are the owners of and entitled to the remainder, after the life estate of Ella S. Mann, in the 218-acre homeplace described in the deed referred to above.

"2. That the plaintiffs have and recover of the defendants Jackson W. Strickland and B. R. and J. M. Alford, trading as Alford Brothers Lumber Company, jointly and severally, the sum of $3,-500.00 as damages for said waste as alleged in the complaint.

"3. It is further ordered that the plaintiffs have and recover of the defendants jointly and severally the cost of this action as taxed by the Clerk."

Defendants excepted and appealed.

John F. Matthews and Hill Yarborough for plaintiff appellees.

E. C. Bulluck and Yarborough & Jolly for defendant appellant Strickland.

W. H. Taylor for defendant appellants Alford.

BOBBITT, J. The sole question is whether the court erred in concluding that the 1936 deed conveyed to Mrs. Ella S. Mann only a life estate in the land described therein as the "4th TRACT," to wit, the J. T. Mann homeplace.

"Ordinarily, in construing a deed it is the duty of the court to ascertain the intent of the grantor or grantors as embodied in the entire instrument, and each and every part thereof must be given effect if this can be done by any fair or reasonable interpretation." *Davis v. Brown,* 241 N.C. 116, 118, 84 S.E. 2d 334, and cases cited; *Franklin v. Faulkner,* 248 N.C. 656, 659, 104 S.E. 2d 841.

The title to all lands of which J. T. Mann was seized and possessed at the time of his death descended to and vested in his heirs subject to his widow's right of dower. The 1936 deed was executed approximately six and one-half months after the death of J. T. Mann. It recites that the heirs and widow of J. T. Mann had "mutually agreed on a disposition of the real estate of which the said J. T. Mann died seized and possessed." In the clause beginning, "NOW, THEREFORE, WITNESSETH," the grantors, "for and in consideration of the sum of $1175.00, which has been mutually agreed upon as the purchase price

to be paid by the party of the second part to the parties of the first part," granted, bargained, sold and conveyed unto Mrs. Ella S. Mann, her heirs and assigns, "the following described land." Immediately thereafter the descriptions of the "1st TRACT," the "2nd TRACT" and the "3rd TRACT" are set forth. Each of these descriptions begins as follows: "All of our right, title and interest *in fee simple* in and to that certain tract or parcel of land . . ." (Our italics). Preceding the description of the "4th TRACT," the 1936 deed provides: "The parties of the first part convey to the party of the second part *a life estate* for and during the natural life of Ella S. Mann in and to the J. T. Mann homeplace, said conveyance of *a life estate in said homeplace* being mutually agreed to and accepted by Ella S. Mann, Widow, in full and complete satisfaction and settlement of any and all dower rights in and to the lands of which J. T. Mann died seized." (Our italics).

When all parts of the 1936 deed are considered, it is manifest the following was intended: (1) The *sale and conveyance* by the heirs to the widow of the fee in the "1st TRACT," the "2nd TRACT" and the "3rd TRACT," in consideration of the purchase price of $1,175.00; and (2) the *conveyance* by the heirs to the widow of a life estate in the "4th TRACT" in consideration of the widow's acceptance thereof in lieu of dower. This intention of the grantors to convey only a life estate in the "4th TRACT" controls decision unless "in conflict with some unyielding canon of construction, or settled rule of property, or fixed rule of law, or is repugnant to the terms of the grant." *Griffin v. Springer*, 244 N.C. 95, 98, 92 S.E. 2d 682, and cases cited; *Cannon v. Baker*, 252 N.C. 111, 113, 113 S.E. 2d 44; *Lackey v. Board of Education*, 258 N.C. 460, 462, 128 S.E. 2d 806.

It is well settled that "(t)he heart of a deed is the granting clause." *Griffin v. Springer, supra*, and cases cited. This is stressed by plaintiffs and by defendants.

Defendants contend the 1936 deed contains (only) *one* granting clause, namely, the clause beginning "NOW, THEREFORE, WITNESSETH;" that this clause conveys "the following described land," including the land described as the "4th TRACT," to Mrs. Ella S. Mann, her heirs and assigns; and that the provisions of the habendum and warranty clauses support this contention. Defendants cite and rely upon *Oxendine v. Lewis*, 252 N.C. 669, 114 S.E. 2d 706, and cases cited therein.

The premise upon which defendants base their said contention is unsound. We think it clear the 1936 deed contains *two* granting clauses. Each is separate and distinct from the other and each is com-

plete within itself. The clause beginning, "NOW, THEREFORE, WITNESSETH," is the first granting clause. It conveys *the fee* in the "1st TRACT," the "2nd TRACT" and the "3rd TRACT." The second granting clause conveys a life estate in the "4th TRACT." Each clause (1) designates the grantors and the grantee, (2) describes the land conveyed, (3) contains operative words of conveyance, (4) sets forth the consideration for the conveyance, and (5) defines the *quantum* of the estate conveyed. See *Griffin v. Springer, supra,* and cases cited. The two clauses are not inconsistent or repugnant. They simply relate to different lands.

If the habendum and warranty clauses were considered in conflict therewith, the second granting clause (relating specifically to the J. T. Mann homeplace) would control decision. *Griffin v. Springer, supra,* and cases cited. Here, the provisions of the habendum and the warranty clauses may be reconciled completely with the provisions of the first granting clause. It would seem the provisions of the habendum and warranty clauses were intended to apply only to the lands conveyed in the first granting clause and therefore should not be considered in conflict with the second granting clause.

Being in agreement with the ruling of Judge Bickett that the 1936 deed conveyed only a life estate (for the life of Mrs. Ella S. Mann) in the lands described therein as the "4th TRACT," to wit, the J. T. Mann homeplace, the judgment of the court below is in all respects affirmed.

Affirmed.

TEXTILE MOTOR FREIGHT, INC. v. MARY MAXINE CONVEY DUBOSE, A MINOR, BY HER GUARDIAN AD LITEM, W. H. CONVEY, AND J. H. DUBOSE.

(Filed 20 November 1963.)

1. Automobiles § 46—

Where there is no evidence that defendant driver failed to give the signal for a left turn as required by statute and no evidence that she was traveling at excessive speed at the time, it is error for the court to instruct the jury upon the issue of the driver's negligence in regard to turn signals and excessive speed.

2. Trial § 33—

It is error for the court to charge upon an abstract principle of law which is not presented by the allegations and evidence.

APPEAL by defendants from *Martin, Special Judge,* 18 February 1963 Special "A" Civil Session of MECKLENBURG.

This is a civil action to recover for damages to plaintiff's tractor-trailer resulting from a collision between said tractor-trailer and a 1958 Volvo automobile owned by defendant J. H. DuBose and driven by his daughter-in-law, Mary Maxine Convey DuBose, who was seventeen years of age at the time of the collision.

The defendants set up a cross-action for personal injuries to the minor defendant and for property damages sustained by defendant J. H. DuBose.

The collision occurred at the intersection of Independence Boulevard, Eastway Drive and Commonwealth Avenue in the City of Charlotte, about 7:35 a.m. on 15 June 1960. Independence Boulevard runs substantially east and west at this intersection; Commonwealth Avenue runs in a northwesterly and southeasterly direction; and Eastway Drive dead ends in the Boulevard at this intersection and runs north from the Boulevard. The traffic at this intersection is controlled by electric signal lights exhibiting the words "Go," "Caution," or "Stop." In approaching this intersection from the east on Independence Boulevard, it is slightly downhill.

The plaintiff's tractor-trailer and its cargo weighed 58,000 pounds and was being driven in a westerly direction in the middle of the three lanes for westbound traffic on Independence Boulevard. Plaintiff's driver testified: "As I was coming into the intersection, at about 150 yards, I noticed a traffic light change from red to green.

"I was going around 30 or 35 miles per hour, and as I got into the intersection I saw a small foreign car traveling east making a left-hand turn north over into Eastway Drive from the inside lane next to the island on Independence Boulevard. I was in the intersection when I first noticed her, noticed she wasn't stopping. As I entered the intersection I saw her making a turn in front of me. * * * I applied my brakes and pulled all the way over into the turning lane. * * * I cut over to the right as far as I could and collided with her in the intersection over near Eastside (sic) Drive. The small foreign car spun around, the back end of it hitting the telephone pole located between two drives."

The plaintiff's evidence further tends to show that the plaintiff's driver lost control of the tractor-trailer when he struck the small car driven by the minor defendant, ran past the intersection of Eastway Drive, hit a Studebaker car on Commonwealth Avenue and stopped between two trees about 20 feet from the northern edge of Independence Boulevard.

The plaintiff alleges that the minor defendant gave no signal or other warning of an intention to make a left turn, but offered no evidence in support of this allegation.

The minor defendant, Mary Maxine Convey DuBose, testified that on the morning of 15 June 1960 she left home about 7:15 a.m.; that she was on her way to summer school at Garringer High School, which is located north of Independence Boulevard just off Eastway Drive. "I do not recall getting on Independence Boulevard, nor do I recall the accident or anything about it. My first memory after the accident is of the hospital." The minor defendant was painfully injured and left with permanent and serious scars on various parts of her body.

Lewis K. Patterson, a witness for defendants, testified: "At about 7:30 a.m. * * * I was on Commonwealth Avenue on my way to work. I was proceeding north and came to the intersection of Commonwealth Avenue and Independence Boulevard and stopped south of Independence Boulevard, in the northbound lane of Commonwealth Avenue at the point where Commonwealth reaches the south side of Independence Boulevard. I stopped for the red traffic light facing me * * *.

"* * * I first saw the Volvo automobile when it had pulled into the left lane, headed east and starting to make a turn, looked like it was in a position to make a turn. It wasn't out to where it was in the street, but in a position to make a left turn. * * *

"When I was pulling up to a stop at the light, the Volvo was already sitting there. When the traffic light changed, I proceeded to cross Independence Boulevard but got only about to the center of the first lane in the eastbound side. I saw the oncoming truck and stopped so as not to be involved. When the light changed, the Volvo was slightly out in the center there, the center lane. It proceeded to cross the street, to go up Eastway Drive, north, and actually it would have been right in line with Commonwealth Avenue, coming up; actually, what she was doing was clearing the street. The Volvo was clearing the intersection. * * *

"I saw the collision occur. * * *

"I would estimate the truck was running at least 40 miles an hour. When the truck hit the Volvo, it spun it completely around. The right tractor wheel, right side of the truck, caught the Volvo in the right side and spun it around, the truck rolling on and knocking the Volvo against the utility pole shown on the blackboard. * * *

"At the time the tractor-trailer truck entered the intersection the traffic light for westbound traffic on Independence Boulevard was red. The accident happened around 7:30 a.m.; the weather was fair; the street was dry. * * * In my opinion the tractor-trailer truck never

did slow down. That's the reason I proceeded to stop, because I knew he couldn't stop. * * *"

The jury rendered a verdict in favor of the plaintiff. Judgment was entered on the verdict and the defendants appeal, assigning error.

Webb & Lee; Charles Sedberry; Sanders & Walker for plaintiff appellee.

Carpenter, Webb & Golding; Pierce, Wardlow, Knox & Caudle for defendant appellants.

DENNY, C.J. The defendants assign as error certain portions of the following instructions to the jury: (1) "Now, members of the jury, there is another statute which states in part as follows: 'The driver of any vehicle upon a highway, before starting, stopping or turning from a direct line, shall first see that such movement can be made in safety, (I) and if, whenever the operator of any other vehicle may be affected by such movement, shall give a signal as required in this section, plainly visible to the driver of such other vehicle of his intention to make such a move, and the signal shall be by means of the hand and arm and manner herein specified or by any mechanical or electrical signal device approved by the Department of Motor Vehicles,' and the signal for left turn, members of the jury, is with the left hand, the hand and arm extended in a horizontal direction with the forefinger pointed and the electrical turn signal referred to is such electrical turn signal which when operated inside by a lever or switch, inside the motor vehicle, shall start a blinking light outside the motor vehicle, indicating the direction to which the operator intends turning his motor vehicle. (J); and (2) "* * * (I)f the plaintiff has satisfied you from the evidence and by its greater weight, that each and all of the following three essential elements existed with respect to plaintiff's damage; first, that the plaintiff's tractor was damaged in a collision at the intersection of Independence Boulevard and Commonwealth and Eastway Drive, and, second, that at and prior to the collision between the tractor-trailer of the plaintiff and the Volvo being operated by the defendants, that at and prior to the collision that the defendants were negligent in the operation of the Volvo in that they (S) operated it at a high and dangerous rate of speed under the circumstances then and there existing, (T) or operated it without keeping a proper lookout or operated it without keeping it under proper control, or attempted to make a left turn without seeing first that the turn could be made in safety (U) and without giving the proper and lawful signal for that left turn; (V) and, third, that such negligence on the part of the defend-

ants in the operation of said Volvo automobile was one of the proximate causes of the collision and of the damages to the plaintiff's tractor, then it would be your duty to answer the first issue YES."

The defendants except to and assign as error those portions of the charge between the letters (I) and (J), (S) and (T), and (U) and (V). The only evidence with respect to the speed of the Volvo car operated by the minor defendant was that of the plaintiff's driver who testified, "When I first saw the small foreign car in the northern lane of Independence Boulevard for eastbound traffic it was going about 10 or 15 miles an hour. After I first saw it, it headed on in towards Eastway Drive and speeded up as it went across the intersection."

No evidence was adduced in the trial below to support the plaintiff's allegation to the effect that the minor defendant failed to give a proper hand signal or other warning of an intention to make a left turn.

The headnote in the case of *Farrow v. White,* 212 N.C. 376, 193 S.E. 386, reads: "Where there is no allegation *or evidence* that the defendant driver failed to give a warning signal required of him by the statute under the circumstances, it is error for the court to charge the law requiring the giving of such signal, since the court is required to charge the law arising upon the evidence, C.S., 564" (now G.S. 1-180). (Emphasis added.)

In *Andrews v. Sprott,* 249 N.C. 729, 107 S.E. 2d 560, this Court said: "* * * (T)he court committed error in charging with respect to the defendant's operation of his car at a reckless rate of speed. * * * The complaint does not allege and the evidence does not show speed. It is error to charge on an abstract principle of law not supported by any view of the evidence. *Worley v. Motor Co.,* 246 N.C. 677, 100 S.E. 2d 70; *S. v. McCoy,* 236 N.C. 121, 71 S.E. 2d 921; *Williams v. Harris,* 137 N.C. 460, 49 S.E. 954." See also *Carswell v. Lackey,* 253 N.C. 387, 117 S.E. 2d 51.

The defendants have not argued in their brief their assignment of error to the failure of the court below to sustain their motion for judgment as of nonsuit interposed at the close of all the evidence. Consequently, this assignment of error will be taken as abandoned. Rule 28 of the Rules of Practice in the Supreme Court, 254 N.C. 783, at page 810.

We deem it unnecessary to consider and pass upon the other assignments of error, some of which seem not to be without merit.

In our opinion, the defendants are entitled to a new trial, and it is so ordered.

New trial.

G. L. ROBERSON AND WIFE REVA B. ROBERSON, HOLLIS ROBERSON AND WIFE EDITH S. ROBERSON, MARY R. BYRD AND HUSBAND BRYAN BYRD, LUTHER ROBERSON AND WIFE DAISY W. ROBERSON, AND JOE ROBERSON AND WIFE BILLIE ROBERSON, AND HUGH ROBERSON, EXECUTOR OF THE LAST WILL AND TESTAMENT OF GERTRUDE ROBERSON PENLAND, DECEASED v. MACKEY O. PENLAND.

(Filed 20 November 1963.)

1. Cancellation and Rescission of Instruments § 4; Judgments § 25—

The fact that an agreement between the widower and beneficiaries in regard to the settlement of an estate and the deed and the consent judgment effectuating the agreement are made in reliance upon the statute giving the husband the right to dissent from the will of his wife, *held* not ground for the cancellation of the consent judgment and deed sequent to the declaration by the court of the unconstitutionality of the statute, the agreement having been made by parties *sui juris* dealing at arms length and who were represented by competent counsel, and there being no suggestion of fraud.

2. Statutes § 4—

The legal principle that an unconstitutional statute is a complete nullity and cannot justify any acts under it, must be construed with respect to the particular factual situation, and while a party may not assert a right arising out of a statute which has been declared unconstitutional, the principle does not strike down all undertakings made in reliance upon such statute.

APPEAL by plaintiffs from *Martin, S.J.*, March, 1963 Special Non-jury Session, BUNCOMBE Superior Court.

The plaintiffs brought this civil action demanding judgment:

"1. That the paper writing purporting to be the deed dated the 16th day of February, 1962, and recorded in the Office of the Register of Deeds of Buncombe County, North Carolina, in Deed Book 859, page 349, be declared null and void and of no force and effect, and be stricken from the records of the Register of Deeds of Buncombe County, North Carolina.

"2. That the entire paper writing purporting to be a contract between these plaintiffs and the defendant arising out of the defendant's purported dissent to the will of Gertrude Roberson Penland be declared null, void and of no force and effect.

"3. That the constitutional rights of the deceased, Gertrude Roberson Penland, be fully protected and enforced and that the Executor thereof be directed to execute her said last will and testament fully in accordance with the same, and in accordance with

said Constitution and the valid laws of the State, as fully and completely as if no acts or things had been done in conflict therewith.

"4. That all parties be restored to the same position and status to which they are entitled by virtue of all valid existing laws of the State of North Carolina."

As the sole basis for the relief demanded, the plaintiffs alleged they executed the deed and entered into the consent judgment giving the defendant a large share in his wife's estate because of their mistaken belief the defendant had the legal right to dissent from the will.

Attached to the complaint was the will of Gertrude Roberson Penland, dated August 20, 1960. The will provided:

"(a) I give, devise and bequeath unto my husband, Mack Penland, the sum of TWO THOUSAND DOLLARS, in fee simple forever.

"(b) That after the payment of the costs of administration, all the balance of the proceeds of said sale of said property, together with any other property that I may own or possess shall be divided into five (5) equal shares or parts, and one part thereof paid to the following named persons: One part to my sister, Mary Roberson Byrd; One part to my brother, Ged Roberson; One part to my brother, Luther Roberson; One part to my brother, Hollis Roberson; and one part to my nephew, Joe Roberson, in fee simple forever."

On the 25th day of August, 1961, the defendant filed a dissent to his wife's will, giving notice of his election not to take under the will but to demand his share of his wife's property as if she had died intestate. The dissent was drafted in conformity with G.S., Chapter 30. Subsequent to the filing of the dissent, the parties personally and through counsel carried on extensive negotiations looking to a settlement of their respective rights in the estate. The negotiations culminated in an agreement fixing the rights of the several devisees and legatees under the will. The consent judgment and the deed implemented the agreement. Both are here under attack upon the ground the parties acted under the mistaken belief a husband, by dissent, became entitled to share as in case of his wife's intestacy.

Judge Martin, of the Superior Court, by consent, found facts which are not in dispute, and concluded:

"1. That the consent judgment signed and executed by the parties and by the Clerk of the Superior Court, together with the

warranty deed, signed and executed by the plaintiffs and delivered to the defendant, and by him duly recorded in the Office of the Register of Deeds, constitute a valid and binding obligation and transaction between the plaintiffs and the defendant and that all of the obligations set forth therein have been fully complied with, with the exception of the final division of the money of said estate by the executor as set forth and agreed upon.

"2. That the executor Hugh Roberson make a division of the moneys belonging to said estate in accordance with the provisions of said consent judgment and pay the respective parts thereof to the respective parties entitled thereto."

The plaintiffs excepted and appealed.

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

Don C. Young and W. W. Candler for defendant appellee.

HIGGINS, J. The plaintiffs seek to have the Court rescind the deed and the consent judgment by which the parties settled their respective claims in the property owned by Mrs. Gertrude Roberson Penland who died without lineal descendants on August 14, 1961. The defendant was the husband of the testatrix. By (a) of Item 2 of the will he was given a legacy of $2,000.00. The remainder of the not inconsiderable estate was devised to the plaintiffs as shown by (b) of Item 2.

After the probate of the will the defendant filed a dissent. Thereafter long negotiations consisting of proposals and counter-proposals between the parties and their counsel followed. All assumed the husband had a legal right to dissent from the will. The negotiations for a settlement culminated in the consent judgment which specified what properties the defendant should receive and that the remainder should go to the plaintiffs who implemented the settlement by executing a warranty deed. The defendant in the consent judgment released all further claim in his wife's estate, including the $2,000.00 bequest.

However, subsequent to the settlement as set forth in the judgment and deed, this Court, in *Dudley v. Staton*, 257 N.C. 572, 126 S.E. 2d 590, held unconstitutional the Legislative Act permitting a husband to dissent from his wife's will. The consent judgment had already been signed and approved by the court. The warranty deed had been executed, delivered, and recorded. At the time of the settlement all interested parties were *sui juris*. They were represented by eminent counsel. They were dealing at arm's length upon a lawful subject. There is no sug-

gestion of any unfair advantage. True, all parties made the agreement in the mistaken belief the husband, by his dissent, became entitled to share in his wife's estate as if she had died intestate. The Legislature had so provided. The provision carried a presumption of its constitutionality. With this presumption on the part of counsel, all parties entered into the settlement of the estate and completed the settlement by judgment and deed. May these be canceled by the court upon a showing the attorneys did not anticipate this Court would hold unconstitutional the provision that a husband may dissent from his wife's will? The question presented goes deeper than a mistake of law on the part of attorneys. Solemn documents fixing property rights are involved. These documents were executed in the exact form which the parties intended. On this subject, Justice Pearson used this language: "But however this may be, the plaintiff by her assent to the legacy vested the legal title in the defendant; and the question is, does the bill disclose any ground upon which she can ask this Court to undo what she has done, so as to relieve her from the legal effect of her assent? * * * It is settled that mere ignorance of law, unless there be some fraud or circumvention, is not a ground for relief in equity whereby to set aside conveyances or avoid the legal effect of acts which have been done." *Foulkes v. Foulkes,* 55 N.C. 260.

The plaintiffs rely for a reversal upon a long line of cases, some by this Court, holding that an unconstitutional statute is a nullity *ab initio,* confers no rights, imposes no obligations, bestows no power, and justifies no acts performed under it. *Board of Managers v. Wilmington,* 237 N.C. 179, 74 S.E. 2d 749; *Norton v. Shelby County,* 118 U.S. 425; Cooley, Constitutional Limitations, 8th Ed., (1927) p. 382.

The *Norton* case was decided in 1886. Its sweeping statements have been narrowed by later decisions. In *Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371, the Court said: "It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects, with respect to particular relations. . . . it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified."

In *McLean Coal Co. v. Pittsburgh Terminal Coal Co.,* 238 Pa. 250, 195 A. 4, the Court held: "The unconstitutionality of a statute is a

defense to an action only when the liability is created by the statute in question; the invalidity of an act is of no avail when the liability arises from acts indicating the assumption of liability by parties who may, it is true, be acting only because the statute was passed, but who are, nevertheless, voluntarily assuming a relationship which creates a liability." See also, 49 Yale Law Journal, 959.

In this case the rights of the parties are fixed by solemn warranty deed and consent judgment. These may not be set aside merely because eminent lawyers were unable to anticipate that this Court would strike down the Act of the General Assembly which permitted the dissent. The rights of the parties are fixed by the judgment and the deed. These documents provide road blocks which the Court may not remove merely because the parties were mistaken as to one or more of the factual considerations which induced them.

The judgment of the Superior Court of Buncombe County is

Affirmed.

MARGARET YOUNG TOLSON AND WADE A. GARDNER, EXECUTORS OF THE ESTATE OF C. F. YOUNG; MARGARET YOUNG TOLSON, INDIVIDUALLY; DAVID C. TOLSON, JOHN JARVIS TOLSON, IV, A MINOR; HARRIETT BOYKIN TOLSON, A MINOR; THE MINORS APPEARING HEREIN BY THEIR NEXT FRIEND, JOHN WEBB v. MARGARET WEEKS YOUNG.

(Filed 20 November 1963.)

Wills § 60—

A childless widow who dissents from the will of her husband who is survived also by one or more lineal descendants by a former marriage, takes her statutory share of the estate computed after the deduction of the Federal estate taxes. G.S. 30-3(b).

APPEAL by defendant from *Bone, J.*, March 1963 Session of WILSON.

This action was instituted under G.S. 1-253 *et seq.* by the executors and beneficiaries named in the will of C. F. Young against his dissenting widow to determine her share of the estate.

Gardner, Connor & Lee for plaintiff appellees.
Allen W. Harrell for defendant appellant.

SHARP, J. C. F. Young died testate on August 16, 1960. He left surviving him a widow, the defendant Margaret Weeks Young who

was his second wife, and one child by a former marriage, the plaintiff Margaret Young Tolson. In apt time the widow duly filed a dissent to her husband's will. Except for making final distribution, the executors have completed the administration of the estate including the payment of the federal estate tax.

This appeal presents one question: Is the distributive share of a childless widow who dissents from her husband's will computed before or after payment of the federal estate tax when the testator is survived by one or more lineal descendants by a former marriage? Plaintiffs contend that the widow's distributive share is determined after the payment of federal estate tax; the defendant widow contends it is determined before and undiminished by such tax. The defendant appeals from a judgment of the Superior Court directing the executors to calculate the widow's share in the estate after the deduction and payment of the federal estate tax.

This Court first considered the question whether the distributive share of a dissenting widow should be computed before or after the payment of the federal estate tax in *Trust Co. v. Green,* 236 N.C. 654, 73 S.E. 2d 879. In that case, the testator died in June 1951 leaving a widow but no lineal descendants. The widow elected to take her statutory share in the estate of her husband. At that time G.S. 30-2 provided that a widow, upon dissent, became entitled to "the same rights and estates in the real and personal property of her husband as if he had died intestate." The applicable statute, G.S. 28-149(3), gave a widow one half of the "surplus of the estate" when the deceased left no lineal descendants. G.S. 28-105, then as now, provided the order of payment of debts and, in the fourth class, included "Dues to the United States." In *Green,* this Court held that the word *debt,* as used in G.S. 28-105, included the federal estate tax and that the share of the widow in the personal estate of her deceased husband should be computed after the payment of all debts, costs of administration, and taxes, including the federal estate tax. This opinion was filed January 6, 1953. In it, Devin, C.J., said:

> "The public policy of the state is a matter for the legislative branch of the government and not for the courts. Whether any change should be made in the manner of distribution to the widow of her interest in the estate of her husband, in view of the provision for marital deduction contained in the federal statute, is a matter for the General Assembly."

A review of the history of subsequent legislation is pertinent at this point. On April 30, 1953 the General Assembly rewrote subsection

3 of G.S. 28-149 to provide, in effect, that after the payment of all debts and costs of administration the net personal estate of a childless married man should be distributed as follows:

(a) If less than $10,000, *all* the personal estate should be allotted to the widow.

(b) If more than $10,000, the widow would receive $10,000 "plus one-half of the remainder which one-half shall be estimated and determined before any estate or inheritance tax levied or assessed under any law enacted by the Congress of the United States is deducted or paid and shall be free and clear of any such tax."

(c) If the decedent died testate and his widow dissented from the will she would receive only one half of the personal estate but it was to be free and clear of any federal estate tax as provided in (b) above.

Subsection (c) of rewritten G.S. 28-149(3) covered the factual situation in the *Green* case; so it is patent that the legislature intended to change the rule of that case *as it applied to the widow of a testator leaving no lineal descendants.* Subsection (b) also exempted from the charge of the federal estate tax a widow's share in the remainder of the personal estate of her childless *intestate* husband in excess of $10,000. Legislation which would have completely nullified the effect of the *Green* case failed. Senate Journal, Session of 1953, 305 and 436; 31 N.C.L. Rev. 491, 494. It is therefore quite clear that the 1953 Legislature did not intend to change the rule laid down in *Trust Co. v. Green* that all debts, including the federal estate tax, are to be determined and paid prior to ascertaining the distributive share of the widow except in the two situations delineated above in subsections (b) and (c) where the decedent left surviving him no lineal descendants.

G.S. 28-149(3) remained unchanged until it was repealed by the 1959 General Assembly when it rewrote the intestate succession laws and the statutes on dissents from wills. These changes became effective July 1, 1960. A subsequent amendment to G.S. 30-3(a) in 1961 does not affect the decision in the instant case. This case is governed by the 1959 enactments to which we now turn.

G.S. 29-13, contained in Article 2 of the 1959 Act, provides:

> "All the estate of a person dying intestate shall descend and be distributed, subject to the payment of costs of administration and other lawful claims against the estate, and subject to the payment by the recipient of State inheritance taxes, as provided in this chapter."

G.S. 28-105 directing the order of the payment of debts was not changed.

G.S. 29-14 now defines the share of the surviving spouse of an intestate as follows:

> "(1) If the intestate is survived by only one child or by any lineal descendant of only one deceased child, one half of the net estate, including one half of the personal property and a one-half undivided interest in the real property; or
>
> "(2) If the intestate is survived by two or more children, or by one child and any lineal descendant of one or more deceased children or by lineal descendants of two or more deceased children, one third of the net estate, including one third of the personal property and a one-third undivided interest in the real property; or
>
> "(3) If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children but is survived by one or more parents, a one-half undivided interest in the real property and the first ten thousand dollars ($10,000.00) in value plus one half of the remainder of the personal property; or
>
> "(4) If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children or by a parent, all the net estate."

Had C. F. Young died intestate the share of his widow would have been determined by G.S. 29-14(1). However, he died testate and his widow dissented from his will.

The effect of a widow's dissent is spelled out in G.S. 30-3(a) and (b) as follows:

> "(a) Upon dissent as provided for in G.S. 30-2, the surviving spouse, except as provided in subsection (b) of this section, shall take the same share of the deceased spouse's real and personal property as if the deceased had died intestate; *provided, that if the deceased spouse is not survived by a child, children, or any lineal descendant of a deceased child or children, or by a parent,* the surviving spouse shall receive only one half of the deceased spouse's estate, *which one half shall be estimated and determined before any federal estate tax is deducted or paid and shall be free and clear of such tax.* (Italics ours).
>
> "(b) Whenever the surviving spouse is a second or successive spouse, he or she shall take only one half of the amount provided by the Intestate Succession Act for the surviving spouse if the testator has surviving him lineal descendants by a former marriage but there are no lineal descendants surviving him by the second or successive marriage."

In only one instance do the 1959 enactments provide that the share of *any* widow shall be determined before the federal estate tax is paid. That is the situation embodied in the proviso of G.S. 30-3(a) which, in effect, describes the factual situation of the *Green* case and incorporates the 1953 change made in G.S. 28-149(3) (c). G.S. 29-14 of the 1959 Act contains no tax-relief provision corresponding to that in repealed G.S. 28-149(3) (b). We must assume that this omission was deliberate and that, except as specified by G.S. 30-3(a) the legislature did not intend to disturb the rule this Court laid down in the *Green* case.

Under the law, as it is now written, the only instance where a surviving wife is allowed to take her distributive share free and clear of the federal estate tax occurs when her husband dies testate, leaves no lineal descendants or parents surviving him, and she dissents from his will. This was the state of facts in *Bank v. Melvin,* 259 N.C. 255, 130 S.E. 2d 387. The facts in this case come within G.S. 30-3(b). Therefore, after the payment of the costs of administration, all other lawful claims against the estate, including the federal estate tax, and subject to the payment of her state inheritance taxes, defendant is entitled to a one-fourth share in the estate of C. F. Young.

The judgment of the Superior Court is

Affirmed.

RUTH T. WHITE v. JOHN COTHRAN AND VERNON LEE COTHRAN.

(Filed 20 November 1963.)

1. Automobiles § 17—

Where the evidence discloses that the street intersection in question had electrically operated traffic signals, with the usual red, yellow, and green lights, the rights of a motorist at such intersection are controlled by the traffic signals and not by G.S. 20-154(b).

2. Same—

A motorist approaching an intersection controlled by signal lights is under duty to maintain a proper lookout and to keep his vehicle in reasonable control in order that he may stop before entering the intersection if the green light changes to yellow or red before he enters the intersection, and a following motorist is under duty to keep his vehicle under reasonable control in order that he may avoid collision with the preceding vehicle in the event its driver is required to stop before entering the intersection by reason of the changing of the signal lights.

3. Automobiles § 46—

Where all of the evidence tends to show that as plaintiff approached the intersection controlled by electric traffic signals, but before reaching the intersection, the green light changed to yellow, and that plaintiff brought her car to a stop just before entering the intersection, it is error for the court, in plaintiff's action against the driver of a following car colliding with the rear of her car, to charge the law under G.S. 20-154(b) or to charge upon the rights of the parties if plaintiff had stopped while the traffic light facing her was green.

4. Trial § 33—

It is prejudicial error for the court to instruct the jury in regard to the law not presented by the evidence in the case.

5. Appeal and Error § 38—

An assignment of error not brought forward and argued in the brief will be deemed abandoned. Rule of Practice in the Supreme Court No. 28.

APPEAL by plaintiff from *Bickett, J.*, April Session 1963 of FRANKLIN.

This is a civil action instituted by the plaintiff to recover for personal injuries allegedly sustained as the result of a rear-end collision on 8 May 1959, about 11:15 p.m., between an automobile driven by plaintiff and an automobile driven by defendant Vernon Lee Cothran, under the circumstances hereinafter set out.

Plaintiff appellant was driving an automobile in an easterly direction along Andrews Avenue, approaching the intersection of Clark Street with said Avenue, in the City of Henderson, North Carolina. Defendant appellee was operating his automobile to the rear of plaintiff's automobile and following plaintiff's car along Andrews Avenue.

At the intersection of Andrews Avenue and Clark Street there is a traffic light, electrically operated, with the usual red, yellow, and green lights. The municipal ordinance of Henderson governing traffic control signals was not introduced in the trial below.

Plaintiff's evidence tends to show that as she approached the intersection, the traffic light changed from green to yellow, and she applied her brakes, stopping just short of the lines marked upon the street for the pedestrian crossing; that within seconds after stopping, the defendant's automobile ran into the rear of plaintiff's automobile, causing plaintiff to suffer whiplash injuries.

Defendant Vernon Lee Cothran testified: "Traffic was moving approximately 15 miles per hour. * * * As we were nearing the stop light Ruth White came to a sudden stop near the intersection and the light changed, and as it changed, as quick as it did, she just came to a sudden stop, and when it did, my car ran into the rear of hers. * * * I didn't see the green light change to red, but I looked up and saw the

green light and put my eyes back on the road and she come up to the light and stopped when it changed. * * * I * * * expected her to go on through, but, instead, the lights flashed on change quick and she came to a sudden stop and I went into her car."

The defendant further testified that he was following the plaintiff at a distance of 10 or 15 feet.

At the close of plaintiff's evidence, defendant John Cothran moved for judgment as of nonsuit as to him. The motion was allowed.

The jury answered the first issue against the plaintiff. Judgment was entered on the verdict, and the plaintiff appeals, assigning error.

Yarborough & Yarborough for plaintiff appellant.
Lumpkin, Lumpkin & Davis for defendants appellee.

DENNY, C.J. The appellant assigns as error the following portions of the charge to the jury: (1) "Now, there is another statute pleaded by the defendant in this case which is designated as 20-154, General Statutes of North Carolina, which provides: The duties of all drivers of a motor vehicle upon either turning or starting or stopping a motor vehicle, and that statute provides that the driver of any vehicle upon highways before starting, stopping or turning from a direct line—in this case, the only allegation and the only proof has to do with stopping—there is no allegation of turning at all, as the court recalls it—that is, they shall first see that such movement, that is, such stopping, can be made in safety, and if they fail to observe that admonition and use reasonable care and due diligence to see that the stopping could be made in safety, that, of course, would be negligence, if one of the proximate causes or the proximate cause of the injury or damage, and would be actionable negligence;" and (2) "It is not required by law that you ascertain that a movement can be made in absolute safety, it only requires that you use the care and prudence that an ordinarily reasonable man should—If she failed to ascertain that such movement could be made in safety, and if she failed to ascertain that such stopping could be made in safety with the green light on, then that would be negligence on the part of Mrs. White, the plaintiff, but if the green light was on when she stopped there, it would also be her duty to give a signal by electrical device or otherwise and such signal to continue for at least 100 feet before reaching the stop light, provided that the stop light was green, and her failure to give such signal would be negligence, and if a proximate cause of the injury or damage to Mrs. White, would be actionable negligence."

In a factual situation like that presented on this appeal, the right of the plaintiff to enter the intersection involved and her duty to stop before entering such intersection, were controlled by the electrically operated traffic signal and not by G.S. 20-154 (b).

As to the second portion of the charge to which the plaintiff excepted and assigns as error, we have held: The meaning and force to be given to electrically operated traffic control signals, in the absence of a statute or ordinance, "is that meaning which a reasonably prudent operator of an automobile should and would understand and apply. *Coach Co. v. Fultz*, 246 N.C. 523. Traffic signals of the kind here described are in such general use that it is, we think, well known by motor vehicle operators that a red traffic light is a warning that the highway is closed in order to permit those using the intersecting highway safe passage through the intersection. Hence, prudence dictates that he should stop. The meaning of the amber light is likewise recognized. It cautions but not in the positive tones of the red light. It warns that red is about to appear, and that it is hazardous to enter. It affords those who have entered on the green light the opportunity to proceed through the intersection before the crossing traffic is invited to enter. *Jackson v. Camp & Brown Produce Co.*, 88 S.E. 2d 540 (Ga.); Blashfield Automobile Law, sec. 1040, perm. ed. The green light indicates that the motorist may proceed. It does not guarantee safe passage through the intersection. The driver accepting the invitation must continue to exercise the care of a reasonably prudent person under similar conditions." *Wilson v. Kennedy*, 248 N.C. 74, 102 S.E. 2d 459. *Beatty v. Bowden*, 257 N.C. 736, 127 S.E. 2d 504; *Bass v. Lee*, 255 N.C. 73, 120 S.E. 2d 570; *Shoe v. Hood*, 251 N.C. 719, 112 S.E. 2d 543; *Williams v. Funeral Home*, 248 N.C. 524, 103 S.E. 2d 714; *Funeral Service v. Coach Lines*, 248 N.C. 146, 102 S.E. 2d 816; *Hyder v. Battery Co.*, 242 N.C. 553, 89 S.E. 2d 124; *Cox v. Freight Lines*, 236 N.C. 72, 72 S.E. 2d 25.

When a motorist approaches an electrically controlled signal at an intersection of streets or highways, he is under the legal duty to maintain a proper lookout and to keep his motor vehicle under reasonable control in order that he may stop before entering the intersection if the green light changes to yellow or red before he actually enters the intersection. Likewise, another motorist following immediately behind the first motorist, is not relieved of the legal duty to keep his motor vehicle under reasonable control in order that he might not collide with the motor vehicle in front of him in the event the driver of the first car is required to stop before entering the intersection by reason of the signal light changing from green to yellow or red.

A careful examination of all the evidence adduced in the trial below fails to reveal any evidence tending to show that the plaintiff stopped her car on the occasion involved while the signal light was green for her. On the other hand, the evidence of the plaintiff and defendant tends to show that as the plaintiff was approaching the intersection, controlled by electric signals, but before reaching the intersection, the green light changed to yellow and the plaintiff brought her car to a stop just before entering the intersection.

G.S. 1-180 provides that in charging the jury the judge "shall declare and explain the law arising on the evidence given in the case." In our opinion, the law as applied in the foregoing portions of the charge, to which the plaintiff excepted and assigns as error, did not arise on the evidence given in the trial below. *Farrow v. White,* 212 N.C. 376, 193 S.E. 386; *Andrews v. Sprott,* 249 N.C. 729, 107 S.E. 2d 560; *Carswell v. Lackey,* 253 N.C. 387, 117 S.E. 2d 51; *Motor Freight v. DuBose, ante,* 497.

The attorneys for the appellant have not brought forward and argued in their brief plaintiff's assignment of error to the action of the court below in allowing the motion of defendant John Cothran for judgment as of nonsuit. Consequently, this assignment of error will be taken as abandoned. Rule 28 of the Rules of Practice in the Supreme Court, 254 N.C. 783, at page 810.

The plaintiff is entitled to a new trial, and it is so ordered.

New trial.

LANE TRUCKING COMPANY v. EDWARD L. HAPONSKI.

(Filed 20 November 1963.)

1. Injunctions § 1—

Injunction is an equitable remedy exercised *in personam* and not *in rem.*

2. Process § 8—

In order to a valid service of process under G.S. 1-104 it must appear by affidavit or by verified complaint treated as an affidavit, that the requirements of G.S. 1-98.4 have been met and that the cause of action is within the purview of G.S. 1-98.2.

3. Judgments § 1—

Service of process on a nonresident under G.S. 1-104 cannot confer jurisdiction of the person upon our court so as to enable it to render a valid judgment *in personam.*

4. *Corporations* § 4; *Process* § 12—

G.S. 55-33(c) has no application to an action against a person who is not a director at the time the action is instituted or to an action which seeks recovery against a director for alleged wrongful conduct subsequent to his removal from office as director, and even when the statute is applicable G.S. 55-33(d) provides the exclusive method of service of process.

APPEAL by defendant from *Latham, J.*, March 1963 Civil Session of WAKE.

This action was instituted in the Superior Court of Wake County, North Carolina, on February 21, 1963. The summons was addressed to the Sheriff of Broward County, Florida. Based on the verified complaint, an *ex parte* temporary restraining order was issued by Judge Fountain. On February 22, 1963, the Sheriff of Broward County, Florida, in said county, delivered to defendant a copy of the summons, complaint and order. No other process has been issued. No other service has been made or attempted.

The allegations of the complaint, summarized or quoted, are as follows:

Plaintiff, a North Carolina corporation, has its principal office and place of business in Raleigh, North Carolina. Defendant formerly resided in Wake County, North Carolina, but now resides in Hollywood (Broward County), Florida. Prior to February 2, 1963, defendant was an officer and director of plaintiff but on that date "defendant was for good cause shown removed as an officer and as a director of the plaintiff" and was duly notified of his said removal. Thereafter, defendant "made no effort to interfere with the plaintiff's property or business in the State of Florida" until shortly before midnight on February 20, 1963, when defendant "went on plaintiff's property, took control of all of the plaintiff's trucks, rolling stock and other equipment, removed it from the plaintiff's property and from the possession and control of the plaintiff's duly authorized officers and agents in the State of Florida." Defendant "holds, or claims possession of, said property and refuses to allow the plaintiff's officers and agents to take possession thereof or to operate said property and equipment in the discharge of plaintiff's business or to use, operate and control the said property and equipment in and about the normal course of plaintiff's business and in the discharge of plaintiff's contract obligations in the State of Florida."

The temporary restraining order provided:

(1) " . . . that the defendant be, and he is hereby restrained and enjoined from interfering in any manner with the plaintiff's control and possession of the property described in the complaint

and from interfering or attempting to interfere in any way or in any manner whatsoever with the plaintiff's possession and use and access to said property or with the exercise by the plaintiff of any and all rights and privileges legally incident to the ownership and possession thereof."

(2) " . . . that the defendant restore to the plaintiff forthwith full possession and control of all property consisting of trucks, rolling stock and equipment now in the possession of the defendant or in any way held or controlled by him."

(3) " . . . that the defendant appear before the Honorable Judge Presiding judge on the 4th day of March, 1963, at 10:00 o'clock A.M., at the Wake County Courthouse in Raleigh, North Carolina, or as soon thereafter as this cause may be heard to show cause, if any there be, why this order should not be continued until the final determination of this action."

Defendant, under a special appearance, moved to dismiss on the ground the attempted service of process was void and the court had no jurisdiction of the person of defendant or of property in his possession.

The matter came on for hearing before Judge Latham. Two orders, both dated March 7, 1963, were entered.

In one order, which relates solely to defendant's said motion to dismiss, it was ordered and adjudged: "1. That this Court has jurisdiction over the person of Edward L. Haponski and over the property of Lane Trucking Company held by him. 2. That defendant's motion, entered upon his special appearance herein be, and the same is hereby in all respects overruled and denied."

The other order provides that defendant is enjoined "permanently" substantially as set forth in the temporary order; that defendant is adjudged in wilful contempt on account of his refusal to comply with the terms of said temporary order; and that defendant appear at a specified time and place to show cause, if any, why he should not be punished for contempt.

Defendant excepted to each of said orders, and excepted to each and all of the findings of fact and conclusions of law set forth therein, and appealed.

Allen Langston for plaintiff appellee.
Bryant, Lipton, Bryant & Battle for defendant appellant.

BOBBITT, J. Plaintiff alleged the "trucks, rolling stock and other equipment" were in the State of Florida when defendant took posses-

sion and control thereof. There is no allegation or contention that the action involves property located in North Carolina and subject to the jurisdiction of our courts.

Plaintiff's action is for prohibitory and mandatory injunctive relief. "Injunction is distinctly an equitable remedy, and the well-established principle underlying equity jurisdiction that it is exercised in *personam,* and not *in rem,* is fully applicable." 28 Am. Jur., Injunctions § 4; 19 Am. Jur., Equity § 452; 43 C.J.S., Injunctions § 162; 30 C.J.S., Equity § 102.

Plaintiff contends the service by the Sheriff of Broward County, Florida, in said county, was authorized by G.S. 1-104 and by G.S. 55-33(c) and conferred upon the Superior Court of Wake County, North Carolina, jurisdiction over the person of defendant. The court below so held.

The provisions of G.S. 1-104 are quoted and discussed by *Denny, C.J.,* in *Church v. Miller,* 260 N.C. 331, 132 S.E. 2d 688. The purported service now under consideration was not made in accordance with the requirements thereof. No affidavit other than the verified complaint was filed by plaintiff. The verified complaint (treated as an affidavit) does not meet the requirements of G.S. 1-98.4. An affidavit in compliance with G.S. 1-98.4 is jurisdictional. *Temple v. Temple,* 246 N.C. 334, 98 S.E. 2d 314, and cases cited. The cause of action alleged by plaintiff is not one of the "kinds of actions and special proceedings" listed in G.S. 1-98.2 in which "service of process outside the State may be had." There was no order "for service of process outside the State pursuant to G.S. 1-104." See G.S. 1-99.

Apart from the foregoing, service in accordance with G.S. 1-104 would not confer upon the Superior Court of Wake County jurisdiction of the person of defendant and enable it to render a valid *in personam* judgment. *Church v. Miller, supra,* and cases cited. As stated by *Moore, J.,* in *Burton v. Dixon,* 259 N.C. 473, 479, 131 S.E. 2d 27, quoted with approval by *Denny, C.J.,* in *Church v. Miller, supra:* "Jurisdiction of a party in an action *in personam,* as is the instant action, can only be acquired by personal service of process within the territorial jurisdiction of the court, or by acceptance of service, or by general appearance, active or constructive. *Warlick v. Reynolds,* 151 N.C. 606, 66 S.E. 657. In an action *in personam* constructive service (by publication, or personal service outside the State) upon a nonresident is ineffectual for any purpose. *Stevens v. Cecil,* 214 N.C. 217, 199 S.E. 161; McIntosh: North Carolina Practice and Procedure (2d ed. 1956), s. 911, p. 479."

G.S. 55-33(c), a provision of the "Business Corporation Act" (Session Laws of 1955, Chapter 1371), provides: "Every resident of this State who shall become a director of a domestic corporation and thereafter removes his residence from this State shall be subject to the jurisdiction of the courts of this State in all actions or proceedings brought therein by, or on behalf of, or against said corporation in which said director is a necessary or proper party, or in any action or proceeding by shareholders or creditors against said director for violation of his duty as a director." Questions as to the interpretation and validity of this statutory provision must be considered in relation to specific factual situations. This statutory provision refers to (1) actions in which a former resident of this State who was and is a director of a domestic corporation is a necessary or proper party in his capacity as such director and (2) actions by shareholders or creditors against a director for violation of his duty as such director. It has no application to the present case. Plaintiff alleged defendant was not a director when this action was commenced. The action is not for violation by defendant of his duty as director but for alleged wrongful conduct of defendant (in Florida) subsequent to his removal from the office of director. Moreover, G.S. 55-33(d) provides the exclusive method of service of process when service of process is authorized by G.S. 55-33(c). Here, no attempt was made to comply with G.S. 55-33(d).

The court having acquired no jurisdiction of the person of defendant, the court erred in overruling defendant's motion to dismiss and in entering an order on the merits adverse to defendant. Accordingly, the said orders of the court below are reversed and the cause is remanded for entry of an order dismissing the action.

Reversed and remanded.

ALLEN LANGSTON v. WAYNE V. BROWN.

(Filed 20 November 1963.)

1. Pleadings § 15—

Where a demurrer presents a contention of the maker of a note that it was agreed between the parties that the note should be paid solely out of sale of the collateral pledged, without personal liability, the existence of such an agreement, for the purpose of the demurrer, must be determined from the face of the complaint and the note attached to the complaint and made a part thereof, without evidence *aliunde.*

2. Bills and Notes § 17—

Where a note for the balance of the purchase price of a chose in action pledged as collateral security for the note, stipulates that upon default the holder should have full power to sell the chose at public or private sale at his option and that after such sale there should be no liability for any deficiency, *held* the stipulation gives the holder an option to sell the chose upon default but does not, within itself, disclose an agreement that the note should be paid solely out of the proceeds of sale of the collateral so as to preclude the maker from maintaining an action on the note when he has elected not to sell the pledged security.

PARKER, J., dissenting.

APPEALS by plaintiff from *Williams, J.*, April 1963 Non-Jury Term of WAKE.

These two cases involve identical questions of law. Each action was instituted on March 12, 1963 to recover judgment for the amount due on a promissory note executed and delivered by the defendant to the plaintiff on December 1, 1961. A copy of each note is attached to the respective complaint as Exhibit A. In Case No. 451, the note contains a promise to pay $32,100 in annual installments of $3,210 with interest at six percent and a provision that if any payment remained overdue for thirty days the holder might declare the entire unpaid balance due and payable. It is alleged in the complaint that no payment of either principal or interest has been made on this note and that plaintiff has elected to exercise his option to declare the entire indebtedness now due and payable.

In Case No. 452, the note recites a promise to pay $5,000, with interest, on or before December 1, 1962. The complaint alleges that on February 14, 1962 a payment of $2,000 was made on this note leaving a balance due of $3,062.50 with interest from that date.

Both notes contain the following provision:

> "This note is given to secure a part of the purchase price of the Class A Common Stock of Wilmur Associates, Incorporated, this day purchased by the undersigned from Allen Langston. The payment of both principal and interest on this note is secured by the pledge of Certificate Number.................for Five Hundred and Ten Shares of the Class A Common Stock of Wilmur Associates, Incorporated, which certificate of stock is pledged with Allen Langston or order as collateral for the security of the payment of this note; he or his assigns shall have full power and authority if default be made in the payment of either principal or interest as to all or any of this note, to sell, assign, and deliver at any time

or times thereafter the whole or any part of said collateral at public or private sale at the option of Allen Langston or the owner or holder of this note after first having given the undersigned ten (10) days notice in writing of intent to make such sale and to apply the proceeds of any such sale of collateral to the payment and satisfaction in full of both principal and interest of this note; it being understood and agreed that after such sale the undersigned shall not be liable for any deficiency."

Defendant demurred to each complaint for failure to state a cause of action in that the note discloses "that the defendant shall not be personally liable to the plaintiff" and that plaintiff must look to the certificate of stock pledged as security for the payment of the note. Judge Williams sustained the demurrers and plaintiff appealed.

I. W. Farmer for plaintiff appellant.
Johnson, Gamble & Hollowell for defendant appellee.

SHARP, J. The demurrers to the complaints pose this question: Does the provision in the notes that the holder "shall have full power and authority" upon default to sell the stock pledged as security "it being understood and agreed that after such sale" the maker shall not be liable for any deficiency, require the holder to enforce collection by a sale of the collateral?

This question must be answered by reference only to the complaint and the note which is made a part thereof. We may not consider the "testimony" contained in both briefs. If, at the time of the execution and delivery of the notes, the parties agreed that payment should be enforced only by a sale of the collateral, such an agreement would preclude personal liability on the part of the maker in an action between the parties, but this is a defense which must be interposed by answer unless it appears in the complaint itself. 3 N.C. Index, Pleadings § 15; *Carroll v. Brown*, 228 N.C. 636, 46 S.E. 2d 715. Neither complaint alleges any such agreement.

The notes in suit provide that the holder may sell the collateral and, *if he does*, the maker shall not thereafter be liable for any deficiency. They do not require such a sale, and the complaints do not allege that the stock has been sold.

The parties may always contract that the pledgeor assumes no personal liability on the debt secured by the pledge but, in the absence of such an agreement, the giving of security does not affect the right of action of the pledgee on the debt of the pledgeor. Restatement, Securi-

ty § 48, Comment a; *Bank v. Hessee,* 207 N.C. 71, 175 S.E. 826; *Sykes v. Everett*, 167 N.C. 600, 608, 83 S.E. 585. The general rule is succinctly stated in 41 Am. Jur., Pledge and Collateral Security § 99, as follows:

> "The taking of collateral security for the payment of a debt does not, in the absence of a statute or stipulation to the contrary, afford any implication that the creditor is to look to it only or primarily for the payment of the debt. The obligation of the debtor to respond in his person and property is the same as if no security had been given, and upon default in payment, the pledgee may elect to sue the pledgeor for his debt, without a sale of the security, and may recover a judgment in such suit against the pledgeor for the amount of the debt, without destroying or in the least affecting his lien on the property pledged."

In these cases, the parties agreed that a resort to the security for payment would discharge the maker from any liability for a deficiency. To that extent only did they modify the general rule. So far as the record now discloses, until the holder does resort to the security, he may look to the maker.

The orders sustaining the demurrers are

Reversed.

PARKER, J., *dissenting.* In case No. 451, plaintiff prays judgment of the court against the defendant in the sum of $32,100, with interest thereon at the rate of 6%, and for costs. In case No. 452, plaintiff prays judgment of the court against the defendant in the sum of $3,-062.50, with interest thereon at the rate of 6%, and for costs. In each case the complaint alleges: "A copy of said note is attached hereto marked 'Exhibit A' and asked to be made a part of this complaint as fully as if set out herein."

It is well-settled law that an exhibit attached to a complaint and made a part thereof can be considered in passing upon a demurrer. *Yeager v. Dobbins*, 252 N.C. 824, 114 S.E. 2d 820; *Moore v. W.O.O.W., Inc.*, 253 N.C. 1, 116 S.E. 2d 186; *Talman v. Dixon*, 253 N.C. 193, 116 S.E. 2d 338; *Sale v. Johnson, Commissioner of Revenue*, 258 N.C. 749, 129 S.E. 2d 465; 71 C.J.S., Pleading, sec. 257; 41 Am. Jur., Pleading, sec. 246; 39 N. C. L. R. 330, Incorporation by Reference. *Carroll v. Brown*, 228 N.C. 636, 46 S.E. 2d 715, cited in the majority opinion as controlling, is clearly distinguishable. The opinion in that case states: "The allegation of the plaintiff to the effect that the note upon which he bottoms his action, draws interest from date until paid at the rate of six per cent per annum, is denied by the defendants in their answer.

The note is not set out in the complaint, hence we think the pleadings raise a question of fact for the jury." Each note, which is attached to each complaint and made a part thereof as fully as if set out therein, contains this language: "It being understood and agreed that after such sale the undersigned shall not be liable for any deficiency."

It appears by the note in each case attached to each complaint and made a part thereof as fully as if set out therein, which note is the foundation of each case, that the parties agreed that payments should be enforced only by a sale of the collateral, and consequently such an agreement precludes personal liability in each case on the part of the maker in these actions between the parties. In my opinion, the judgment in each case below sustaining the demurrer to each complaint should be affirmed, and I so vote.

ESTELLE C. DAVIS, ADMINISTRATRIX OF THE ESTATE OF DEBORAH DENISE DAVIS, DECEASED V. JOEL DEE PARNELL.

(Filed 20 November 1963.)

1. Trial § 21—

On motion to nonsuit, the evidence must be considered in the light most favorable to plaintiff, giving her the benefit of all reasonable inferences of which it may be susceptible.

2. Automobiles § 41m—

In an action to recover for the death of a five year old child, fatally injured when struck by an automobile driven by defendant at night as the child was crossing the street at an angle in the same general direction as defendant was driving, nonsuit is erroneously allowed when there is testimony of a witness permitting the inference that defendant overtook and passed the witness as the witness was traveling at the maximum lawful speed of 35 miles per hour for that zone.

APPEAL by plaintiff from *Parker, J.*, April, 1963 Civil Session, NEW HANOVER Superior Court.

The plaintiff Administratrix of Deborah Denise Davis instituted this action to recover under the wrongful death statute, alleging the death of her intestate, age 5, proximately resulted from the defendant's actionable negligence.

The defendant admitted fatally injuring the plaintiff's intestate as she attempted to cross his traffic lane, but denied he was negligent in any particular. He alleged, however, the parents of the child, who

would benefit by recovery for her death, were contributorily negligent in that they permitted her to be on the street at night unattended.

At the close of plaintiff's evidence, judgment of compulsory nonsuit was entered from which the plaintiff appealed.

Aaron Goldberg for plaintiff appellant.
W. G. Smith for defendant appellee.

HIGGINS, J. The court entered judgment of nonsuit and dismissed the action on the ground the plaintiff's evidence was insufficient to permit any reasonable inference her intestate's death resulted from defendant's actionable negligence. This appeal challenges the correctness of that judgment. On the question presented, the plaintiff is entitled to have the evidence considered in the light most favorable to her, giving her the benefit of all reasonable inferences of which it may be susceptible. *Griffin v. Blakenship,* 248 N.C. 81, 102 S.E. 2d 451; *Hughes v. Thayer,* 229 N.C. 773, 51 S.E. 2d 488.

The fatal accident occurred on Dawson, "one of the busiest arterial streets in the City of Wilmington." The street surface was divided into four traffic lanes, each 11 feet in width. The two north lanes were marked for west-bound travel—the two south lanes for travel east. A yellow line in the center separated the two north from the two south lanes.

Mr. Johnson, the only eyewitness examined, testified that he was driving east with lights on at a speed of about 35 miles per hour. After passing through the Thirteenth Street intersection he saw two children crossing to the south side of Dawson, about 60 to 75 feet in front. Behind them and about 10 feet beyond, also crossing in the same direction, was the plaintiff's intestate, age five. These children were all south of the yellow line. They were crossing at an angle toward the east—the direction the witness and the defendant were driving. Upon seeing the children, certainly the two in front, the witness applied his brakes and stopped. The plaintiff's intestate was in the middle of the street, crossing also at an angle. "I heard brakes squealing, and I saw the lights of the car coming. It (defendant's vehicle) hit the child from the rear and knocked it up the street, over and over, about 30 feet from the impact. . . . There were no cars in front of Mr. Parnell traveling eastwardly at the time of the accident." In answer to a question, Mr. Johnson testified Parnell's car was driven "at a high rate of speed." The evidence was ordered stricken by the court. Whereupon the court excused the jury and Mr. Johnson testified before the judge: "I was traveling at 35 miles an hour." He observed the defendant's

vehicle for about 40 feet. "I have an opinion satisfactory to myself as to the rate of speed the car was making; that opinion is at least 45 to 50 miles an hour." The record does not disclose any objection either to the question or to the answer.

After the jury was recalled, no reference was made to the evidence taken in its absence. The defendant's motion for nonsuit was allowed and judgment entered accordingly.

We are not able to determine, nor do we find it necessary to do so, whether the court on the motion to nonsuit took into account the evidence which it heard in the absence of the jury. However that may be, we think there is evidence sufficient otherwise to permit an inference of excessive speed on the part of the defendant and of his failure to see the little children in the street in time to have avoided running over the plaintiff's intestate. According to the evidence of the witness Johnson, he was driving at 35 miles per hour, admittedly the legal maximum, at the time he saw the children. The evidence permits the inference the defendant overtook and passed the witness. The court should have submitted the case to the jury. We reach this conclusion on the rule of law which requires us to give plaintiff the benefit of all legitimate inferences that may be drawn from the evidence and to resolve all discrepancies in her favor. The jury, however, may not render a verdict for the plaintiff until she has made out her case by the greater weight of the evidence. *Hood v. Coach Co.*, 249 N.C. 534, 107 S.E. 2d 154; *Lake v. Express Co.*, 249 N.C. 410, 106 S.E. 2d 518.

The judgment of nonsuit is

Reversed.

BETTY HARRIS v. HENRY M. PARRIS, NETTIE B. PARRIS, BENJAMIN A. WHITLEY AND ANNIE HARRIS.

(Filed 20 November 1963.)

1. Automobiles § 41h—

Evidence that a driver, immediately upon the turning of the traffic control signal facing him from red to green, turned left in an attempt to cross the three lanes for traffic approaching the intersection from the opposite direction, and was struck by a vehicle in the middle lane, which vehicle she did not even see before impact, *is held* sufficient to be submitted to the jury on the issue of such driver's negligence.

2. Automobiles § 8—

A driver intending to go straight through an intersection has the right to assume and act on the assumption that all other travelers will observe

the law and not block his lane of travel by a left turn without first ascertaining that such move could be made in safety.

3. Automobiles § 41h—

Evidence that the driver of a car traveling in the middle lane of three lanes of traffic for his direction, struck a vehicle which had approached the intersection from the opposite direction and which, immediately upon the changing of the traffic control signal from red to green, had turned left suddenly in the path of oncoming traffic, *held* insufficient to be submitted to the jury on the issue of such driver's negligence.

APPEAL by all defendants from *Walker, S.J.*, April 22, 1963 Special Civil "B" Session, MECKLENBURG Superior Court.

The plaintiff instituted this action to recover for the personal injuries she sustained in a two-vehicle collision at the intersection of Independence Boulevard and Mint Street in the City of Charlotte. Independence Boulevard is 60 feet wide. The three north lanes are for travel west. The three south lanes are for travel east. Mint Street is 40 feet wide. The two east lanes are for travel north and the two west lanes are for travel south. Electric traffic control signals were in operation at the time of the collision.

The plaintiff was a passenger in the defendant Harris's 1956 Chevrolet which Whitley was driving west in the middle lane of Independence Boulevard. As Whitley's vehicle approached the intersection the defendant Nettie B. Parris, driving her husband's 1959 Plymouth, approached the intersection from the west on Independence Boulevard in the north lane for east-bound traffic, stopped in obedience to the red light, gave a left turn signal indicating she intended to go north on Mint Street. As the signal turned green she made a left turn in front of the Chevrolet in which the plaintiff was a passenger. The front of the Chevrolet struck the right side of the Plymouth near the rear door. The vehicles remained near the point of impact. The Chevrolet left skid marks of approximately eight feet. The impact occurred in the middle—Whitley's—lane for west-bound traffic. Although it was about noon on a clear day, Mrs. Parris failed to see the approaching Chevrolet. She testified: "As to where my car was when I first saw the Whitley driven automobile, I can truthfully say I did not see him until he hit me." The plaintiff was injured in the collision.

The owners of the vehicles admitted agency of their drivers. Each denied negligence. The jury found all parties negligent and awarded damages. From the judgment, each of the defendants appealed.

Richard T. Meek, Elbert E. Foster for plaintiff appellee.

Haynes, Graham & Bernstein, By Myles Haynes for defendants Henry M. Parris and Nettie B. Parris appellants.

Pierce, Wardlow, Knox and Caudle by Lloyd C. Caudle, H. Edward Knox, Lloyd C. Caudle for defendants Annie Harris and Benjamin A. Whitley appellants.

HIGGINS, J. The several defendants assign as error the refusal of the court to grant their motions for nonsuit. We may dismiss the Parris appeal by simply saying Mrs. Parris admitted she attempted to turn left across the three lanes for west-bound traffic, blocked the middle lane in which Whitley approached the intersection without even seeing the Chevrolet he was driving until the instant of impact. The court properly denied her motion for nonsuit.

Admittedly the defendant Whitley, operating the Annie Harris Chevrolet, approached and entered the intersection on the green light. There is no opinion evidence of excessive speed. The physical evidence indicated lack of speed. His vehicle left eight feet of skid marks. After the impact both vehicles were still in the intersection. As Whitley approached the intersection, intending to continue through, he had the right to assume and act on the assumption that all other travelers would observe the law and not block his lane by a left turn until such movement could be made in safety. A left turn across an open travel lane leaves a through traveler little time and opportunity to avoid a collision. Under the circumstances here disclosed, Whitley, the through driver, with a green light, did not forfeit his right of way merely because the impeding driver may have touched the intersection first. The duty of Whitley on this occasion required him to keep in his proper middle lane of traffic. At the same time he was required to give notice of any intended change in direction through the intersection and, in the absence of such notice, other travelers were required to assume that he intended to continue through in his proper lane of traffic. Evidence that he failed to exercise due care in any particular is not disclosed by the record. *Hudson v. Transit Co.,* 250 N.C. 435, 108 S.E. 2d 900; *Bradham v. McLean Trucking Co.,* 243 N.C. 708, 91 S.E. 2d 891; *Hyder v. Battery Co.,* 242 N.C. 553, 89 S.E. 2d 124; *Butner v. Spease,* 217 N.C. 82, 6 S.E. 2d 808; G.S. 20-155.

Evidence of actionable negligence on the part of Whitley or Annie B. Harris is lacking, and motions for nonsuit should have been allowed.

As to Defendants Parris—No error.

As to defendants Whitley and Harris—Reversed.

LANDIS H. WELSH AND WIFE, MARGARET W. WELSH v. LEON M. TODD AND WIFE, MITTIE J. TODD.

(Filed 20 November 1963.)

1. Nuisance § 1—

A fence which is of no beneficial use to the owner and which is erected and maintained by him solely for the purpose of annoying a neighbor is a spite fence and may be abated subject to the same equitable principles which govern injunctive relief generally.

2. Same— Whether fence was spite fence held question for jury on evidence in this case.

Evidence that defendants erected on their land a windbreak fence some four feet high along that portion of that side of their lot which did not adjoin plaintiffs' lot and that the fence was some seven and one-half feet high adjacent to plaintiffs' land, that the fence damaged plaintiffs' lot by interfering with the view and breeze, with evidence of animosity on the part of defendants, and that the additional height along plaintiffs' property served no useful purpose but was solely from a vengeful and malicious motive, *is held* to take the case to the jury on the crucial question of whether the fence in fact served any purpose beneficial to defendants in the legitimate use and enjoyment of their property or whether defendants in good faith reasonably believed it did so.

APPEAL by plaintiffs from *Parker, J.*, May 1963 Session of NEW HANOVER.

Action to abate an alleged "spite fence" and to recover damages for its erection and maintenance. Plaintiffs offered evidence tending to show the following facts:

Plaintiffs Welsh and defendants Todd own adjoining water front lots in the Ocean View Subdivsion on Middle Sound in New Hanover County. The Welsh lot is fifty feet wide and runs southeasterly from Trinity Avenue to the center line of the Intracoastal Canal. Plaintiffs' northern line is contiguous to defendents' southern boundary, but the Todd lot extends northwesterly one hundred and four feet beyond the rear of plaintiffs' lot. The Todd house was erected sometime before plaintiffs built theirs in June 1960. Plaintiffs' house is situated about five feet from their north property line. Defendants' front porch is forty or fifty feet to the rear of plaintiffs' back porch which is approximately thirty feet from the plaintiffs' western boundary. The Welsh front porch is about eighteen feet from a steep bluff in the eastern line of the property. The Sound is a short distance from the bluff and the Inland Waterway courses generally north and south approximately one hundred feet out in the Sound.

In April 1962 the defendants erected a web fence along their southern boundary. This type fence is commonly used as a windbreak. It

consists of small concrete posts and interwoven boards of western cedar. From the western end of defendants' lot to the western end of plaintiffs' property the fence is only four feet high; from the western end of plaintiffs' lot to the bluff, a distance of one hundred and nineteen feet, the fence is seven and a half feet high.

Plaintiffs' house obstructs the defendants' view of the Sound from their front porch to the south and east. The defendants' fence interupts plaintiffs' view of the Inland Waterway to the north for over a mile. It also interferes with their view of the Sound to the northeast and cuts off the breeze from the north and northeast. Directly in front of their house, from the end of the fence, plaintiffs still have an open view across the Sound. In the opinion of an expert realtor, the erection of the fence has depreciated the value of plaintiffs' property four thousand dollars.

During the construction of the fence Mr. Welsh complained to Mr. Todd that the fence was blocking his view. Mr. Todd's reply was, "You blocked my view and I am going to block yours." On another occasion Mr. Welsh asked him why he did not add a "couple more boards" to the height of the fence. Todd replied that he thought he had the fence high enough to serve his purpose. Before the defendants erected the fence plaintiffs had installed a flood light at the rear of their house on the end farthest from the Todd property. Between the light and the Todd house there is a ten-foot wide cedar and a large shrub. Welsh denied that it was aimed at the defendants' house or that it was kept burning all of the time.

At the close of plaintiffs' evidence, defendants' motion for judgment of nonsuit was allowed and plaintiffs appealed.

J. C. Wessell, Jr. and Carr & Swails for plaintiff appellants.
William K. Rhodes, Jr., for defendant appellees.

SHARP, J. Since the decision in *Barger v. Barringer*, 151 N.C. 433, 66 S.E. 439, it has been established law in this State that a spite fence is a private nuisance. A spite fence is one which is of no beneficial use to the owner and which is erected and maintained solely for the purpose of annoying a neighbor. It may be abated, subject to the same equitable principles which govern injunctive relief generally, and damages recovered if any have been sustained. *Burris v. Creech*, 220 N.C. 302, 17 S.E. 2d 123; 22 Am. Jur., *Fences*, §§ 43, 46; Annot., Spite Fences, 133 A.L.R. 691, 720.

Plaintiffs' evidence, viewed in the light most favorable to them, permits the inference that the fence, constructed to a height of seven

and a half feet along the property line, serves no useful purpose and that defendants erected it solely to satisfy a vengeful and malicious motive to injure plaintiffs. Therefore, the motion for nonsuit was improvidently granted. Whether the fence does in fact serve any purpose beneficial to the defendants in the legitimate use and enjoyment of their property or whether defendants erected it in good faith reasonably believing that it would perform a useful function are questions for the jury.

Courts have denied equitable relief where the walls and fences complained of screened a defendant's premises from objectionable noises, odors, and unseemly conduct on the plaintiff's property. *Stroup v. Rauschelbach*, 217 Mo. App. 236, 261 S.W. 346; *Daniel v. Birmingham Dental Mfg. Co.*, 207 Ala. 659, 93 So. 652; *D'Inzillo v. Basile*, 40 N.Y.S. 2d 293.

On cross-examination, Mr. Welsh testified that he had erected a flood light on the rear of his house. However, the answer contains no allegation that defendants constructed the fence to shield their premises from such a light or from any objectional conduct whatever on the part of the plaintiffs. Defendants merely admit the erection of the fence and stand upon their rights as property owners to maintain it. A jury must determine whether this fence comes within the protection of those rights.

The judgment of nonsuit is
Reversed.

CITY OF HENDERSON v. COUNTY OF VANCE AND HENRY W. HIGHT, CLERK OF VANCE COUNTY RECORDER'S COURT.

(Filed 20 November 1963.)

Appeal and Error § 6; Declaratory Judgment Act § 1—

A proceeding by a municipality to determine whether, under a statute consolidating the municipal and county courts, the county should pay to the city one-half of the fees in prosecutions in recorder's court in which the defendant is acquitted or unable to pay the costs or in which a nol. pros. is entered, will be remanded when it appears that the amount of unpaid costs since the enactment of the statute had not been determined and that there had been no demand upon the county for any specified sum, since such proceeding is in fact for the purpose of procuring an advisory opinion upon which the city may rely in bringing an action against the county if so advised.

APPEAL by defendants from *Hobgood, J.*, at Chambers in HENDERSON, North Carolina, on 25 July 1963. From Henderson.

In 1949 the General Assembly of North Carolina consolidated the Municipal Court of the City of Henderson with the Recorder's Court of Vance County. The 1949 Session Laws of North Carolina, chapter 409, section 2, provides: "The clerk of said recorder's court shall collect all fees, costs, fines and forfeitures and other revenues derived from said court and deposit the same in a separate fund. The said clerk shall turn over to the county school fund the clear proceeds of all penalties, forfeitures and fines collected, as required by Article 9, Section 5, of the Constitution of North Carolina, and all costs and other revenues from said court, after payment of the salaries of the recorder, prosecuting attorney and clerk, and other expense of its operation, shall be turned over one-half to the county general fund and one-half to the City of Henderson general fund monthly."

This action was instituted on 23 January 1963 for a declaratory judgment to obtain (1) a determination whether or not the County of Vance should pay into the hands of the Clerk of the Vance County Recorder's Court one-half the costs in State failures; and (2) a declaration whether or not the County of Vance should be repaid for said costs of State failures prior to the division of the costs and revenues of said Recorder's Court between the County of Vance and the City of Henderson.

G.S. 6-36 reads as follows: "In a criminal action, if there is no prosecutor designated by the court as liable for the costs under the provisions of the General Statutes section 6-49, and the defendant is acquitted or convicted and unable to pay the costs, or a *nolle prosequi* is entered, or judgment arrested, the county shall pay the clerks, sheriffs, constables, justices and witnesses one-half their lawful fees; except in capital cases and in prosecutions for forgery, perjury, or conspiracy, when they shall receive full fees. No county shall pay any such costs unless the same are approved, audited and adjudged against the county as provided in this chapter."

It is alleged in the defendants' answer that the County of Vance presently is paying one-half of the fees due to fee-basis officials and witnesses, to wit, "constables, justices and witnesses."

It was admitted on oral argument before this Court that the defendant Henry W. Hight is Clerk of the Superior Court of Vance County and receives a salary rather than fees for his services as such Clerk. It was also admitted that this defendant is the Clerk of the Vance County Recorder's Court and is paid an additional salary for his services in

that capacity. Chapter 409, Session Laws of 1949, fixed the salary of the Clerk of this court at $125.00 per month.

This matter was heard on the pleadings and oral arguments. No evidence was offered in the hearing below.

The court, upon the facts found, held as a matter of law "(a) That the County of Vance should pay into the hands of the Clerk of the Vance County Recorder's Court one-half of his fees as well as one-half of the fees of the Constables, Justices of the Peace, and Witnesses in all state failures.

"(b) That said one-half of the Clerk's fees in state failures should be included in the distribution as a part of the net proceeds from said Recorder's Court, and distributed one-half to the City of Henderson, and one-half to the County of Vance.

"(c) That the County of Vance should not be repaid the Clerk's fees in state failures prior to the distribution."

Thereupon, the court adjudged and decreed "That the County of Vance is and has been liable since the enactment of session laws of 1949 Chapter 409 to pay into the Clerk of the Vance County Recorder's Court one-half of the lawful fees of the Clerk, Sheriffs, Constables, Justices of the Peace, and Witnesses in all criminal actions where the defendant is acquitted or unable to pay the costs or in which a *nol pros* is entered, and the payment of said one-half fees be included in the net proceeds from said Recorder's Court, which proceeds are distributable one-half to the City of Henderson and one-half to the County of Vance."

From the foregoing judgment the defendants appeal, assigning error.

Zollicoffer & Zollicoffer for plaintiff appellee.
A. A. Bunn, Sterling G. Gilliam for defendant appellants.

PER CURIAM. It will be noted that the court below, upon the facts found, held as a matter of law "That the County of Vance should pay into the hands of the Clerk of the Vance County Recorder's Court one-half of his fees as well as one-half of the fees of the Constables, Justices of the Peace and Witnesses in all state failures." However, the judgment entered below is to the effect that the County of Vance is and has been liable since the enactment of the Session Laws of 1949, Chapter 409, to pay into the hands of the Clerk of the Vance County Recorder's Court one-half of the lawful fees of the Clerk, Sheriffs, Constables, Justices of the Peace, and Witnesses in all criminal cases where the defendant is acquitted or unable to pay costs or in which a *nol pros* is entered.

It is not ascertainable from the pleadings when this controversy arose, or for what period of time the County of Vance has refused to pay one-half of the Clerk's fees demanded. We do not recall that any question was raised on the oral argument before this Court with respect to the failure to pay Sheriffs' fees. Furthermore, in the findings of fact, the court found that prior to January 1960 the County of Vance paid into the hands of the Clerk of the Recorder's Court one-half of the fees of the Clerk, Constable, Justices of the Peace, and Witnesses in State failures, and that since that time the County of Vance has been paying into the hands of the Clerk only one-half of the fees of Constables, Justices of the Peace, and Witnesses in State failures.

There are no allegations in the pleadings with respect to the amount of unpaid costs by the County of Vance in State failures. Neither are there any allegations to show that a claim or claims for such indebtedness have been presented to the County of Vance in the manner prescribed by law.

As we construe the plaintiff's pleadings and brief, this action was brought for the sole purpose of procuring from this Court an advisory opinion upon which the plaintiff may rely and bring an action, if so advised, against the defendants to recover certain unpaid costs it alleges to be due from the County of Vance to the Clerk of the Recorder's Court, the amount of which has not yet been ascertained.

In the case of *Fuquay Springs v. Rowland*, 239 N.C. 299, 79 S.E. 2d 774, the action was purportedly instituted under the Declaratory Judgment Act, to determine what items of cost should be included in the bills of costs in a criminal action tried in the Fuquay Springs Recorder's Court. This Court, speaking through Barnhill, J., later C.J., said: "While we concede that the Declaratory Judgment Act, G.S. ch. 1, art. 26, is comprehensive in scope and purpose, it does not, and was not intended to, embrace an action such as this. We cannot perceive that the Legislature, in enacting that statute, intended to vest in the superior courts of the State the general power to oversee, supervise, direct, or instruct officials of inferior courts in the discharge of their official duties.

"The defendant Council (Clerk of Fuquay Springs Recorder's Court) did not appeal. Even so, he is an official of the court. If he fails to collect and account for monies rightfully belonging to plaintiff, or taxes items of cost which should not be taxed, or fails to tax items which should be taxed, the law provides an adequate and expeditious remedy in behalf of those who have the right to raise the issue in any of these particulars."

The appeal was dismissed and the cause remanded to the Superior Court with instructions to dismiss the case from the docket.

In our opinion it would be unwise for this Court to render an advisory opinion on the questions posed, before all the pertinent facts have been found or agreed upon as was done in the case of *Greensboro v. Guilford County*, 191 N.C. 584, 132 S.E. 558.

The judgment entered below is vacated and the cause is remanded to the Superior Court where the plaintiff may take such action as it deems advisable in light of this opinion.

Remanded.

HELEN N. SNUGGS v. CLYDE T. SNUGGS.

(Filed 20 November 1963.)

Divorce and Alimony § 18—

An order for subsistence *pendente lite* may be modified at any time before trial on application of either party without a finding of a material change of condition.

APPEAL by plaintiff from *McConnell, J.*, in Chambers in RICHMOND on July 15, 1963.

This action was begun in Richmond County on 23 February 1963. The complaint alleges plaintiff and defendant were married in March 1940; defendant, in February 1962, wrongfully abandoned plaintiff and his minor child. Plaintiff asks for alimony without divorce and for the custody of and support for the minor child.

When the complaint and summons were served, plaintiff gave notice that she would, on 4 March 1963, move before the judge holding the courts of the Twentieth District at the courthouse in Anson for an order for alimony *pendente lite*. Judge Brock, by special assignment presiding over the March Term of Anson, heard the motion. The parties submitted affidavits in support of their respective contentions. The court found defendant had abandoned his wife and had failed to provide her with necessary subsistence. He further found defendant had "a net annual income in excess of $5,000.00." Based on these findings he required defendant to pay plaintiff for her support and the support of their minor child the sum of $350 per month, except for such time as the minor child's expenses at college was paid by defendant, and for such periods he should pay plaintiff $250 per month. When the order

was made, the minor was in the senior class in high school. In addition to these monthly payments plaintiff was permitted to continue to occupy the home place. Defendant was required to pay the taxes thereon and keep it insured. He was required to endorse to plaintiff a note for $2,000, part of the purchase price of real estate sold by plaintiff and defendant.

Defendant made the monthly payments as required by Judge Brock but did not transfer the $2,000 note as directed by the order. On 17 April plaintiff filed a petition with Judge Brock praying for an order requiring defendant to show cause why he should not be held in contempt. On that date Judge Brock signed an order requiring defendant to appear before Judge McRae at the courthouse in Rockingham to show cause why he should not be held in contempt. On the same date defendant gave notice that he would apply to Judge McConnell for an order modifying Judge Brock's order of subsistence.

When the motion to attach defendant for contempt came on for hearing before Judge McRae, he continued the matter for hearing by Judge McConnell at the same time he heard defendant's motion for modification of Judge Brock's order of subsistence. Judge McConnell heard the parties on 5 June 1963 and on 15 July 1963. He found "the income of the defendant for the year 1962 was approximately $5,500.00 inclusive of certain capital gains from the sale of property which the plaintiff shared, that if he be required to pay the sum of $350.00 per month, to wit, $4200.00 annually, it would jeopardize his business; that there is nothing in the record to show that defendant's income for 1963 will be more than that for 1962." Based on his findings Judge McConnell reduced the monthly payment which defendant was required to pay from $350 per month to $250 per month. He required defendant to deposit with the clerk of the court as security for payment of the monthly sums the $2,000 note. Plaintiff excepted and appealed.

Pittman, Pittman & Pittman by W. G. Pittman for plaintiff appellant.

Webb & Lee by Hugh A. Lee for defendant appellee.

PER CURIAM. Plaintiff contends that Judge McConnell was without authority to modify the order made by Judge Brock since defendant neither alleged nor offered evidence tending to show a change in condition between the time Judge Brock heard the matter and made his order and the time the matter was heard by Judge McConnell. The identical contention was made in *Rock v. Rock*, 260 N.C. 223. The conclusion then reached is determinative of this appeal.

Affirmed.

JEREMIAH EDGAR DEZERN v. ASHEBORO CITY BOARD OF EDUCATION, ERNEST ISLEY, AND JOHN N. OGBURN, JR., GUARDIAN AD LITEM FOR ERNEST ISLEY.

(Filed 20 November 1963.)

1. Automobiles § 9—

It is negligence to permit a disabled bus to stand on a highway at night without lights, blocking a lane of traffic, without giving warning to approaching vehicles. G.S. 20-129, G.S. 20-134.

2. Automobiles § 10—

Where a motorist is traveling within the maximum legal speed he will not be held contributorily negligent as a matter of law in colliding with the rear of a vehicle left in his lane of traffic at nighttime without lights.

APPEAL by defendants from *McConnell, J.*, February 1963 Civil Session of RANDOLPH.

J. Harvey Luck and Miller & Beck for plaintiff.

Jordan, Wright, Henson & Nichols and G. Marlin Evans for defendants.

PER CURIAM. This action was instituted by plaintiff to recover for personal injuries and property damage which resulted when his automobile collided with the rear of a school activities bus.

Verdict was favorable to plaintiff. The defendant Board of Education carried liability insurance covering the bus and thereby waived governmental immunity from liability to the extent of the insurance policy limits. G.S. 115-53. The amount of the judgment is within policy limits.

Defendants appeal and assign as error the denial of their motion for nonsuit.

The evidence, taken in the light most favorable to plaintiff, is summarized as follows:

Defendant Isley, agent of defendant Board of Education, was operating the bus (with one passenger aboard) westwardly on U. S. Highway 64, a few miles east of Asheboro, N. C., on the night of 2 February 1961. He was having "ignition" trouble. The motor cut off at Woody's Drive-In. Isley got the motor started and after he had driven about one-half mile in the direction of Asheboro the motor cut off again and the lights on the bus went out. The bus was left standing in the north lane facing west, without lights. It was 8 feet wide and 12 feet high, and obstructed practically the entire lane. It was painted yellow. The highway is 23 or 24 feet wide. Isley and the passenger left

the bus and went to a nearby house to telephone for help. They returned to the bus and attempted to push it. Before they could move it, the plaintiff ran into the rear of the bus. No one attempted to flag traffic or give warning of any kind. The bus had been standing in this position about 25 minutes. The highway was level and dry; the weather was cloudy and there was fog; the night was dark. The collision occurred about 6:45 P.M. When plaintiff, driving westwardly, was about 200 yards from the bus, and before he knew of its presence, he saw approaching a line of east-bound traffic, consisting of 8 to 10 cars. Plaintiff's speed was 35 miles per hour; the line of traffic was moving about 40 to 45 miles per hour. The speed limit was 55 miles per hour. The first car in the line dimmed lights and plaintiff did likewise. Some of the meeting cars did not dim their lights. Being somewhat blinded by the lights, plaintiff watched the edge of the hardsurface, the outline of which was clear, to guage his direction. Plaintiff reduced speed and at the time of the collision was going 20 to 30 miles per hour. When he passed one of the cars with bright lights, he, for the first time, saw the bus in his lane of travel. It was 20 to 25 feet away. He did not have time to apply brakes, though he attempted to do so. He did not turn to the left because of the east-bound traffic; the shoulder of the road was only 3 feet wide and too narrow for passage. Plaintiff was seriously injured and his automobile was extensively damaged.

Defendants were negligent in permitting the bus to stand on the highway at night, without lights, blocking the lane of traffic, and in failing to give warning to approaching vehicles. G.S. 20-129 and 134; *Scarborough v. Ingram*, 256 N.C. 87, 122 S.E. 2d 798. Plaintiff was not exceeding the speed limit (55 miles per hour), his vision was impaired by blinding lights and fog. Under the provisions of G.S. 20-141(e) and our decisions the plaintiff was not contributorily negligent as a matter of law; it was a case for the jury. *Brooks v. Honeycutt*, 250 N.C. 179, 108 S.E. 2d 457; *Wilson v. Webster*, 247 N.C. 393, 100 S.E. 2d 829; *Burchette v. Distributing Co.*, 243 N.C. 120, 90 S.E. 2d 232; *Chaffin v. Brame*, 233 N.C. 377, 64 S.E. 2d 276. Issues as to negligence of defendants, contributory negligence of plaintiff, and damages were submitted to the jury. All were answered in favor of plaintiff.

No error.

JACOB WILLIAMS v. W. EDWARD WALLACE.

(Filed 20 November 1963.)

Trover and Conversion § 2—

In an action in trover and conversion against lessor by a stranger to the lease, demurrer is properly allowed when it appears from the pleadings that under the terms of the lease the personalty attached to the realty should become the property of lessor upon the termination of the contract or lease and that the particularly described equipment alleged to have been converted was of such weight as to be *prima facie* attached to the realty and that the other personalty was not described with sufficient definiteness, since in no event could plaintiff have rights in the personalty superior to that of the lessee.

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

The complaint alleges these facts:

On April 22, 1960 the defendant leased to one J. Noah Williams a lot north of the city limits of Smithfield for a term of five years at a monthly rental. The lease (made a part of the complaint) required that defendant construct a building 48 x 40 feet on the lot and provided "that all of the equipment that the party of the second part (lessee) installs in the building and attaches to any portion of the building shall become the property of the party of the first part (lessor) upon the termination of this contract or lease." After the lease was executed, a corporation designated Smithfield Ham Plant, Inc. was organized and subsequently operated its business on the leased premises. Plaintiff is president of the corporation. At his own expense he installed the following articles of personalty, reasonably worth $20,349.73, in the building:

> "(T)wo seven and one-half ton refrigerator compressors, one hot water heater system, one couch, one smoke maker and numerous other articles of personal property used in the operating of said business."

On July 15, 1962, fifteen days before the rent became due, defendant borrowed the keys to the building from J. Noah Williams, went into illegal possession, and has since refused to surrender possession of the premises to the plaintiff.

Plaintiff prays that he recover the sum of $20,349.73 from the defendant for the conversion of his equipment and fixtures. The defendant's demurrer to the complaint for failure to state a cause of action was sustained. Plaintiff then moved to amend the complaint by making J. Noah Williams a party plaintiff. This motion was denied but the

court offered plaintiff an opportunity "to file an amended complaint with reference to any causes of action against defendant W. Edward Wallace that the original complaint might have." Plaintiff declined to amend and appealed from the order sustaining the demurrer.

E. R. Temple for plaintiff appellant.
Wellons & Wellons for defendant appellee.

PER CURIAM. This is an action for the conversion of personal property alleged to belong solely to the plaintiff and not an action for the wrongful repossession of the leased premises. Therefore, Jacob Williams is the only necessary and proper party plaintiff.

Plaintiff is not an assignee of the lease contract between J. Noah Williams and the defendant. Had he installed the equipment in the building as assignee, he would then have stood in the shoes of the original lessee, J. Noah Williams, whose rights to remove equipment at the end of the term were defined by the lease. *Sanders v. Ellington,* 77 N.C. 255; *Springs v. Refining Co.,* 205 N.C. 444, 171 S.E. 635. Nevertheless, any equipment plaintiff put into the building must have been put there pursuant to authority or license from J. Noah Williams. *A fortiori,* under the facts of this case, plaintiff can at no time have any greater rights with respect to the fixtures and equipment than would have been available to the lessee of the premises.

The lease specifically prohibits J. Noah Williams from removing any equipment which has been attached to any portion of the building. *Prima facie,* two seven and one-half ton refrigerator compressors, one hot water heater system, and one smoke maker would be attached to the building. The other items alleged to have been converted are not described in the complaint with that degree of certainty which is required in an action for conversion. ". . . (G)oods claimed to have been converted should be described with convenient certainty in order that the jury may know what is meant and in order that the defendant may be protected from another action based upon the same cause of action." *Norman v. Rose Lake Lumber Co.,* 22 Idaho 711, 128 Pac. 85; 53 Am. Jur., *Trover and Conversion,* § 167.

"In an action of trover, the declaration, petition, or complaint must describe the property converted, otherwise it will be fatally defective." 65 C.J., *Trover and Conversion,* § 123; 89 C.J.S. § 97.

It may be that plaintiff has a cause of action against the defendant for the conversion of *some* personal property. If so, on a proper complaint, he may still have his day in court. The complaint in this case

does not set forth the plain and concise statement of facts envisaged by G.S. 1-122.2.

The judgment sustaining the demurrer is

Affirmed.

JESSE NOAH WILLIAMS AND WIFE, ELLEN WILLIAMS, T/A SMITHFIELD LIVESTOCK EXCHANGE, INC. v. JOHN N. DENNING, C. L. DENNING AND KENNETH WESTBROOK, T/A DENNING-WESTBROOK OIL COMPANY, INC.

(Filed 20 November 1963.)

1. Appeal and Error § 19—

The exceptions must be grouped in the assignments of error. Rule 19(3).

2. Appeal and Error § 3—

An order striking allegations contained in a pleading is not appealable and may be reviewed prior to trial only by *certiorari.* Rule 4(a)(2).

3. Judgments § 13—

Judgment by default may not be entered pending the hearing of a motion to strike on the ground that the motion was not verified, since a motion is not a pleading within the meaning of G.S. 1-144.

4. Appeal and Error § 3—

An order allowing the filing of an amended complaint, made in the discretion of the court, is not reviewable in the absence of a showing of abuse of discretion.

APPEAL by corporate plaintiff from *Braswell, J.*, June 1963 Criminal Session of JOHNSTON.

The complaint, stripped of useless verbiage, alleges these facts: Corporate plaintiff in 1962 leased its truck to corporate defendant to haul gasoline; lessee was to pay for the use of the truck $80 per trip; it made forty-one trips for which it owed corporate plaintiff $3,280; defendant falsely and fraudulently promised to pay the agreed rental but had failed to pay; because of the failure to pay, plaintiff was entitled to recover $3,280 compensatory damages and $10,000 punitive damages; it was, by virtue of G.S. 44-1, entitled to a materialman's lien to the extent of the unpaid rental charges on all the assets of corporate defendant. The complaint was verified.

Named defendants, in apt time, filed a motion to strike ten designated portions of the complaint. The motion was not verified.

After defendants filed their motion to strike and more than thirty days after the service of summons plaintiff moved for judgment by default final for the sum of $3,280, for that defendants' motion to strike was not verified.

Judge Braswell heard the motions. He allowed defendants' motion to strike each of the ten portions of the complaint. He denied plaintiff's motion for judgment by default final. He allowed plaintiff thirty days in which it could file an amended complaint. Corporate plaintiff excepted and appealed.

E. R. Temple for plaintiff appellant.

Shepard, Spence & Mast by Norman C. Shepard for defendant appellees.

PER CURIAM. Plaintiff took eleven exceptions—ten to the order sustaining defendants' motion to strike, one to the refusal to allow its motion for judgment by default.

The exceptions are not grouped in the record as required by Rule 19(3) of the Court (254 N.C. 797). An order striking allegations contained in a pleading is not appealable. The remedy, if the order is deemed erroneous, is by *certiorari.* Rule 4(a) (2) (254 N.C. 785).

Plaintiff's pleadings are a complaint, G.S. 1-121, and a reply, G.S. 1-140. Defendants pleadings are an answer and a demurrer, G.S. 1-124. A motion is an application for an order, G.S. 1-578. It is not a pleading within the meaning of G.S. 1-144. *Brownfield v. South Carolina,* 189 U.S. 426, 47 L. ed. 882.

The order allowing plaintiff to file an amended complaint and defendant time thereafter to answer was made in the court's discretion and as such is not reviewable in the absence of manifest abuse, which is not here suggested. *Osborne v. Canton,* 219 N.C. 139, 13 S.E. 2d 265.

Appeal dismissed.

JESSE NOAH WILLIAMS AND WIFE, ELLEN WILLIAMS, T/A SOUTHLAND LIVESTOCK, INC. v. JOHN DENNING, C. L. DENNING AND KENNETH WESTBROOK T/A DENNING-WESTBROOK OIL COMPANY, INC.

(Filed 20 November 1963.)

1. Appeal and Error § 4—

Where an action is entitled named individuals "t/a" a named corporation, the corporation cannot be the party aggrieved by an order striking

the names of the individuals and the letters "t/a" from the captions of the summons and complaint and the references to said individuals from the complaint.

2. Same—

An order striking allegations from the complaint is not immediately reviewable except by *certiorari.* Rule 4(a)(2).

3. Judgments § 13—

A judgment by default final is not apposite pending the hearing of a motion to strike.

4. Appeal and Error § 19—

Where no assignment of error appears in the record, the appeal is subject to dismissal. Rule 19(3).

APPEAL by plaintiff Southland Livestock, Inc., from an order entered June 27, 1963, at Smithfield, North Carolina, by *Braswell, J.*, the superior court judge then presiding over the courts of the Eleventh Judicial District. From JOHNSTON.

The complaint alleges that "the plaintiff corporation" placed an order with "the defendant corporation" for 800 gallons of diesel fuel to be delivered by said defendant and placed in one of the diesel fuel tanks of said plaintiff at its place of business in Smithfield, N. C.; that said defendant negligently delivered and placed in a diesel fuel tank of plaintiff 800 gallons of high test fuel; and that the use of said high test fuel by said plaintiff caused it to suffer damages in particulars alleged.

Defendants in apt time filed a motion to strike. Plaintiffs countered with a motion for judgment by default final. The hearing was on these motions and on demurrer *ore tenus* to the complaint. The court's order allowed the motion to strike, denied the motion for judgment by default final and overruled the demurrer *ore tenus*. It allowed "plaintiff" thirty days to file an amended complaint if it so desired. The "plaintiff," obviously "the plaintiff corporation," filed exceptions to said order and gave notice of appeal.

E. R. Temple for plaintiff appellant.
Shepard, Spence & Mast for defendant appellees.

PER CURIAM. Appellant is not a "party aggrieved" and had no right of appeal from portions of the order striking the names of the individuals and the letters "t/a" from the captions of the summons and complaint and the references to said individuals from the complaint. Suffice to say, the *matter* so stricken was not germane to the only cause of action the complaint purports to allege, namely, a cause of

action by "the plaintiff corporation" against "the defendant corporation."

As to portions of said order striking allegations relating to the alleged cause of action by "the plaintiff corporation" against "the defendant corporation," appellant did not apply to this Court for a writ of *certiorari* and its purported appeal must be dismissed for failure to comply with our Rule 4(a)(2), Rules of Practice in the Supreme Court, 254 N.C. 783, *785*.

The motion to strike was filed in apt time. Hence, there was no merit in appellant's motion for judgment by default final and no right of appeal from the court's denial thereof.

In addition to the foregoing, no assignments of error appear in the record filed in this Court. Hence, appellant's purported appeal is subject to dismissal for failure to comply with our Rule 19(3), Rules of Practice in the Supreme Court, 254 N.C. 783, *797*.

Appeal dismissed.

STATE v. MRS. OTTIS COPPLEY.

(Filed 20 November 1963.)

Bills and Notes § 20—

Where the evidence discloses that the check issued by defendant was returned by the bank, not on account of insufficient funds, but because it was written on the wrong kind of check form, the court should enter a judgment of not guilty in a prosecution for issuing a worthless check.

APPEAL by defendant from *McConnell, J.*, February 18, 1963 Session, ROWAN Superior Court.

In this criminal prosecution the State charged that on January 9, 1961, Mrs. Ottis Coppley "did unlawfully, wilfully, draw, make, utter, issue and deliver to Wallace Motor Company a check drawn on the Commercial Bank of Lexington, N. C., for the payment of money in the sum of $11.94, knowing at the time of the making, drawing, uttering, issuing, and delivering of said check as aforesaid that she did not have sufficient funds on deposit in or credit with said bank with which to pay the same upon presentation."

The defendant entered a plea of not guilty. The following was in evidence from the bank upon which the check was drawn:

"This is to certify that the check for $11.94 referred to below was presented to us for payment on February 11, 1961. It was good for the amount for which it was drawn and was not returned on account of insufficient funds but because it was written on the wrong kind of check form. Mrs. Coppley says she did not have one of her checks on us at the time, and that the payee insisted that he change one of his forms. /s/ Commercial Bank of Lexington, by: J. W. McLendon."

From a verdict of guilty and judgment, the defendant appealed.

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

Henderson & Yeager by Buford T. Henderson, Frank J. Yeager for defendant appellant.

PER CURIAM. The certificate from the Commercial Bank of Lexington was in evidence, uncontradicted and unchallenged. That evidence made out a complete defense to the charge. The court should have entered a judgment of not guilty. The judgment and verdict are set aside. The cause is remanded for disposition as here directed.

Reversed.

JANE ANDREWS BEAVER v. ROBERT LEWIS TEAL.

(Filed 20 November 1963.)

APPEALS by plaintiff and defendant from *Williams, J.*, March 4, 1963, Civil Session of WAKE.

This litigation grows out of a collision of automobiles on July 14, 1961, at 5:25 a.m., in Gastonia. Plaintiff was operating a Chevrolet in an easterly direction along Fifth Avenue. Defendant was operating a Ford in a southerly direction along Marietta Street. The collision occurred within the intersection of said streets and near the center of said intersection. The front part of defendant's Ford struck the left side of the Chevrolet operated by plaintiff. Both plaintiff and defendant sustained personal injuries and both cars were damaged.

Plaintiff alleged the Sir Walter Chevrolet Company was the owner of the Chevrolet she was driving and that she was in possession thereof as bailee.

Plaintiff alleged the collision was proximately caused by the negligence of defendant in particulars set forth and that she was entitled to recover damages for her personal injuries and for (for the benefit of said bailor) the damage to the Chevrolet. Answering, defendant denied negligence, conditionally pleaded contributory negligence of plaintiff in particulars set forth, and as a counterclaim alleged plaintiff's negligence was the sole proximate cause of the collision and on account thereof he was entitled to recover damages for personal injuries.

The electric traffic control signal erected at said intersection was not put into operation until 6:00 a.m. and was not in operation at the time of the collision. At the time of the collision, it was clear and light and the (paved) streets were dry. The streets were *of equal width.* Testimony as to the width of each street varied from 21 feet to 30 feet. An old wooden store building located on the northwest corner was an obstruction to plaintiff's view to her left and defendant's view to his right as they approached the intersection. (Note: Exhibits, consisting of diagrams and photographs, used to illustrate the testimony of witnesses and referred to in their testimony, were not included in the record on appeal.)

The court submitted and the jury answered the following issues:

> "1. Was the plaintiff injured by the negligence of the defendant as alleged in the Complaint? ANSWER: Yes.
>
> "2. Did the plaintiff by her own negligence contribute to such injury as alleged in the defendant's Answer? ANSWER: Yes.
>
> "3. What amount, if any, is the plaintiff entitled to recover of the defendant for her personal injuries? ANSWER: None.
>
> "4. What amount, if any, is the plaintiff entitled to recover of the defendant for damage to the automobile of Sir Walter Chevrolet Company? ANSWER: None.
>
> "5. Was the defendant injured in his person by the negligence of the plaintiff as alleged in defendant's further answer and counterclaim? ANSWER: Yes.
>
> "6. What amount, if any, is the defendant entitled to recover of the plaintiff for his personal injuries? ANSWER: None."

Based upon this verdict, the court entered judgment as follows:

> "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover nothing of the defendant by way of this action and that the defendant have and recover nothing of the plaintiff by way of his counterclaim; and it appearing to the Court that Sir Walter Chevrolet Company is

> not a party to this suit and has not been served with summons, complaint or other process in this action and has not appeared herein through counsel or otherwise: IT IS THEREFORE FURTHER ORDERED AND ADJUDGED that the action to recover for damages to the automobile belonging to Sir Walter Chevrolet Company be, and the same is hereby dismissed; and that the costs of this action be taxed against the plaintiff as by law provided."

Plaintiff and defendant excepted, appealed and, on appeal, each assigns errors.

Dupree, Weaver, Horton & Cockman and Jerry S. Alvis for plaintiff.
Lake, Boyce & Lake for defendant.

PER CURIAM. Plaintiff contends the court should have nonsuited defendant's counterclaim and that she should be awarded a new trial (as to her action) on account of errors in rulings on evidence and in the charge. Defendant contends the court should have nonsuited plaintiff's action and that he should be awarded a new trial (as to his counterclaim) on account of errors in rulings on evidence and in the charge.

There is much force in defendant's contention that the evidence, when considered in the light most favorable to plaintiff, discloses that plaintiff's (contributory) negligence was a proximate cause of the collision. Too, there is much force in plaintiff's contention that the evidence, when considered in the light most favorable to defendant, discloses that defendant's (contributory) negligence was a proximate cause of the collision. There was plenary evidence to support the jury's findings that the negligence of both plaintiff and defendant proximately caused the collision.

Each assignment of error brought forward by plaintiff and by defendant has been carefully considered. The challenged rulings and instructions are not free from error. However, consideration of the evidence in its entirety and of the charge contextually leaves the impression that neither party was prejudiced by such error(s). Indeed, it appears well-nigh inescapable that each driver, notwithstanding by the exercise of due care he (she) could and should have done so, failed to observe the approach of the other and the imminent danger of collision until too late to avoid the collision. Under these circumstances, the verdict of the jury will not be disturbed.

In view of our decision, it is unnecessary to pass upon plaintiff's motion to dismiss defendant's appeal for failure to file (separate) brief

in connection therewith within the time prescribed by the Rules of this Court.

It is ordered that each party shall pay one-half of all costs incident to both appeals.

On plaintiff's appeal: No error.

On defendant's appeal: No error.

MRS. BERTHA SPRUEILL, ADMINISTRATRIX OF THE ESTATE OF MAURICE SPRUEILL, JR. v. LINARD HAMLET.

(Filed 20 November 1963.)

APPEAL by plaintiff from *Brock, S.J.*, May 27, 1963 Civil Session of PERSON.

Plaintiff brings this action to recover damages resulting from the death of her intestate, passenger in a bus traveling north on Highway 57. She alleges her intestate's death was proximately caused by defendant's negligence in that he operated his truck in a southward direction at night loaded with slab wood inadequately secured and in such manner that the width of the vehicle and load exceeded ninety-six inches, and while so loaded defendant operated his truck without adequate lights and either to the left of or in such close proximity to the center of the highway that one of the pieces of wood projecting from his truck pierced the bus, striking and killing plaintiff's intestate when the vehicles passed.

Defendant denied plaintiff's allegations of negligence. He alleged he was driving his vehicle in his right lane; the bus driver veered to his left and came into defendant's lane of travel; "at that instant the left side of the bus sideswiped the left side of the bed of the truck . . . the force of the collision caused one of the wooden slabs loaded on the bed of his truck to become dislodged and the same penetrated the window on the left front and side of the bus and thereafter struck plaintiff's intestate." At the conclusion of plaintiff's evidence, defendant's motion for nonsuit was allowed. Plaintiff excepted and appealed.

Burns, Long & Burns by F. Kent Burns, Young, Moore & Henderson by J. C. Moore for plaintiff appellant.

Haywood and Denny by Egbert L. Haywood and George W. Miller, Jr., for defendant appellee.

PER CURIAM. We have carefully examined the evidence. We are of the opinion and hold that, when viewed in the light most favorable to plaintiff, it is sufficient to permit a jury to find the facts to be as alleged by plaintiff. If the facts be as plaintiff alleges, defendant is liable. No useful purpose would be served by detailed analysis of the evidence. In accord with our practice, *Weaver v. Bennett,* 259 N.C. 16, 129 S.E. 2d 610, discussion of the evidence is omitted.

Reversed.

DEANNA ELDRETH, BY HER NEXT FRIEND, O. V. DENTON v. CHARLES RAY ELDRETH, JR.

(Filed 20 November 1963.)

APPEAL by defendant from *McConnell, J.,* at Chambers in Asheboro, North Carolina, 11 April 1963. From RANDOLPH.

Civil action for alimony without divorce. On 11 April 1963, after due notice, a hearing was held for alimony *pendente lite,* counsel fees, and temporary custody and support of the minor child born of the marriage.

The plaintiff and the defendant were married on 6 November, 1961, and the minor child, Michael Rennie Eldreth, was born on 27 February 1963. The parties separated in November 1962.

At the time of the hearing the plaintiff was living with her parents in the City of Bristol, Virginia, and had custody of the minor child. At the hearing below the defendant moved to continue the hearing until the plaintiff and the minor child were before the court. Motion denied.

The court heard evidence, found facts, and awarded counsel fees, temporary alimony and support for the minor child, and awarded temporary custody of the minor child to the plaintiff until the 27th day of May 1963 or until the further order of the court.

The court further ordered that the defendant pay into the court the sum of $30.00 for the use and benefit of the plaintiff in making the trip from Bristol, Virginia, to Asheboro, North Carolina, on 27 May 1963, to attend a further hearing on the matters involved, it appearing that plaintiff was without funds to make the trip.

From the foregoing order the defendant appeals, assigning error.

Ottway Burton for plaintiff appellee.

Linwood T. Peoples for defendant appellant.

PER CURIAM. The order entered below was a temporary one, subject to modification by the judge assigned to hold the session of the Superior Court of Randolph County, North Carolina, beginning on 27 May 1963. This further hearing was granted on motion of the defendant in order that he might cross-examine the plaintiff concerning the reasons for their separation.

No prejudicial error has been shown that would justify setting aside the temporary order pending another hearing.

Affirmed.

STATE v. MARION FRANK CRAWFORD.

(Filed 27 November 1963.)

1. Criminal Law § 71—

Only a voluntary confession is competent in evidence, and a confession is voluntary when, and only when, it is in fact voluntarily made.

2. Same—

A confession otherwise voluntary is not rendered involuntary and therefore incompetent by the mere fact that the accused at the time of making the confession was under arrest or in jail or in the presence of armed officers.

3. Same—

Evidence upon the preliminary inquiry that defendant was advised of his rights and that defendant then, without being threatened or coerced, made the incriminating statements offered in evidence, and that defendant's counsel was given opportunity to cross-examine the witness in regard to the voluntariness of the confession made by defendant to the witness, *is held* to support the court's finding that the confession was in fact voluntary, and the admission of the confession in evidence will not be disturbed.

4. Rape § 1—

Rape is the carnal knowledge of a female, forcibly and against her will.

5. Rape § 8—

Carnal knowledge of any female child under the age of twelve years, regardless of consent, is rape. G.S. 14-21.

6. Homicide § 4—

A homicide committed in the prepetration of the capital offense of rape is murder in the first degree, irrespective of premeditation and deliberation. G.S. 14-17.

7. Homicide § 11—

An indictment for homicide in the language of the statute is sufficient, and proof that the murder was committed in the prepetration of a felony constitutes no variance. G.S. 52-144.

8. Criminal Law § 101—

An extrajudicial confession of a defendant is alone insufficient to sustain a conviction, but if the confession is corroborated by other evidence in regard to all of the elements of the crime, the evidence is sufficient to be submitted to the jury on the question of guilt.

9. Homicide § 20— Evidence of defendant's guilt of murder in the first degree held sufficient to sustain conviction.

The confession of defendant that while he was having sexual intercourse with an eight-year old child she started to scream and that he put his hand over her mouth, that when he took his hand off her mouth she spoke once, and said nothing more, that he believed her to be dead and carried away and hid her body, with corroborating evidence that deceased was last seen with defendant and that her body was found at the place where defendant said he placed it, with expert medical testimony of the use of force and violence in the penetration of deceased's vagina and that death resulted from suffocation from the bursting of air sacs in deceased's lungs, *is held* sufficient to be submitted to the jury and sustain a conviction of murder in the first degree.

10. Homicide § 29; Criminal Law § 114— Charge on right of jury to recommend life imprisonment held without error.

Where, in the preliminary portion of the charge, the court instructs the jury that it is the sole province of the jury to find the facts and return its verdict, and to exercise a discretion in regard to the punishment as the court would thereafter instruct the jury, and that the jury should arrive at the facts without sympathy or prejudice toward any person, and the court thereafter, in instructing the jury as to the possible verdicts, fully charges the jury that in the event the jury found defendant guilty of murder in the first degree the jury had the unbridled discretion to recommend that the punishment should be life imprisonment, the charge is without error, since, construed contextually, the cautionary instruction that the jury should arrive at their verdict without sympathy or prejudice toward any person could not have been misunderstood by the jury as affecting its unbridled discretion to recommend life imprisonment.

11. Homicide § 28—

When all of the evidence tends to show that defendant killed deceased in the prepetration of rape, without evidence of guilt of a less degree of the crime, the court correctly refrains from submitting the question of defendant's guilt of murder in the second degree.

APPEAL by defendant from *Johnston, J.*, 4 February 1963 Session of FORSYTH.

Criminal prosecution on indictment charging the defendant with murder in the first degree.

Plea: Not guilty. Verdict: Guilty of murder in the first degree as charged in the bill of indictment.

From a judgment of death by asphyxiation, defendant appeals.

Attorney General T. W. Bruton and Assistant Attorney General James F. Bullock for the State.

Hosea V. Price for defendant appellant.

PARKER, J. The record discloses that the State introduced evidence as follows: On Sunday, 18 November 1962 Sandra Denise Marshall, a Negro girl born 14 August 1954, was living with her mother Vera Sanders in a house at 1203 Free Street in the Happy Hill Garden section of the city of Winston-Salem. Defendant Marion Frank Crawford, a Negro man born on 10 June 1936, lived in a house on Willow Street, which is back of the house where Vera Sanders and her daughter lived. Vera Sanders knew the defendant by the name of Willie. Sandra and other children in the neighborhood called him Uncle Willie.

About 4:00 p.m. on Sunday, 18 November 1962 the defendant came to Vera Sanders' home. He stayed about 15 minutes, and then he and Sandra went out the house about the same time. That was the last time Vera saw Sandra alive.

Eloise Finney lives at 1207 Free Street. About 4:00 or 4:15 p.m. on 18 November 1962 defendant came to her house with Sandra Denise Marshall. Eloise said to him: "Now that your wife has gone home already, you're just like a little chicken on a wire." "I says, you're just running around everywhere." He said: "Yes, that when his wife was there he gave her all the loving and affection she needed, but when she was away he did what he wanted to." Sandra did not say anything, "She just looked up like she was hypnotized." They stayed three or four minutes. Then, as Eloise testified, "he just took her by the hand, and they both went out my back door."

When Sandra did not return home, her mother went out looking for her. Periodically she returned to see if Sandra had come back. About 11:00 p.m. that night Eloise Finney came to her house to use a buffer. She and Eloise went to where the defendant was living, arriving there about 11:15 p.m. The defendant came to the door. Vera asked him about Sandra. He replied, "he left all the children out on the street playing." Vera then went to Elizabeth Griffin's house, and called her mother's home. She then went back to where the defendant lived. Then she and the defendant went to a number of places, and finally to the police station to report that Sandra was missing.

About 10:30 a.m. on 26 November 1962 Sergeant G. C. Wilson of the Winston-Salem Police Department and four policemen and the Rescue Squad went to a graveyard in the Happy Hill Garden section. This cemetery is not kept up. It is grown over with briers, honeysuckle vines, weeds, and trees, and in some places it is impossible to get through. They searched this graveyard for about three hours looking for Sandra, but without success. They left and went to other places looking for her, and again without success. Then they returned to the cemetery in the Happy Hill Garden section, and that afternoon found Sandra's dead body in a hole under a tree that had blown over and pulled up some dirt as it was blown over. The dead body and the hole were covered with leaves and honeysuckle vines and a small toy wagon. When Sergeant Wilson raised the little toy wagon and saw the child's coat, he placed the wagon back and called the county coroner Dr. W. D. Vreeland. He did not move or touch the body.

Dr. Vreeland is a graduate of an accredited medical school and is licensed to practice medicine in North Carolina. The court found he is an expert physician and surgeon. When he arrived at the scene and was standing within two feet of the body, he could not see it, because it was covered with vines and leaves. Sergeant Wilson pointed the place out to him. He cleared away the vines and leaves and the little toy wagon that was on the top of the body. When he first saw the body, it was lying on its left side with the head sharply doubled down, up under the left shoulder, the arms were wrapped around the head, and the legs were pulled up sharply against the chest. Her dead body was fully clothed except for her panties, which were under the body. Dr. Vreeland used gloves in a superficial examination of the body there, because she appeared to have been dead some time. The body was carried to the Kate Bitting Hospital morgue, where Dr. Vreeland examined the body in more detail. In the hospital he found her vagina gaping open widely, and it definitely appeared to be injured. Dr. Vreeland's opinion was that Sandra died from suffocation and shock due to trauma. Being of opinion that it would be preferable to have Sandra's body examined by a pathologist, Dr. Vreeland sent her body to Dr. Geoffrey Mann of Richmond, Virginia, for an autopsy.

At 8:20 p.m. on 26 November 1962, Sergeant C. E. Cherry of the Winston-Salem Police Department picked up the dead body of Sandra Denise Marshall at the Kate Bitting Hospital morgue and delivered it to the morgue of the University of Virginia, Medical Center, Richmond, Virginia, at 2:20 a.m. on 27 November 1962. About 9:00 a.m. on 27 November 1962, Dr. Geoffrey Mann started an autopsy on

Sandra's dead body. Sergeant Cherry was present during most of Dr. Mann's autopsy on Sandra's dead body.

Dr. Geoffrey Mann is a graduate of an accredited medical school, the University of Manitoba, Manitoba, Canada. He holds the following degrees: AA, BS, LLB and MD. He is licensed to practice medicine in Virginia and Mississippi. He is a Fellow of the Royal Society of Tropical Medicine and Hygiene, a Fellow of the American College of Pathologists, a Fellow of the American College of Clinical Pathologists, a Fellow of the American Academy of Forensic Sciences. He is the author of a number of textbooks in the field of forensic pathology and traumatic pathology. He is a contributor to about a hundred papers on the subject. He is Chief Medical Examiner of Virginia; Professor and Chairman of the Department of Legal Medicine of the Medical College of Virginia; and Professor of Forensic Medicine at the University of Virginia. He is senior consultant to the Armed Forces Institute of Pathology, and senior consultant of the Federal Air Aviation Agency. He has been engaged in the practice of forensic pathology and conductor of post-mortem examinations due to traumatic deaths for about twenty years. He has performed ten to fifteen thousand autopsies. The court held that Dr. Mann is an expert as a physician and surgeon, specializing in the field of pathology.

Dr. Mann testified in substance: Beginning at 9:30 a.m. on 27 November 1962 he performed a post-mortem examination on the body of Sandra Denise Marshall, which body was identified to him by Sergeant C. E. Cherry, a police officer who accompanied the body. He examined Sandra's body from head to toe, inside and out. He first made an external examination of the body. The child had a considerable number of abrasions about the face and forehead and over various other portions of the legs and arms, where the skin had rubbed off. She had numerous scratches about the body, many of which he thought were post-mortem; that is, that they occurred after death, and probably caused from dragging the body, or the body being forced against some object, such as the ground or some extraneous, foreign material. His autopsy disclosed that the child's vaginal orifice had been widely dilated. Her hymen had been violently torn and completely ruptured as a result of some entry into her vagina. He could pick up the hymen by using forceps and reconstruct it. There was a tremendous amount of bruising inside her vagina. The membrane separating the private parts of the child from the lower portion of the pelvis was completely suffused with blood, causing it to be markedly swollen and filled with fluid and blood. It takes tremendous injury to produce this type of membrane in this particular region. In his opinion, based on his autopsy,

there had been a forceful entry into the child's vagina by some foreign object, applied with considerable force. His autopsy of Sandra's body showed that many of the little air sacs which make up the lungs had been exploded. This is almost one hundred per cent indicative that severe pressure had been applied to her mouth and nose. He found marks on her neck, which he interpreted as fingernail marks, and a small bit of hemorrhage in a muscle of her neck. In his opinion, Sandra came to her death as a result of suffocation by pressure being applied to the mouth and nose: "that pressure applied to the mouth and nose played the biggest factor in the death of the child." From his examination he thought she had been dead anywhere from three to ten days, with the probability leaning to ten days rather than three.

About 11:30 p.m. on 29 November 1962, three police officers of Winston-Salem arrested the defendant in the town of Jonesville at the home of Tildon Foster. At that time the defendant was known to them as Willie Gilchrist. They carried him to the city hall in Winston-Salem and talked to him 15 or 20 minutes in the office of Detective Captain Burke. The defendant said his name was Willie Gilchrist, and gave the officers the names of his father and mother in Spartanburg, South Carolina. The officers showed him a photograph of Willie Gilchrist in Spartanburg. The defendant said he was his half brother, and that he had the same name. They then placed him in the county jail.

The next morning between 10:00 and 11:00 a.m. the defendant was carried to the office of Captain Burke. Lieutenant Henry C. Carter of the Winston-Salem Police Department and Detectives Landon and Smith were present. The defendant made a statement, which was taken down in longhand by Detective Landon and later transcribed by typewriter. Defendant was afterwards given a transcribed copy of his statement, and it was read to him. The defendant said it was correct and signed it. The statement defendant made to the officers is, in substance, as follows: His name is Marion Frank Crawford. He is 26 years old. He was born in Spartanburg, South Carolina, on 10 June 1936. He was serving 20 years in prison in South Carolina for cutting Max Swain and fracturing his skull. He escaped on 27 or 29 July and came to Winston-Salem. He told Sandra Denise Marshall that he was going to a store to get some ice cream. He started walking toward the store, and she followed him. When he reached the store, he went inside and purchased a pack of cigarettes for himself and a bar of candy for her. She waited on the outside of the store. When he came out of the store, they walked up the street and then into an open field. He told her to lie down. He took her pants off. He got on top of her and had sexual intercourse with her. She started to scuffle, and everything went blank.

She started to scream and he put his hand over her mouth. When he took his hand off of her mouth, she said "Uncle Willie" and did not say anything else. He said to himself, "Lord, what have I done?" He believed she was dead. He left, went around part of the field, came back by Free Street, went up on the corner, and talked with some people. He then left the corner, went back and picked Sandra up and carried her back up the branch toward Free Street and around the back of 808 Willow Street and on up to a fence. He placed her body on the wires near a post. He hung her jacket on the fence. He jumped over the fence, pulled her over the fence, and placed her in the graveyard near an old tree. He then left. The next day he went back to the graveyard and moved her body, placing it near an old tree lying on the ground. He laid her panties on her and then placed an old wagon over her with the sides down. She scuffled because "she wasn't used to it, and it caused her to scuffle." The State introduced in evidence the written statement signed by defendant, which is practically identical with the oral statement which Lieutenant Carter testified defendant made. Later the defendant carried the officers to the place where he finally left Sandra's dead body.

The defendant offered no evidence.

Defendant assigns as error the admission in evidence of his confession, and the admission in evidence of the written copy of his confession signed by him.

It is hornbook law that a voluntary confession is admissible in evidence against the one making it; an involuntary confession is not. A confession is voluntary in law when, and only when, it was in fact voluntarily made. *S. v. Davis,* 253 N.C. 86, 116 S.E. 2d 365; *S. v. Livingston,* 202 N.C. 809, 164 S.E. 337. A confession otherwise voluntary is not rendered involuntary and therefore incompetent by the mere fact that the accused at the time of making the confession was under arrest or in jail or in the presence of armed officers. *S. v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572, 28 A. L. R. 2d 1104; *S. v. Litteral,* 227 N.C. 527, 43 S.E. 2d 84; *S. v. Bennett,* 226 N.C. 82, 36 S.E. 2d 708; *S. v. Thompson,* 224 N.C. 661, 32 S.E. 2d 24; *S. v. Wagstaff,* 219 N.C. 15, 12 S.E. 2d 657; *S. v. Stefanoff,* 206 N.C. 443, 174 S.E. 411; *S. v. Gray,* 192 N.C. 594, 135 S.E. 535; *Culombe v. Connecticut,* 367 U.S. 568, 6 L. Ed. 2d 1037, 1050-1053, and note 38 on p. 1051. When Lieutenant Carter testified defendant made a statement, defendant challenged its admissibility in evidence. Whereupon, the trial judge had a preliminary inquiry and afforded both the State and the defendant a reasonable opportunity to present evidence in the absence of the jury showing the circumstances under which the confession was made. *S. v. Rogers,*

supra; S. v. Gibson, 216 N.C. 535, 5 S.E. 2d 717; *S. v. Whitener,* 191 N.C. 659, 132 S.E. 603.

Defendant's counsel cross-examined Lieutenant Carter at length. The record discloses that Lieutenant Carter told defendant, before he made any statement, that he did not have to make any statement whatever, unless he wanted to, and that if he did make any statement, it could be used against him or for him in court, and that he was entitled to an attorney, and could use the telephone if he wanted to. Defendant made no request. After defendant's counsel had finished his cross-examination of Lieutenant Carter, the trial judge asked him: "Is there anything more that you want to offer to (sic) this preliminary examination? Are there any more questions that you want to ask him?" Defendant's counsel replied, "No, your Honor." Defendant offered no evidence on the preliminary inquiry.

The record tends to show that defendant's confession was the product of an essentially free and unconstrained choice by him, and entirely voluntary. There is nothing in the record to show the contrary. Defendant in his brief has no statement or argument that his confession was not voluntary. The trial judge found, upon a consideration of all the evidence offered on the preliminary inquiry, that defendant's confession was voluntarily made and then admitted it in evidence. The competency of the confession was a matter for the trial judge. He ruled it admissible, and this ruling is supported by competent evidence. *S. v. Rogers, supra; S. v. Hairston,* 222 N.C. 455, 23 S.E. 2d 885; *S. v. Manning,* 221 N.C. 70, 18 S.E. 2d 821; *S. v. Alston,* 215 N.C. 713, 3 S.E. 2d 11. No error in this respect has been made to appear in the record. In addition, no error has been made to appear in the record in the admission in evidence of defendant's written confession signed by him.

Defendant has other assignments of error to the admission of evidence. However, in his brief he has neither reason nor argument stated or authority cited in support of these assignments of error. They present no new question, merit no discussion, and after having been carefully examined are all overruled.

Defendant assigns as error the denial of his motion for judgment of nonsuit.

"Rape is the carnal knowledge of a female, *forcibly* and *against her will.*" *S. v. Jim,* 12 N.C. 142. This was the early definition of the crime, and it is still a correct definition of the crime. *S. v. Johnston,* 76 N.C. 209; *S. v. Marsh,* 132 N.C. 1000, 43 S.E. 828; *S. v. Johnson,* 226 N.C. 671, 40 S.E. 2d 113. Our statute, G.S. 14-21, also makes it rape carnally to know and abuse any female child under the age of twelve years, even though she consents. *S. v. Storkey,* 63 N.C. 7; *S. v. Johnston,*

supra; S. v. Johnson, supra; S. v. Jones, 249 N.C. 134, 105 S.E. 2d 513; *S. v. Strickland,* 254 N.C. 658, 119 S.E. 2d 781.

G.S. 14-17 provides: "A murder * * * which shall be committed in the perpetration or attempt to perpetrate any * * * rape, * * *, 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." *S. v. Grayson,* 239 N.C. 453, 80 S.E. 2d 387; *S. v. King,* 226 N.C. 241, 37 S.E. 2d 684; *S. v. Mays,* 225 N.C. 486, 35 S.E. 2d 494.

This Court said in *S. v. Mays, supra:* "When a homicide is committed in the perpetration of the capital felony of rape the State is not put to proof of premeditation and deliberation. Proof that the homicide was committed in the perpetration or attempted perpetration of the felony of rape is all that is required. *S. v. Dunheen,* 224 N.C. 738."

The indictment here charges the capital felony of murder in the language prescribed by statute. G.S. 15-144. In *S. v. Mays, supra,* the Court said: "The bill of indictment charges the capital felony of murder in the language prescribed by statute. G.S. 15-144. It contains every averment necessary to be made. *S. v. Arnold,* 107 N.C. 861; *S. v. R. R.,* 125 N.C. 666. Proof that the murder was committed in the perpetration of a felony constitutes no variance between *allegata* and *probata. S. v. Fogleman,* 204 N.C. 401, 168 S.E. 536. If the defendant desired more definite information he had the right to request a bill of particulars, in the absence of which he has no cause to complain." See also *S. v. Maynard,* 247 N.C. 462, 101 S.E. 2d 340; *S. v. Scales,* 242 N.C. 400, 87 S.E. 2d 916; *S. v. Streeton,* 231 N.C. 301, 56 S.E. 2d 649.

The general rule is well settled in North Carolina, and it seems also in this nation, that a naked extrajudicial confession of guilt by one accused of crime, uncorroborated by any other evidence, is not sufficient to warrant or sustain a conviction. *S. v. Long,* 2 N.C. 455; *S. v. Cope,* 240 N.C. 244, 81 S.E. 2d 773; *S. v. Thomas.* 241 N.C. 337, 85 S.E. 2d 300; Anno. 127 A. L. R. 1131, where the cases are assembled.

The State has offered this evidence, *aliunde* of defendant's confession, of the *corpus delicti:* About 4:00 p.m. on Sunday, 18 November 1962, defendant came to the home of Vera Sanders, mother of Sandra Denise Marshall. Sandra was born 14 August 1954. He stayed about 15 minutes, and then he and Sandra went out the house about the same time. That was the last time Vera Sanders saw Sandra alive. About 4:00 or 4:15 p.m. on the same afternoon, defendant and Sandra went to the home of Eloise Finney. They stayed three or four minutes, and, as Eloise testified, "he just took her by the hand, and they both

went out my back door." On the afternoon of 26 November 1962, police officers of the city of Winston-Salem found Sandra's dead body in a graveyard in the Happy Hill Garden section. This graveyard was grown over with briers, honeysuckle vines, weeds, and trees. Her dead body was in a hole under a tree that had blown over and pulled up some dirt as it was blown over. The dead body and the hole were covered with leaves and honeysuckle vines and a small toy wagon. Her body was fully clothed, except for her panties which were under the body. Defendant in his confession stated he took Sandra's pants off before he had sexual intercourse with her, that he laid her pants on her dead body, and placed an old wagon over her dead body with the sides down. Defendant afterwards carried police officers to the place where they found Sandra's dead body. Dr. Geoffrey Mann, an exceptionally well-qualified pathologist, performed a port-mortem examination on Sandra's body, examining her body from head to toe, inside and out. His testimony is to the effect that there had been a forcible entry into Sandra's vagina by some foreign object, applied with considerable force, that many of the little air sacs which make up the lungs had been exploded, and he expressed the opinion that she came to her death as a result of suffocation by pressure being applied to her mouth and nose. Defendant in his confession said when Sandra started to scream he put his hand over her mouth, and when he took his hand off of her mouth, she said "Uncle Willie," and did not say anything else. The testimony of Dr. W. D. Vreeland, a licensed medical doctor in North Carolina and county coroner, is that he examined Sandra's dead body in the Kate Bitting Hospital morgue in Winston-Salem and found her vagina gaping open widely, and that it definitely appeared to be injured, and that in his opinion Sandra died from suffocation and shock due to trauma. In our opinion, and we so hold, the State has offered in evidence sufficient extrinsic corroborative circumstances, as will, when taken in connection with defendant's confession, suffice to show that defendant murdered Sandra Denise Marshall in the perpetration of rape, and to sustain the conviction. The trial court properly submitted the case to the jury.

The trial court began its charge to the jury by reading the indictment, by instructing the jury as to the legal effect of a plea of not guilty, and by giving a correct definition of the term "a reasonable doubt." He then instructed the jury:

> "It is the province of the jury, and the sole province of the jury, to determine what the facts are in the case and, as the Court will hereafter instruct you, to exercise a discretion in the question of punishment. You determine what the facts are from all of the evi-

dence that is offered in the case, determining what the truth is and, then, you take the law as it is announced by the Court and apply it to the facts as you find them, and thereby arrive at your verdict, (A) allowing your verdict, insofar as it is humanly possible, to speak the truth, which is the very meaning of the word, 'verdict,' itself, and do this, Members of the Jury, without sympathy or without prejudice towards any person. (B)"

Defendant assigns as error the above part of the charge between the letters (A) and (B).

The trial court then instructed the jury that they could return one of three verdicts: Guilty of murder in the first degree as charged in the indictment, and that if they returned this verdict, the defendant's punishment will be death; or guilty of murder in the first degree with a recommendation that the defendant be punished by life imprisonment, and that if they returned this verdict, defendant's punishment will be life imprisonment; or not guilty. The court then read to the jury G.S. 14-17, with the proviso: "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."

A little further on in its charge the court instructed the jury:

> "Now, gentlemen, the Court instructs you that under that statute, Chapter 14, Section 17, and under the law of this State, if you find the prisoner guilty of murder in the first degree - - - and you will understand that the Court is not suggesting that you so find - - - you may, at the time of returning your verdict into open court, recommend that the prisoner's punishment shall be life imprisonment, and, in which case, your verdict would be guilty of murder in the first degree with the recommendation that the prisoner's punishment shall be life imprisonment. And the Court instructs you that in such an event, the prisoner's punishment shall be automatically fixed at life imprisonment. This right that you have is an unbridled right; it is absolute in you, and it is without any restrictions, conditions, or limitations whatever."

In closing its charge, the court instructed the jury:

> "If you return a verdict of murder in the first degree, the Court instructs you now, as it has already instructed you, that you may at the time of returning your verdict into open Court, recommend that the prisoner's punishment be imprisonment for life, and in that event, the punishment will be imprisonment for life. You are

instructed that this is a right that you have that is unbridled and that is without conditions, restrictions, or limitations. You may return one of three verdicts in the case.

"1. Guilty of murder in the first degree as charged in the bill of indictment.

"2. Guilty of murder in the first degree with a recommendation that the punishment of the prisoner be life imprisonment.

"3. Not guilty.

depending upon how you, the jury, find the facts under the evidence and the Court's instructions as to the law."

The trial court correctly instructed the jury, as required by the proviso contained in G.S. 14-17. *S. v. McMillan,* 233 N.C. 630, 65 S.E. 2d 212; *S. v. Carter,* 243 N.C. 106, 89 S.E. 2d 789; *S. v. Denny,* 249 N.C. 113, 105 S.E. 2d 446.

Defendant contends that the challenged part of the charge, to the effect that the jury should arrive at its verdict so as to speak the truth, and to do this without sympathy or prejudice to anyone, was in effect an instruction to the jury that they should not show any sympathy to him, and deprived him of the right vested in the jury by the proviso contained in G.S. 14-17 to exercise an absolute and "unbridled discretionary right" to recommend for him life imprisonment, if they convicted him of murder in the first degree. With this contention we do not agree.

The admonition or cautionary instruction that the jury should arrive at their verdict "without sympathy or without prejudice towards any person" was given in what may be termed the prologue to the charge, and in this prologue to the charge the court instructed the jury: "It is the province of the jury, and the sole province of the jury, to determine what the facts are in the case and, as the court will hereafter instruct you, to exercise a discretion in the question of punishment." A study of this introductory cautionary instruction leads us to the opinion that the part of the charge complained of could hardly have been understood otherwise by the jury than as having reference to the duty of the jury in arriving at their verdict on the primary question before them, namely, whether the defendant was guilty or not guilty of the crime charged in the indictment. The court, after the challenged part of the charge, instructed the jury that they could return one of three verdicts; that if they returned a verdict of guilty of murder in the first degree with a recommendation that the defendant be punished with life imprisonment, his punishment will be life imprisonment, and read to them G.S. 14-17. A little later in the charge

the court instructed the jury that its right to recommend life imprisonment, if they convicted the defendant of first degree murder, "is an unbridled right; it is absolute in you, and it is without any restrictions, conditions, or limitations whatever," and in the conclusion of the charge the court gave substantially the same instruction. A reading of the charge as a whole (*S. v. Burgess,* 245 N.C. 304, 96 S.E. 2d 54) leads us to the conclusion that the charge could leave the jury in no doubt that relief from the death penalty, if they convicted defendant of first degree murder, was committed without limitation of any kind to their discretion, and that there is no reasonable ground to believe the jury was misled or misinformed.

A jury should not convict or acquit a defendant by reason of sympathy or prejudice. If there was sympathy here, it would seem that it was for Sandra Denise Marshall and her tragic death, and if there was prejudice here, it would seem it would be against the defendant, and cautioning the jury against sympathy and prejudice under the facts here in arriving at a verdict of guilty or not guilty was not harmful to defendant. It would seem that it is the duty of a court to caution the jury against sympathy and prejudice in arriving at a verdict of guilty or not guilty whenever the circumstances require it. *People v. Botkin,* 9 Cal. App. 244, 98 P. 861; *Doyle v. State,* 39 Fla. 155, 22 So. 272; *Kirchman v. State,* 122 Neb. 624, 241 N.W. 100; *State v. Trapp,* 56 Ore. 588, 109 P. 1094; *S. v. Barton,* 70 Ore. 470, 142 P. 348; *Commonwealth v. Cisneros,* 381 Pa. 447, 113 A. 2d 293; *State v. Malloy,* 79 S.C. 76, 60 S.E. 228; *S. v. Harsted,* 66 Wash. 158, 119 P. 24; 53 Am. Jur., Trial, sec. 822; 88 C. J. S., Trial, sec. 297, b, Cautionary Instructions, p. 809. See *S. v. Fulkerson,* 61 N.C. 233; *S. v. McCarter,* 98 N.C. 637, 4 S.E. 553. In *Daniel v. United States,* 268 F. 2d 849, the Court said: "Admonitions against prejudice and sympathy are part of the boiler plate of a criminal charge." The assignment of error to the charge is overruled. There is no other assignment of error to the charge.

The record shows no evidence of murder in the second degree or of manslaughter. The trial court properly limited the possible verdicts to those set out in the record. *S. v. Mays, supra.*

Lieutenant Henry C. Carter testified that Sandra was "a little girl." The pathos of this little eight-year-old girl's last words, "Uncle Willie," after she had been brutally ravished and was dying from suffocation by reason of the explosion of many little air sacs, which made up her lungs, caused by pressure applied to her mouth and nose by the 26-year-old defendant, haunts the mind. The facts here recall to memory the words of the apostle James, which have come ringing down the

centuries: "When lust hath conceived, it bringeth forth sin: and sin, when it is finished, bringeth forth death." The Epistle of James, Ch. 1, v. 15—King James Version.

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

No error.

JAMES CHARLES BEASLEY v. COY WILLIAMS AND JOHN LOUIS MASSIE.

(Filed 27 November 1963.)

1. Automobiles § 52—

The mere fact of ownership of a vehicle does not impose liability for injury inflicted as a result of the negligent operation of the vehicle by the driver, but in order to hold the owner liable, plaintiff must show facts calling for the application of the doctrine of *respondeat superior*, or that the owner was negligent himself in providing a dangerously defective vehicle or in permitting a known incompetent to drive, and mere evidence that the owner permitted the tort-feasor to drive is insufficient to be submitted to the jury on the question of the owner's liability.

2. Automobiles § 41e—

Evidence that the driver of a car left the vehicle standing unattended without lights at nighttime, partially on the hard surface, and that plaintiff was unable to stop before striking the rear of the vehicle when he first saw it upon resuming his bright lights after dimming his lights in response to oncoming traffic, *held* sufficient to be submitted to the jury on the issue of negligence.

3. Automobiles § 42d—

Plaintiff will not be held contributorily negligent as a matter of law in striking the rear of a vehicle left unattended on a highway at nighttime without lights when plaintiff at the time is traveling within the statutory maximum speed limit. G.S. 20-141(b).

PARKER, J., dissenting in part.

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

Plaintiff seeks compensation for injuries resulting from a collision between an automobile operated by plaintiff and an automobile owned by defendant Massie and with his permission operated by defendant

Williams. At the conclusion of the evidence the court allowed the motion of defendants for nonsuit. Plaintiff excepted and appealed.

Levinson & Levinson by Knox V. Jenkins, Jr., for plaintiff appellant.

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

RODMAN, J. The allegations of negligence are: (1) Defendant Williams, permissively using Massie's automobile, unlawfully parked it at night on a rural paved road and "abandoned the same for a considerable period of time without leaving said car attended and without providing any lights or warning signals whatsoever . . . and without leaving at least 15 feet of a clear and unobstructed width upon the main-traveled portion of said highway opposite said unlawfully parked automobile;" and (2) "said automobile being driven and unlawfully parked by the defendant, Coy Williams, had defective headlights, but was otherwise in operative condition . . ."

Defendants filed a joint answer. They denied plaintiff's allegations of negligence. They allege the automobile operated in an easterly direction by Williams "suddenly stopped running;" Williams was not able to get the car completely off the paved portion of the highway; he left the parking lights of the automobile burning and went to seek help; while Williams was gone, plaintiff, operating his vehicle at an unreasonable rate of speed and without keeping a proper lookout, negligently ran into the rear of the vehicle Williams had been driving. They plead the negligence of plaintiff as the sole proximate cause or a contributing cause of the collision and resulting injuries.

Proof that one owns a motor vehicle which is operated in a negligent manner, causing injury to another, is not sufficient to impose liability on the owner. The injured party, if he is to recover from the owner, must allege and prove facts (1) calling for an application of the doctrine of *respondeat superior, Lynn v. Clark,* 252 N.C. 289, 113 S.E. 2d 427, or (2) negligence of the owner himself in (a) providing the driver with a vehicle known to be dangerous because of its defective condition, or (b) permitting a known incompetent driver to use the vehicle on the highway.

Here there is neither allegation nor evidence on which liability for plaintiff's injuries can be imposed on defendant Massie, owner of the vehicle with which plaintiff collided. The court correctly allowed his motion to nonsuit.

Was there error in allowing the motion of defendant Williams: The answer depends upon the proper answer to these questions: Was there

evidence that Williams' negligence proximately caused the collision? Does the evidence lead to the single conclusion that plaintiff was contributorily negligent?

The evidence offered by plaintiff would permit a jury to find these facts: Plaintiff was traveling northeastwardly on a rural paved road; about 2:00 a.m. the right front of his car struck the left rear of the automobile which defendant Williams had been operating, likewise headed in a northeast direction; the engine of that car was not running; there were no lights or signals on or at the car; the car was partially on the paved area and partially on the shoulder, occupying four or five feet of the paved area, leaving fourteen or fifteen feet of paved area open to travel; there was no one in or about the car; the place where the collision occurred was outside a business or residential district.

Plaintiff's evidence is sufficient to support a finding that defendant Williams had violated a statute, G.S. 20-134, designed to promote safe use of the public highways. The evidence would support a finding of negligence proximately causing injury. *Melton v. Crotts*, 257 N.C. 121, 125 S.E. 2d 396, and cases there cited; *St. Johnsbury Trucking Co. v. Rollins*, 21 A.L.R. 2d 88, supplemented by an extensive annotation.

Does the evidence lead to the single conclusion that plaintiff failed to exercise reasonable care for his own safety in using the highway? The answer must, we think, be in the negative. The evidence, viewed in the light favorable to plaintiff, would permit a jury to find these facts: The collision occurred in a rural area; plaintiff was traveling in the night at a speed of 40 to 45 m.p.h.; there is neither allegation nor evidence that such speed violated the provisions of G.S. 20-141(b); plaintiff had his bright lights on; he saw approaching him from the opposite direction a car with its bright lights on; both drivers were required by statute, G.S. 20-181, to dim their headlights; both did so; although keeping a careful lookout, plaintiff had not seen the unlighted car parked on the highway when he dimmed his headlights; as soon as he passed the oncoming car, he threw his lights back on bright, and then for the first time saw the unlighted car; he was at that time within 20 to 30 feet of the car; he was unable to avoid the collision.

This Court was in 1927 for the first time called upon to decide if a motorist who outran his headlights, i.e., traveled at a speed which prevented him from stopping within the distance in which his headlights would disclose an unlighted vehicle obstructing travel on a highway, was as a matter of law contributorily negligent. In *Weston v. R. R.*, 194 N.C. 210, 139 S.E. 237, Justice Brogden, writing for a unanimous Court, quoted from decisions by the appellate courts of Michi-

gan, Ohio, Wisconsin, and Utah. The quotation from the Michigan court reads: "We think the court was right in holding plaintiff guilty of contributory negligence as a matter of law. It is well settled that it is negligence as a matter of law to drive an automobile along a public highway in the dark at such speed that it cannot be stopped within the distance that objects can be seen ahead of it." The quotation from the Wisconsin court reads: "It seems to us, and we decide, that the driver of an automobile, circumstanced as was the driver of the car in which plaintiff was riding, and operating it under such conditions as he operated his machine on the night of the accident, is not exercising ordinary care if he is driving the car at such a rate of speed that he cannot bring it to a standstill within the distance that he can plainly see objects or obstructions ahead of him. If his lights be such that he can see objects for only a distance of ten feet, then he should so regulate his speed as to be able to stop his machine within that distance."

Following these quotations, Justice Brogden said: "The standard of duty announced and applied in the foregoing decisions is broad, severe, and unbending, but it appears to be a just rule, particularly in view of the fact of the appalling destruction of life and limb by motor driven vehicles upon the highways of the State." Notwithstanding the seeming unqualified approval given to the rule contended for by the defendant in that case, the Court did not in fact so hold. Judge Brogden, after giving his approval to the rule, immediately said: "However, it is not necessary to apply the rule strictly in order to defeat recovery in the present case."

That Justice Brogden did not understand that the Court had committed itself to the approval of the rule announced by the courts of Michigan and the other states referred to in the opinion is also evidenced by his opinion written two years later in *Williams v. Express Lines,* 198 N.C. 193, 151 S.E. 197. He there said: "In the *Weston* case there was no evidence that defendant was guilty of any negligence at all. Furthermore, the plaintiff in that case was fully apprised of the danger because he discovered in the rain and mist an object in front of him. Notwithstanding, 'he made no effort to reduce his speed until it was too late'." The Court declined to hold plaintiff in that case guilty of contributory negligence as a matter of law.

The statement made in the *Weston* case that one who outran his headlights was negligent as a matter of law was reiterated and applied in a number of cases. Illustrative are: *Lee v. R. R.,* 212 N.C. 340, 193 S.E. 395; *Clarke v. Martin,* 217 N.C. 440, 8 S.E. 2d 230; *Beck v. Hooks,* 218 N.C. 105, 10 S.E. 2d 608; *Dillon v. Winston-Salem,* 221 N.C. 512, 20 S.E. 2d 845; *Pike v. Seymour,* 222 N.C. 42, 21 S.E. 2d

884; *Allen v. Bottling Co.,* 223 N.C. 118, 25 S.E. 2d 388; *Tyson v. Ford,* 228 N.C. 778, 47 S.E. 2d 251; *Cox v. Lee,* 230 N.C. 155, 52 S.E. 2d 355; *Brown v. Bus Lines,* 230 N.C. 493, 53 S.E. 2d 539; *Wilson v. Motor Lines,* 230 N.C. 551, 54 S.E. 2d 53.

Perhaps the reason given for holding the operator of a motor vehicle contributorily negligent for outrunning his headlights was as concisely stated in *Cox v. Lee, supra,* as anywhere. There Barnhill, J. (later C.J.), said: "Likewise, he must at all times operate his vehicle with due regard to the width, traffic, and condition of the highway, and he must decrease speed and keep his car under control 'when special hazard exists . . . by reason of weather or highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any . . . vehicle, or other conveyance on . . . the highway . . .' G.S. 20-141. This requirement, as expressed in G.S. 20-140, 141, constitutes the hub of the motor vehicle law around which other provisions regulating the operation of motor vehicles revolve."

Other cases seemingly factually identical, or at least closely related, held the question of the driver's negligence must be submitted to a jury. Illustrative are: *Williams v. Express Lines, supra; Clarke v. Martin,* 215 N.C. 405, 2 S.E. 2d 10; *Thomas v. Motor Lines,* 230 N.C. 122, 52 S.E. 2d 377; *Chaffin v. Brame,* 233 N.C. 377, 64 S.E. 2d 276.

The 1953 Legislature amended the statute, G.S. 20-141, prescribing speeds at which vehicles might be lawfully operated on the highway. Subsection e of that statute now reads: "The foregoing provisions of this section shall not be construed to relieve the plaintiff in any civil action from the burden of proving negligence upon the part of the defendant as the proximate cause of an accident: Provided, that the failure or inability of a motor vehicle operator who is operating such a vehicle within the maximum speed limits prescribed by G.S. 20-141(b) to stop such vehicle within the radius of the lights thereof or within the range of his vision shall not be considered negligence *per se* or contributory negligence *per se* in any civil action, but the facts relating thereto may be considered with other facts in such action in determining the negligence or contributory negligence of such operator."

It is said in 31 N. C. Law Rev. 417, in an article entitled "Survey of Statutory Changes": "Similarly the 1953 General Assembly has decided that the driver's negligence, in the case of driving within the speed limit but outrunning headlights, should be passed upon by the jury, thus overruling the decisions of the supreme court that a driver's failure or inability to stop his automobile within the radius of its headlights or within the range of his vision constitutes negligence as a matter of law." The interpretation there placed on the statute was

given judicial approval in a unanimous decision of this Court in *Burchette v. Distributing Co.,* 243 N.C. 120, 90 S.E. 2d 232. Winborne, J. (later C.J.) said: "So the courts must interpret the statute as it is written—the wisdom of it being the legislative function.

"Hence interpreting the amendatory act, if the driver of a motor vehicle who is operating it within the maximum speed limits prescribed by G.S. 20-141(b) fails to stop such vehicle within the radius of the lights of the vehicle or within the range of his vision, the courts may no longer hold such failure to be negligence *per se,* or contributory negligence *per se,* as the case may be, that is, negligence or contributory negligence, in and of itself, but the facts relating thereto may be considered by the jury, with other facts in such action in determining whether the operator be guilty of negligence, or contributory negligence, as the case may be."

The interpretation given to the 1953 statute in *Burchette v. Distributing Co., supra,* has been consistently adhered to. *Wilson v. Webster,* 247 N.C. 393, 100 S.E. 2d 829; *Hutchins v. Corbett,* 248 N.C. 422, 103 S.E. 2d 497; *Brooks v. Honeycutt,* 250 N.C. 179; *Scarborough v. Ingram,* 256 N.C. 87, 122 S.E. 2d 798; *Melton v. Crotts,* 257 N.C. 121, 125 S.E. 2d 396; *Salter v. Lovick,* 257 N.C. 619, 127 S.E. 2d 273.

Whether defendant Williams was negligent and whether plaintiff was contributorily negligent are questions which must be submitted to a jury under proper instructions.

As to defendant Massie: Affirmed.

As to defendant Williams: Reversed.

PARKER, J., *dissenting as to defendant Williams.* Plaintiff, according to his testimony, was returning home from Columbia, South Carolina. Prior to the collision he had traveled about 185 miles. He left Columbia that night between ten and eleven o'clock. As stated in the majority opinion, when plaintiff was meeting the automobile driven by defendant Williams, both dimmed their lights. Plaintiff's uncontradicted testimony is as follows: "I was meeting a car and I saw his car [the parked car] for the first time when I put my lights back on bright. I just saw the car in a flash and that was it. I would say I was 20 to 30 feet from the rear of the car when I first saw it. This was the car I hit. The car that I was meeting had its lights on and I dimmed my lights. When I put my lights back on bright, I was so close that I could not keep from hitting the car. * * * It was a clear, dark night that night. * * * He had just got by me good when I struck the other car. I don't have an opinion as to how far I had traveled after I passed him before I struck the other car. When I put my

lights back on bright, I was right on this car which was parked. I don't know exactly how fast I was going; I would say 40 or 50 miles per hour. When I saw the car that was meeting me, I maintained the same speed right up until I hit the parked vehicle. I did not hit my brakes because I did not have time. * * * I do not know how many car lengths I could see ahead of me when my bright lights were on and I don't know how many car lengths I could see ahead of me when my dim lights were on."

There are two lines of decisions in our Reports involving highway accidents which turn on the question of contributory negligence. In *Tyson v. Ford*, 228 N.C. 778, 47 S.E. 2d 251, and in *McClamrock v. Packing Co.*, 238 N.C. 648, 78 S.E. 2d 749, will be found a list of cases of this type in which contributory negligence was held as a matter of law to bar recovery, and a second list in which contributory negligence has been held to be an issue for a jury.

Without attempting to analyze and distinguish the reasons underlying the decisions in those cases, they illustrate the fact that frequently the point of decision was affected by concurrent circumstances, such as fog, rain, glaring headlights, color of vehicles, etc., and that these conditions must be taken into consideration in determining the question of contributory negligence and proximate cause. "Practically every case must stand on its own bottom." *Cole v. Koonce*, 214 N.C. 188, 198 S.E. 637. For a recent case in which this Court held that the driver was guilty of legal contributory negligence in striking an unlighted parked car on the highway at night, see *Hines v. Brown*, 254 N.C. 447, 119 S.E. 2d 182. See also *Smith v. Metal Co.*, 257 N.C. 143, 125 S.E. 2d 377, in which the driver of a motor scooter was held guilty of legal contributory negligence in striking an unlighted truck parked at night on a street in the city of Goldsboro. In *Burchette v. Distributing Co.*, 243 N.C. 120, 90 S.E. 2d 232, relied on in the majority opinion, plaintiff testified that the lights on the tractor "were on bright; that the lights blinded him."

There is no evidence here of any fog, rain, glaring headlights, etc. In my opinion, plaintiff's failure under all the attendant circumstances to decrease his speed of 40 or 50 miles an hour in meeting and passing the approaching automobile on a dark night up to the very second of colliding with the unlighted parked car establishes facts necessary to show negligence on plaintiff's part proximately contributing to his injuries so clearly that no other conclusion can be reasonably drawn therefrom, and consequently I vote to sustain the judgment of involuntary nonsuit as to defendant Williams. I concur in the majority opinion upholding the nonsuit as to the defendant Massie.

MARIE HALES v. MCCRORY-MCLELLAN CORPORATION, J. W. MEARES AND F. D. MORPHIS.

(Filed 27 November 1963.)

1. Corporations § 26—

A corporation may be held liable for false imprisonment committed by its employees in the course of their employment and within the scope of their authority in having a person arrested on a charge of shoplifting.

2. False Imprisonment § 1—

Calling a policeman to aid in restraining a person does not legalize an unlawful restraint.

3. Same—

While restraint must be involuntary in order to constitute the basis of an action for false imprisonment, no actual force is required if there be an implied threat of force sufficient to compel a person to remain where he does not wish to remain or to go where he does not wish to go.

4. False Imprisonment § 2—

Plaintiff's evidence to the effect that while she was engaged in exchanging certain articles previously purchased at defendant's store she was charged with shoplifting, that an employee ordered her to come to a designated spot and told another employee to call the police, that after the arrival of the police plaintiff was taken to the police station where an affidavit was sworn to by another employee, and that plaintiff was released upon bond, *held* sufficient to support an inference by the jury that plaintiff was induced to believe that any attempt on her part to leave the scene would not be allowed, and therefore that the restraint was involuntary.

APPEAL by plaintiff from *Cowper, J.*, June, 1963 Session, WILSON Superior Court.

The plaintiff instituted this civil action on August 24, 1961, to recover from the defendants compensatory and punitive damages for false imprisonment and slander. At the close of the evidence the court entered judgment of compulsory nonsuit, from which the plaintiff appealed.

Lucas, Rand, Rose and Morris, and Louis B. Meyer for plaintiff appellant.
Gardner, Connor & Lee by Cyrus F. Lee and Raymond M. Taylor for defendants appellees.

HIGGINS, J. The appeal presents this question of law: Was the evidence offered at the trial, when considered in the light most favorable to the plaintiff, sufficient to permit the jury to find the defendants

either actually or by procurement caused the plaintiff to be falsely imprisoned and falsely accused of shoplifting as a result of which she sustained damages? In addition to the general denial, the defendants by amendment to the answer pleaded that more than six months elapsed after the action accrued and before it was instituted.

The evidence disclosed that the corporate defendant operated in the City of Wilson a self-service variety store. Merchandise was displayed on counters from which customers were permitted to make their selections to be paid for on their way out. The indivdual defendants were agents and servants of the corporate defendant and were in charge of its store.

The plaintiff testified that on September 3, 1960, she returned to the defendant's store certain articles previously purchased which she sought to exchange for more appropriate sizes. While so engaged, the individual defendants, acting for the corporation, charged her with shoplifting; that notwithstanding her complete innocence of the charge, the defendant Morphis ordered her to "come over here with me . . . you know what for . . . He told her (Mrs. Baker, another employee) to call the police . . . We stood at the end of the counter waiting until the policeman came . . . We met the policeman about middleway the aisle and we went into this little room. . . . one of the policemen asked Mr. Morphis if he wanted to sign papers and he said yes. Mr. Morphis told one of the policemen that he saw me when I came down with a bag and he knew what the bag was for. That . . . was before Mr. Morphis said he wanted to sign papers. . . . Mr. Meares (another employee) . . . came in (a little room adjacent to the display counters) and he said he knew what it was about and what I was in there for and to go ahead and sign the papers. . . . I was taken over to the police station by Mr. Tant (police officer) . . . When I got to the police station, I went to the desk and gave them my name and address. . . . After I answered the questions, I was told that I could go back to a little room and wait there. I had called my daddy . . . (He) signed my bond and I was released."

Immediately an affidavit sworn to by defendant Morphis was filed in the recorder's court. Based thereon a warrant for the plaintiff's arrest was issued charging her with the crime of shoplifting. If the plaintiff was under unlawful arrest, not only the individual defendants but their principal, the corporation itself, may be held civilly liable. *Kelly v. Shoe Co.*, 190 N.C. 406, 130 S.E. 32.

However, defendants stressfully contend the plaintiff was not under arrest; that no force was exerted; that she was not at any time restrained; that she remained in the store until after the officers appear-

ed, accompanied them to the small room adjacent to the counters, and later to the police station entirely of her own free will.

From the foregoing circumstances, may not the jury, however, infer that the defendants, backed up by the presence and participation of two police officers whom they had called, induced the plaintiff to consider herself under restraint and to believe that any move or attempt on her part to leave the scene would not be allowed? Two of the store's employees, in the presence of police officers, accused the plaintiff of larceny. Upon receiving assurances the accusers would sign the necessary papers, the officers and the accusers conducted the plaintiff to police headquarters where she was charged and released only after she gave bond. A jury may find that she was justified in assuming she was under involuntary restraint. It may further find the restraint was unlawful.

Under the decisions of this Court, restraint must be consented to or it must be lawful. Calling a policeman to assist does not legalize an unlawful restraint. *Long v. Eagle Stores,* 214 N.C. 146, 198 S.E. 573. "False imprisonment is the illegal restraint of the person of any one against his will." *Parrish v. Mfg. Co.,* 211 N.C. 7, 188 S.E. 817; *Martin v. Houck,* 141 N.C. 317, 54 S.E. 291. Justice Walker, in *Riley v. Stone,* 174 N.C. 588, 94 S.E. 434, stated the rule: "Force is essential only in the sense of imposing restraint. . . . The essence of personal coercion is the effect of the alleged wrongful conduct on the will of plaintiff. There is no legal wrong unless the detention was involuntary. False imprisonment may be committed by words alone, or by acts alone, or by both; it is not necessary that the individual be actually confined or assaulted, or even that he should be touched. 19 Cyc., pp. 319 and 323. Any exercise of force, or express or implied threat of force, by which in fact the other person is deprived of his liberty, compelled to remain where he does not wish to remain, or to go where he does not wish to go, is an imprisonment. . . . The essential thing is the restraint of the person. This may be caused by threats, as well as by actual force, and the threats may be by conduct or by words. If the words or conduct are such as to induce a reasonable apprehension of force, and the means of coercion are at hand, a person may be as effectually restrained and deprived of liberty as by prison bars. . . ."

The plaintiff testified, and offered supporting evidence tending to corroborate her, that she was innocent of any wrongdoing. The evidence, in the light most favorable to her, entitles her to have the jury resolve the issues raised by the pleadings. This disposition leaves the plea of the statute of limitations unadjudicated.

Reversed.

LYDIA B. KELLER, ADMINISTRATRIX OF THE ESTATE OF EDWARD C. KELLER, DECEASED v. SECURITY MILLS OF GREENSBORO, INC., AND BANKS H. KENNEDY.

(Filed 27 November 1963.)

1. Automobiles § 25—

The fact that the speed of a vehicle is lower than that fixed by statute does not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, or when hazard exists with respect to weather or highway conditions, and speed shall be reduced as may be necessary to avoid colliding with any vehicle on the highway. G.S. 20-141(c).

2. Automobiles § 41a—

Testimony and the physical facts at the scene of an accident which are sufficient for the jury to infer that defendant was traveling at excessive speed under the circumstances in driving on a wet street entering an intersection, that he attempted to turn right and was unable to control his vehicle so that it struck the side of a vehicle stopped on the intersecting street in obedience to the traffic control signal, *held* sufficient to be submitted to the jury on the issue of defendant's negligence.

3. Appeal and Error § 34—

Objection that appellant, instead of reducing the testimony to narrative form, merely gave conclusions as to the meaning of the testimony, should ordinarily be presented by countercase or exceptions to the case on appeal, and the appeal will not be dismissed under Rule 19(4) unless the narration of the evidence is fatally defective.

APPEAL by plaintiff from *Armstrong, J.*, April 1, 1963, Session of GUILFORD (Greensboro Division).

Clarence C. Boyan for plaintiff.
Sapp & Sapp for defendants.

MOORE, J. The administratrix of Rev. Edward C. Keller, deceased, brings this action to recover for his wrongful death. He was injured 23 August 1960, about 6:00 P.M., when the truck of the corporate defendant collided with the automobile he was driving. From these injuries he died at 8:30 the same evening.

At the close of plaintiff's evidence the court sustained defendants' motion for nonsuit. Plaintiff contends that the evidence makes out a *prima facie* case of actionable negligence.

The collision occurred at the intersection of East Cumberland and Sampson Streets in the City of Dunn. Cumberland Street runs generally east and west; Sampson Street runs north and south. The intersection is in a residential district, and the speed limit in this vicinity is

35 miles per hour. Traffic at the intersection "was controlled by two electric traffic devices commonly known as stop lights, duly installed and operated under the authority of the State Highway Commission." The streets are paved. On the day in question it had been raining and the streets were wet. It was drizzling at the time of the accident. The corporate defendant's truck was being operated by individual defendant, in the course and about the business of his employment by corporate defendant.

Witnesses, including a police officer, who went to the scene immediately after the accident testified to the following facts. The vehicles were at or near the southwest corner of the intersection. Keller's car was near the south edge of Cumberland Street facing southeast; the front of his car was about even with the west edge of the intersection. Keller was lying in the street, his head against the curb. The front of the truck was rammed into the left side of the car. The vehicles were about perpendicular to each other; the truck faced southwest. When the truck was moved the door of the car came off on the bumper of the truck. The car was practically demolished. (It was stipulated that the car was worth $435 before the accident, $85 immediately after.) The only dirt and debris, consisting of the rear-view mirror and moulding from Keller's car, found at the scene were under the vehicles before they were moved.

Julia Smith, who lives on Cumberland Street west of the intersection, was standing on her porch. About 6:00 P.M. she saw Rev. Keller, who was known to her, drive by on Cumberland Street headed east in his proper lane of travel. She heard the noise of the impact but did not see the vehicles at the time of the collision.

Rev. Samuel Dias was at Julia Smith's home on her porch. He saw the Keller car pass. It was the only car on the street. He heard the noise of the impact and went to the scene. The car involved in the wreck was the one he had seen pass the Smith home.

Lila Thaggard testified as follows: I live on the west side of Sampson Street about one-half block north of Cumberland Street. "I saw the collision and it happened around 6 o'clock in the afternoon. I was standing in my door there on Sampson Street and this truck, it came from the north coming east on Broad Street (the next street to the north of and parallel to Cumberland) and it turned off Broad Street into Sampson Street, and it was coming so fast that I looked behind him to see who was after him, and when he stopped, he was kind of curved like as if he was going west and he hit this car. The truck curved like he was going west at the intersection of Cumberland Street.

The automobile I learned later was driven by Rev. Keller and was on Cumberland Street headed east. I . . . went up to the scene . . . ."

Plaintiff alleges, *inter alia*, that the driver of the truck failed to keep a proper lookout, failed to keep the truck under reasonable control, failed to decrease speed in approaching and crossing the intersection [G.S. 20-141(c)], and operated the truck at a speed greater than was reasonable and prudent under the conditions then existing [G.S. 20-141(a)].

The fact that the speed of a vehicle is lower than that fixed by statute does not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, or when hazard exists with respect to weather or highway conditions, and speed shall be reduced as may be necessary to avoid colliding with any vehicle on the highway. G.S. 20-141(c); *Primm v. King,* 249 N.C. 228, 106 S.E. 2d 223. The physical facts at the scene of an accident may disclose that the operator of the vehicle was traveling at excessive speed. *Carr v. Stewart,* 252 N.C. 118, 113 S.E. 2d 18; *Riggs v. Motor Lines,* 233 N.C. 160, 63 S.E. 2d 197.

From the evidence adduced, it is permissible, but not compulsory, that a jury conclude that Keller had stopped before entering the intersection or was approaching and had not reached the intersection, that it was raining and the pavement was wet, that the driver of the truck attempted to turn west into Cumberland Street and his speed was such that he could not control the truck, and that by reason of excessive speed, loss of control or inattention he ran into the Keller automobile, demolished it and inflicted fatal injuries upon Keller.

The court erred in sustaining defendants' motion for nonsuit.

Defendants move in this Court to dismiss the appeal for non-compliance with rule 19(4) of the Rules of Practice in the Supreme Court, 254 N.C. 800. The rule provides, in part, that "The evidence in case on appeal shall be in narrative form, and not by question and answer . . . ." The primary purpose of the rule is to save the time of the Court in reviewing the evidence and to reduce printing costs. It is observed that none of the evidence in the present case on appeal is in question and answer form, except in one instance where defendants objected to a question and answer. Defendants do not contend that the case on appeal presents the evidence by question and answer; they contend that the evidence in the record consists of "The Conclusions of plaintiff appellant as to the meaning of the testimony and not constituting a reduction to narrative of the testimony itself." Most of the evidence in the record appears to be a narrative of the testimony of the witnesses stated in the first person, a portion in the third person.

Testimony relating to pictures, offered as exhibits, is in the third person, and indeed may be short-hand explanations. It is true that the evidence is brief, and the narration is hardly a model of compliance with Rule 19(4). However, we do not consider the narrative sufficiently defective or at variance with the rule to justify a dismissal of the appeal. Furthermore, appellee did not file a countercase or exceptions to the case on appeal, though he had an opportunity to do so. The motion to dismiss is denied.

The judgment below is
Reversed.

CELESTER H. SHAW v. THE J. F. WARD COMPANY.

(Filed 27 November 1963.)

1. **Negligence § 37b—**

A store proprietor is not an insurer of the safety of customers but is under duty to exercise ordinary care to keep the premises in reasonably safe condition and to give warning of hidden perils or unsafe conditions so far as he can ascertain them by reasonable inspection and supervision, but he is not required to give warning of conditions that are obvious.

2. **Negligence § 37f—**

Evidence that the steps in defendant's store were illuminated by natural light from a glass door and window in front and half a glass door in the rear and by flourescent light, except to the extent of shadows caused by the guard rail, that the wooden step was worn to a depth of one-quarter to one-half inch by long use, with testimony of plaintiff that she did not know at the time she fell what caused her to fall but that she concluded, based upon an inspection some 45 days after the accident, that she fell because the step was worn and slick, *is held* insufficient to be submitted to the jury on the issue of negligence.

APPEAL by plaintiff from *Gambill, J.*, February 25, 1963, Civil Session, DAVIDSON Superior Court.

Civil action to recover damages for personal injury. At the close of plaintiff's evidence the court entered judgment of compulsory nonsuit, from which the plaintiff appealed.

Walser and Brinkley, by Gaither S. Walser for plaintiff appellant.
DeLapp & Ward for defendant appellee.

HIGGINS, J. The plaintiff, an invitee, was injured in a fall as she descended the wooden steps between the first and the second floors of

defendant's department store. She alleged: "That said second step was loose and would give under pressure and the cupped, loose, worn, depressed and uneven area was very slick from constant wear."

The plaintiff testified: "When I came down the stairway, I had my hand on the rail. When I got to the second step from this little platform where you step on before you go down into the store, my foot slipped off the step and I fell. It was my right foot that slipped off. . . . At that point the steps were worn and slick and on the edge they were splintering; on the edge of the step I slipped off of it is worn out in the middle where it has been walked on a lot. I did not observe the condition of the step that day but did go back on February 19th and again on February 23rd. . . . There was a sloping on the second step, and I would say the sloping was from a quarter of an inch to a half inch due to the worn out condition. . . . The hand rail casts a shadow. . . . I would say that I have been trading there maybe four or five years, something like that, and during that time I have gone to the upstairs department when I went to the store. Much of the ladies' wear is upstairs and when I would go upstairs, I would walk up these steps and down these steps. . . . As to how deep it was worn, I would say down where it is worn the most it would be at least a quarter of an inch."

In reply to a question by the court, the plaintiff said she didn't know at the time of her fall (January 3, 1962) what caused the fall. But when she returned to the store on February 19, 1962, and saw the condition of the steps she then concluded that their worn and slick condition caused the fall and resulting injury.

Does this evidence and the legitimate inferences from it disclose the injury was proximately caused by the defendant's negligence as alleged? If the answer is no, then we need not consider defendant's conditional defense that plaintiff was familiar with the steps, inattentive to those conditions, which were obvious, and her inattention was a contributing cause to her fall and injury.

"The proprietor of a store is not an insurer of the safety of customers while on the premises. But he does owe to them the duty to exercise ordinary care to keep the premises in a reasonably safe condition and to 'give warning of hidden perils or unsafe conditions in so far as can be ascertained by reasonable inspection and supervision'." *Case v. Cato's,* 252 N.C. 224, 113 S.E. 2d 320; *Hood v. Coach Co.,* 249 N.C. 534, 107 S.E. 2d 154; *Ross v. Drug Store,* 225 N.C. 226, 34 S.E. 2d 64. "Where a condition of the premises is obvious . . . generally there is no duty on the part of the owner . . . to warn of that condition." *Garner v. Greyhound Corp.,* 250 N.C. 151, 108 S.E. 2d 461.

In the instant case the plaintiff was familiar with the stairway. She had been using it regularly for four or five years. She had gone up the steps moments before she fell on the way down. A glass door and windows in front, and a half-glass door in the rear admitted natural light. Flourescent light illuminated the stairway except to the extent of shadows cast by the guard rail. The time was 12:00 o'clock noon. According to the plaintiff's own evidence she did not know at the time she fell what had caused her fall. The evidence she gave was a conclusion she drew from an examination she made 45 days after her accident. At most the evidence indicated a wooden step worn by long use to the depth of one-quarter to one-half inch.

When tested by the rules of liability approved by this Court in the foregoing cases and many others which are cited therein, we conclude the evidence was insufficient to permit any inference of actionable negligence on the part of the defendant. The judgment of nonsuit is

Affirmed.

WILLIAM W. McRAE, EMPLOYEE v. CLAUDE WALL, EMPLOYER, AND NATIONWIDE MUTUAL INSURANCE COMPANY, CARRIER.

(Filed 27 November 1963.)

1. Master and Servant § 93—

On appeal from the Industrial Commission the courts determine only whether as a matter of law the facts found by the Commission support its conclusions and whether they justify the award, and the findings of fact of the Commission are conclusive when supported by competent evidence.

2. Master and Servant § 64—

Evidence tending to show that plaintiff employee was injured when a cement block wall collapsed and blocks struck him on the left hand and head, that the injury to the hand resulted in a permanent partial disability but that the injury to the head did not break the skin but caused a knot which subsided shortly thereafter, *held* to support an award for disability of the hand but not to support a finding that a disfiguring scar on the head some eighth of an inch wide and five inches long, which appeared subsequent to the injury, was the result of the injury.

APPEAL by defendants from *Johnston, J.*, March, 1963 Civil Session, RICHMOND Superior Court.

This proceeding originated as a workmen's compensation claim for injuries and disfigurement resulting from an industrial accident. The

North Carolina Industrial Commission held a hearing at which all jurisdictional facts and the claimant's average weekly wage were stipulated. The evidence disclosed the claimant suffered a hand and head injury as a result of a collapsing cement block wall which he was laying as underpinning for a new house. He testified: "The wall was six or seven blocks high, each block is 8 inches, several of them fell on me and struck me on the left hand and in the head, the left side of my head; I would feel dizzy like I was going to fall, my hand was swollen. I was treated by Dr. V. G. Watters. I saw him the same day. I went back to work the next day. It commenced to give me trouble later on. My left hand was giving me more trouble than anything else. I worked on until the job was almost finished. I had to stop on account of my left hand. I was out about four weeks. The doctor did not tell me anything about working or not working. Since the accident, my head has given me dizzy spells. I have this scar."

By the Court: "A scar five inches long one inch above his left ear extending from the forehead two and a half inches back of left ear—slight discoloration—no hair growing in the scar, which is about an eighth of an inch wide." * * *

"I did not claim to be disabled until the job was over. I have not been to any doctor other than Dr. Watters and saw no doctor between the Safie job and December, 1961. The skin was not broken on my head or my hand when I was struck. The doctor gave me a prescription. The hair began to leave my head and the scar to show two or three weeks later. All I did was to wash it with soap and water. It won't festered. The hair came out and the lightness showed through." * * *

"I had this scar about three weeks after the block fell on me. I saw the doctor two or three times. The scar did not come all at one time. I did not use any application—just rubbed it with turpentine."

The accident occurred on December 5, 1960. The claimant called as his witness Dr. V. G. Watters, who treated the injuries immediately after the accident. Dr. Watters testified as his opinion the claimant had suffered a permanent partial disability of 10 to 15 per cent in the left thumb and forefinger. With respect to the head injury, he testified: "I do not think the skin was broken, just bruised; the knot on the head was the size of a quarter. The knot had subsided on December 12, 1961. I do not recall any injury which would have resulted in the scar he now has."

The hearing commissioner found the injury to the hand and the disfiguring scar, five inches long, one-eighth-inch wide across the head above the left ear, were results of the accident and entered an award

of compensation for the permanent partial injury to the hand, and allowed a lump sum payment of $250.00 for the disfigurement. The full Commission on review, and the Superior Court on appeal, affirmed. The employer and his insurance carrier appealed.

Page & Page by John T. Page, Jr., for plaintiff employee, appellee.
I. Weisner Farmer for defendants, appellants.

HIGGINS, J. When called upon to review the findings of fact, conclusions of law, and awards of the North Carolina Industrial Commission in compensation cases, the courts determine as a matter of law whether the facts found support the Commission's conclusions, and whether they justify the awards. However, in passing on challenged findings of fact, the courts must approve the findings if they are supported by competent evidence. Hence the Court may set aside a finding of fact only upon the ground it lacks evidentiary support. *Blalock v. Durham,* 244 N.C. 208, 92 S.E. 2d 758; *Watson v. Harris Clay Co.,* 242 N.C. 763, 89 S.E. 2d 465; *Creighton v. Snipes,* 227 N.C. 90, 40 S.E. 2d 612.

We have no difficulty in finding in the record evidence to support the finding that claimant sustained by accident a compensable injury to his hand. The award on that account is sustained. However, evidence is lacking to support the finding that claimant sustained a disfiguring scar five inches long, one-eighth-inch wide, across the side of his head above his left ear. Claimant himself testified the skin was not broken on his head. "The hair began to leave my head and the scar to show two or three weeks later. . . . The scar did not come all at one time. I did not use any applications . . . just rubbed it with turpentine."

The claimant's doctor testified the head injury consisted of a knot about the size of a quarter which had subsided when he saw him again one week after the accident. The skin was not broken. "I do not recall any injury which would result in the scar he now has . . . the lump I saw could not have resulted in the loss of hair. This scar looks as if the skin was cut or broken and sewed up. I did not find any such condition when I first examined him."

Because of lack of evidence to sustain it, we must strike the Commission's Finding No. 4. The evidence simply fails to show the disfiguring scar was the result of the accident.

The proceeding will be remanded to the North Carolina Industrial Commission with direction to strike both its Finding of Fact No. 4 and

the award of $250.00 based thereon. As thus modified, the findings and award are affirmed.

Modified and affirmed.

GORDON E. CULVER v. JAMES LAROACH.

(Filed 27 November 1963.)

Automobiles § 41f—

Evidence tending to show that plaintiff stopped behind a preceding car, which had stopped for a stop light at an intersection, that defendant, who was following behind plaintiff's car at a speed not exceeding ten miles per hour and a distance of about thirty feet, applied his brakes but that his car skidded on the ice and snow down an incline and bumped the rear of plaintiff's vehicle, inflicting no damage to defendant's car and insignificant damage to plaintiff's vehicle, *held* insufficient to be submitted to the jury in plaintiff's action to recover for personal injury.

APPEAL by plaintiff from *Armstrong, J.*, 29 April 1963 Civil Session of GUILFORD (Greensboro Division).

Plaintiff instituted this action to recover for personal injuries resulting from the alleged negligence of the defendant.

On the morning of 29 January 1962, the plaintiff was operating his 1955 Rambler station wagon in a northerly direction on North Eugene Street in the City of Greensboro. The street was slick with ice and snow, and sloped downhill to the north.

Plaintiff was operating his station wagon about 1-½ car lengths behind a car in front of him. Defendant was following behind the plaintiff. The car in front of plaintiff stopped. Plaintiff applied his brakes and stopped. The defendant, who was proceeding behind plaintiff at a speed of not more than ten miles per hour and at a distance of about 30 feet, applied his brakes and his car slid down the incline and bumped the rear of plaintiff's station wagon. All three cars had stopped for a stop light at the intersection of North Eugene Street and Bellemeade Street. The accident occurred about 100 to 150 feet north of the intersection of North Eugene and Bellemeade Streets.

It was agreed by the parties at the time that no damage had been done to the defendant's car and that the damage to the plaintiff's station wagon was too insignificant to report.

At the close of all the evidence the defendant moved for judgment as of nonsuit and the motion was allowed.

The plaintiff appeals, assigning error.

Hines & Dettor and Joseph A. Sansone for appellant.
Smith, Moore, Smith, Schell & Hunter for appellee.

PER CURIAM. A careful review of the evidence adduced in the trial below leads us to the conclusion that the evidence is insufficient to establish actionable negligence on the part of the defendant.

The judgment entered below is
Affirmed.

STATE v. CHESTER GODWIN.

(Filed 27 November 1963.)

1. Criminal Law § 106—

An instruction which, in effect, places the burden upon defendant to prove his defense of an alibi is prejudicial error.

2. Criminal Law § 116—

The jury returned as a verdict "we decided he is guilty of an assault of this person," whereupon the court asked the jury if the court should understand that the jury found the defendant guilty of an assault with a deadly weapon inflicting serious injuries not resulting in death, as charged in the indictment. *Held:* It was prejudicial error for the trial court to intimate to the jury what their verdict should be.

APPEAL by defendant from *Burgwyn, E. J.*, August 1963 Session of JOHNSTON.

Criminal prosecution upon an indictment charging defendant with an assault with a deadly weapon upon Billy Ray Carter with intent to kill resulting in serious injury. G.S. 14-32.

Plea: Not guilty.

The record discloses the following in respect to the verdict:

"Upon the coming in of the verdict, the Jury says: 'We decided that he is guilty of an Assault on this person.'

"COURT: Do I understand that the Jury finds the Defendant guilty of an Assault with a Deadly weapon, inflicting serious injuries, not resulting in death, as charged in the Bill of Indictment? Do you mean to say that?

"JUROR: Yes, sir.

"COURT: So say you all?

"JURY: Yes, sir, we agree.

"CLERK: Do you, the Jury, find the Defendant guilty of Assault with a Deadly Weapon with Intent to Kill, inflicting serious injuries not resulting in death? Jury: Yes.

"COURT: Guilty as charged in the Bill of Indictment?

"JURY: Yes."

Judgment: "Let the defendant be confined in the State prison for not less than seven nor more than ten years."

Defendant appeals.

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

Levinson & Levinson and R. E. Batton by L. L. Levinson for defendant appellant.

PER CURIAM. The State offered plenary evidence to carry the case to the jury on the offense charged in the indictment.

Defendant offered evidence tending to show an alibi. He assigns as error the court's charge on an alibi, which in effect placed the burden of proving an alibi on defendant. The assignment of error is good. *S. v. Allison,* 256 N.C. 240, 123 S.E. 2d 465; *S. v. Spencer,* 256 N.C. 487, 124 S.E. 2d 175; *S. v. Walston,* 259 N.C. 385, 130 S.E. 2d 636.

Defendant assigns as error the verdict as rendered, upon which the judgment is based, on the ground that the trial judge told them in effect what their verdict shall be. In *S. v. Gatlin,* 241 N.C. 175, 84 S.E. 2d 880, the Court quoted with approval from *Edwards v. Motor Co.,* 235 N.C. 269, 69 S.E. 2d 550, as follows: " 'Where the findings are indefinite or inconsistent, the presiding judge may give additional instructions and direct the jury to retire again and bring in a proper verdict, but he may not tell them what their verdict shall be'." The assignment of error is good. The Attorney General in his brief states:

> "Certainly, it would have been proper for the judge to have reinstructed the jury at this time as to the proper possible verdicts and directed the jury to retire for further consideration. However, in inquiring of the jury as to whether the intended verdict was not that of being guilty of the most serious offense charged, the judge created a situation which the State has difficulty in distinguishing from that in *State v. Gatlin, supra,* in which case the Court ordered a new trial."

The verdict and judgment are vacated, and a new trial is ordered.

New trial.

POLLY ANN HENDERSON, BY HER NEXT FRIEND, ADA LOCKLEAR v. LUTHER EDMUND LOCKLEAR.

(Filed 27 November 1963.)

Automobiles § 41m—

Evidence that a child less than five years old was on the hard surface of a highway, unattended, and clearly visible to defendant while he traveled a distance of one-half mile, that she ran across the highway toward her companion, another small child, when defendant was only some 40 feet away, and that defendant could not then avoid striking the child, notwithstanding he had reduced his speed from some 45 miles per hour to 25 miles per hour, *held* sufficient to be submitted to the jury.

APPEAL by plaintiff from *Mallard, J.*, April 1963 Mixed Session of HOKE.

H. D. Harrison, Jr., for plaintiff.
Hostetler & McNeill for defendant.

PER CURIAM. Infant plaintiff, by her next friend, seeks to recover damages for personal injuries suffered by her on 18 December 1960 when she was struck by an automobile. The accident occurred on rural paved road No. 1105 near Antioch in Hoke County.

The evidence and inferences to be drawn therefrom, considered in the light most favorable to plaintiff, tend to establish the following facts.

The highway in the vicinity of the accident runs generally east and west and is straight and level. The paved portion is 18 feet wide; there are 7-foot shoulders on each side. The speed limit is 55 miles per hour. On 18 December 1960 the weather was fair and the road dry. The accident occurred about 2:00 P.M. Defendant was driving his automobile eastwardly. There was no other vehicular traffic. There was nothing within the highway or its shoulder to obstruct the vision of a motorist. Defendant saw two small children, one of whom was the plaintiff, run from a house on the south side of the road, down a hill and into the highway. Plaintiff was "going on" 5 years of age. Defendant was about one-half mile away when he saw the children enter the highway. Defendant was travelling 45 to 50 miles per hour. He took his foot off the accelerator and reduced speed to 25 miles per hour. Plaintiff crossed to the north side of the highway but her companion remained on the south side. The children were proceeding west facing defendant's approaching automobile. Plaintiff was walking on the edge of the hardsurface. When defendant was about 40 feet away, plaintiff start-

ed running straight across the road toward her companion. Defendant was in his proper lane of travel; he applied brakes and skidded 4 or 5 feet. Plaintiff came in contact with the car just to the right of the center of the front of the hood. She was knocked to the pavement about 10 or 15 feet in front of the car. She was rendered unconscious and suffered injuries.

Plaintiff, a child less than 5 years old and unattended by any person of responsible age, was on the hardsurface portion of the highway and clearly visible to defendant at all times while he travelled a distance of one-half mile. It was to be anticipated that she might be generally inattentive to danger, and, upon the near approach of a vehicle, might act on impulse and attempt to run to her playmate. She did not suddenly dart from a place of concealment into the path of defendant's vehicle. *Johns v. Day,* 257 N.C. 751, 127 S.E. 2d 543; *Dixon v. Lilly,* 257 N.C. 228, 125 S.E. 2d 426. She was not in a place of apparent safety, accompanied by older children or adults. *Brewer v. Green,* 254 N.C. 615, 119 S.E. 2d 610; *Brinson v. Mabry,* 251 N.C. 435, 111 S.E. 2d 540. The duty of a motorist with respect to the presence of children of tender age, whom the motorist sees, or in the exercise of reasonable care should see, on or near the highway, has been repeatedly declared. *Ammons v. Britt,* 256 N.C. 248, 123 S.E. 2d 579; *Pope v. Patterson,* 243 N.C. 425, 90 S.E. 2d 706; *Pavone v. Merion,* 242 N.C. 594, 89 S.E. 2d 108; *Greene v. Board of Education,* 237 N.C. 336, 75 S.E. 2d 129. In the light of the duty of the motorist in such circumstance, the questions whether the defendant in the instant case was driving his vehicle at a greater speed than was reasonable and prudent [G.S. 20-141(a)], or whether he decreased speed to the extent that an ordinarily prudent person would have done [G.S. 20-141(c)], are for jury determination.

The judgment below is

Reversed.

IVAN EMORY FARRAR v. WILLIAM FARRAR.

(Filed 27 November 1963.)

Automobiles § 47—

Evidence that defendant, while his invitee was attempting to enter the vehicle but before he was actually in, started the vehicle, resulting in injury to the invitee, *held* sufficient to be submitted to the jury on the issue of negligence.

APPEAL by plaintiff from *Crissman, J.*, February 25, 1963 Civil Session, GUILFORD Superior Court, Greensboro Division.

Civil action to recover damages for personal injury allegedly caused by defendant's actionable negligence. From a judgment of nonsuit entered at the close of the evidence, the plaintiff appealed.

Robert S. Cahoon for plaintiff appellant.

Jordan, Wright, Henson & Nichols, and G. Marlin Evans by G. Marlin Evans for defendant appellee.

PER CURIAM. The parties are brothers. On February 26, 1960, the plaintiff accepted the defendant's invitation to accompany him in the latter's pickup truck to the home of a near relative. The defendant entered his truck from the left, and while the plaintiff was attempting to enter from the right, but before he was actually in the vehicle, it moved off, inflicting personal injuries.

The evidence most favorable to the plaintiff permits the inference that defendant was careless in moving the vehicle while the plaintiff was in a place of danger; that the movement resulted in some injury to the plaintiff. Appropriate issues should have been submitted to the jury. The judgment of nonsuit is

Reversed.

MINA WILKINS v. GEORGE T. WOOD, JR.

(Filed 27 November 1963.)

APPEAL by plaintiff from *Crissman, J.*, March 1963 Regular Civil Session of GUILFORD, High Point Division.

Action for personal injuries. This appeal involves only the question of nonsuit. Plaintiff's evidence tends to show the following facts:

Defendant is a practicing physician and surgeon in High Point. On January 6, 1958 plaintiff, then fifty-eight years old, consulted him with reference to a gastrointestinal condition. He decided that a sigmoidoscopic examination was necessary and his nurse, Mrs. Johnson, prepared her for it. Plaintiff used a step to get up on the examining table. While sitting on the edge of the table she removed her undergarment. The nurse removed her shoes and put them under the table; her nylon hose were not removed.

Plaintiff was somewhat embarrassed and nervous as a result of the examination which lasted about ten minutes and caused her "a little inconvenience, discomfort, and irritation." However, she was given no medicine or injections. After the examination plaintiff was told to relax on the table for a few minutes, and she did so. Thereafter, the nurse told her to sit on the side of the table a short time before she attempted to leave it as she would be dizzy. While plaintiff was thus sitting, Mrs. Johnson handed her a cleaning tissue and told her to use it and then deposit it in the waste can on the other side of the room.

Plaintiff remained on the edge of the table until she thought the dizziness has disappeared. Then, standing by the table, she used the tissue and put on the underclothing she had removed. Plaintiff's shoes were under the table but she did not see them. Without asking the nurse for her shoes, she walked four or five steps across the asphalt-tile floor to the waste can in her stocking feet. The lever which raised the top of the can was about an inch from the floor. Plaintiff put her right toes on this lever and, just as the lid came up, her left foot slipped out from under her. She fell to the floor breaking her left hip and two toes on her right foot. The nurse, who had never left the room, came to her immediately. The defendant came back into the room and said to the nurse, "How come you didn't wait on her and how come you didn't put her shoes on her?" Plaintiff told the defendant that she fell because the floor was slick and asked him if it had been waxed. He replied that it "hadn't just been waxed, but had just been buffed."

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

W. H. Steed and J. W. Clontz for plaintiff appellant.

Jordan, Wright, Henson & Nichols and William B. Rector, Jr., for defendant appellee.

PER CURIAM. Plaintiff alleged that her injuries were proximately caused by defendant's negligence in that: (1) He caused her shoes to be removed from her feet and concealed them so that she could not find them after leaving the table; (2) without providing any assistance, he ordered her to leave the table immediately after the examination when he should have known her equilibrium was impaired; (3) he maintained the floor of his examining room in a dangerously slippery condition; and (4) he wilfully failed and refused to remove from plaintiff's body the lubricants which he had applied.

Plaintiff's evidence fails either to substantiate these allegations or to establish a failure on the part of the defendant to perform any duty

which he owed her arising out of the doctor-patient relationship. The only conclusion to be drawn from this evidence is that plaintiff's fall was one of those unforeseen mishaps which occasionally bechance and baffle the most circumspect.

The judgment of nonsuit is

Affirmed.

LUCILLE MYERS CAPPS v. REUBEN B. STRATTON.

(Filed 27 November 1963.)

APPEAL by plaintiff from *Crissman, J.*, 18 February 1963 Civil Session of GUILFORD—High Point Division.

Civil action to recover damages for personal injuries allegedly caused by the actionable negligence of defendant.

Defendant in his answer denied negligence and conditionally pleaded contributory negligence of plaintiff as a bar to recovery.

This action grew out of a collision between an automobile driven by plaintiff and an automobile driven by defendant about 12:25 p.m. on 9 January 1961 at the intersection of West Washington and College Streets in the city of High Point.

The jury found by their verdict that plaintiff was injured by defendant's negligence as alleged in the complaint, and that plaintiff by her own negligence contributed to her injuries as alleged in the answer.

From judgment entered on the verdict, plaintiff appeals.

Martin, Whitley and Washington by Edward K. Washington for plaintiff appellant.

Morgan, Byerly, Post, Van Anda & Keziah by W. B. Byerly, Jr., for defendant appellee.

PER CURIAM. The pages of our Reports are filled with cases for damages growing out of automobile collisions at street intersections, wherein the applicable law has been stated and repeated again and again. A careful examination of the assignments of error discloses no new question or feature requiring extended discussion. Prejudicial error has not been made to appear. The verdict and judgment will be upheld.

No error.

JAMES P. KAPERONIS AND WIFE, NANCY G. KAPERONIS v. NORTH CAROLINA STATE HIGHWAY COMMISSION.

(Filed 11 December 1963.)

1. Constitutional Law § 24; Jury § 5—

The constitutional guaranties of the right to trial by jury relate only to the trial of issues of fact in those instances in which such right existed at common law or by virtue of statute at the time the constitutional provisions were adopted. Constitution of North Carolina, Art. I, § 19; Fourteenth Amendment to the Constitution of the United States.

2. Same; Eminent Domain § 11—

G.S. 136-108 giving the trial judge authority to hear and determine any issues raised by the peadings, other than the issue of damages, in an action brought by the owner of land to recover compensation for its taking for a right of way by the Highway Commission is constitutional, since it does not deprive a property owner of any right to trial by jury in any instance in which such right existed at the time of the adoption of the Constitutions.

3. Boundaries §§ 4½, 12; Evidence § 24—

A map referred to in a deed becomes a part of the deed and need not be registered, and a duly authenticated copy of the original plat duly identified, made by a registered surveyor and referred to in the deed, is properly admitted in evidence.

4. Evidence § 24; Eminent Domain § 11—

A copy of a resolution or ordinance of the Highway Commission, certified by its secretary as a true copy as recorded in the minutes of the Commission on the date specified, is competent in evidence.

5. Eminent Domain § 11—

In an action by the owner of land to recover compensation for the alleged additional taking of his lands by increasing the width of the highway easement, it is competent for the Commission to introduce its duly certified resolution authorizing the original easement for the greater width, with testimony of its engineers and agents that it had occupied and maintained the full right of way, which was duly marked on the ground, and had obtained a release from plaintiffs' predecessor in title for the full width of the right of way as claimed by it.

6. Evidence § 40—

Where a witness, found by the court to be a handwriting expert, testifies that the signature on the release offered in evidence was identical with the signature on the last will and testament of plaintiffs' predecessor in title, the admission in evidence of a duly authenticated copy of the release is proper. G.S. 8-40.

7. Eminent Domain § 11—

It is not required that an easement obtained by the Highway Commission prior to June 1, 1959 be recorded, G.S. 47-27, and evidence in this

case of the Commission's initial acquisition of the right of way for the full width claimed by it, that such right of way was marked on the ground and encroachments thereon required to be removed, and that plaintiff's predecessor in title signed a release for the right of way to its full width as claimed by the Commission, *held* sufficient to sustain the court's finding that the Highway Commission originally appropriated the right of way for the full width claimed by it.

8. Same—

Where it is adjudicated upon supporting evidence that the Highway Commission had taken no property of the complaining land owners, G.S. 136-119 does not apply, and plaintiffs may not complain of the taxing of the costs against them upon the dismissal of their action to recover compensation for the asserted taking.

APPEAL by plaintiffs from *MacRae, Special Judge,* 25 March 1963 Special Civil "B" Session of MECKLENBURG.

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

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

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

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

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

the plaintiffs' property by metes and bounds, to wit, "and more particularly described and shown on a blueprint of survey by T. J. Orr, Registered Surveyor, of the Property of T. Frank Estate dated March, 1948 which blueprint is made a part hereof. * * *

"So much of said property as lies within the bounds of the right of way of Wilkinson Boulevard is subject thereto."

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

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

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

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

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

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

> 'Resolved that in the judgment of the Commission it is necessary for the protection of the State Highway Commission and the safety of travel, that State Highway Projects #635, #650, Charlotte to Gastonia, and Project #542, Greensboro to High Point, have a right of way of one hundred feet, that is fifty feet from the center of the road with such additional right of way inside the curves as will provide for at least two hundred feet clear vision, the Chairman of the State Highway Commission is authorized and empowered to take all necessary legal steps in the name of the Commission to acquire said right of way either by purchase, gift or condemnation.'

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

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

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

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

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

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

"10. While Project 6503 was being constructed, T. Frank, husband of Katie Frank, operated a barbecue restaurant and had a wooden building located on the aforesaid land. The building occupied an area within 50 feet south of the center line of Project 6503. This building was removed in approximately 1928.

"11. Katie Frank's signature appears on defendant's Exhibit 'D' which is a release by T. Frank to the State Highway Commission for all damages on Project No. 6503 and bears the date March 5, 1929 [which release reads as follows: 'T. Frank. *RELEASE OF CLAIM FOR DAMAGES.* Project 6503, Mecklenburg County, North Carolina. I, T. Frank, of Rte. 4, Charlotte, N. C., in consideration of Eight Hundred and Fifty ($850.00) Dollars, Warrant No. 60468, paid by the North Carolina State Highway Commission, hereby release and discharge the said Commission from all claims and demands which I have against it in law or in equity, arising out of any and all contracts, liabilities, acts, and omissions in the past or which may result from the present condition of things. Witness my hand and seal this 29th day of February, 1929. T. Frank (SEAL) Katie Frank'].

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

"13. In approximately 1930 through 1931, the State Highway Commission erected signs at the Charlotte City Limits and along Wilkinson Boulevard west to the Catawba River on either side of Wilkinson Boulevard at intervals of approximately 2½ miles. Said signs were similar to defendant's Exhibit 'E' and bore the legend 'Notice—R/W of this highway 50 feet each side of the center line.' These signs have been maintained until the present time by the State Highway Commission.

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

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

The court below concluded as a matter of law that,

"1. The plaintiffs have record title to the aforesaid triangular tract of land subject to the right of way of the State Highway Commission for a highway of 50 feet as shown on the blueprint of survey of T. J. Orr dated March 1948, which survey is incorporated by reference in the deed under which plaintiffs claim title;

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

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

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

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

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

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

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

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

"4. That the costs of this action be taxed against the plaintiffs."

The plaintiffs appeal, assigning error.

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

Attorney General Bruton, Asst. Attorney General Harrison Lewis, Trial Attorney Andrew McDaniel; and J. Marshall Haywood; Bradley, Gebhardt, DeLaney & Millette (Associate Counsel) for the Highway Commission.

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

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

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

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

Since the decision of this Court in the case of *Railroad v. Davis* (1837), 19 N.C. 451, it has been universally held in this jurisdiction that private property may be taken for a public purpose without the intervention of a jury. Furthermore, compensation need not precede or be made contemporaneous with the taking, but the amount of damages may be determined subsequent to the taking. Ruffin, C.J., speaking for the Court, said: "* * * (T)he case of *Smith v. Campbell,* 10 N.C. 590, is a decision that is not a controversy 'respecting property,' within the sense of the Bill of Rights. But the remaining words of the clause yet more clearly exclude this case from its operation. 'The ancient mode of trial by jury,' is the consecrated institution. This expression has a technical, peculiar, and well understood sense. It does not import that every legal controversy is to be submitted to and *determined* by a jury, but that *the* trial by jury shall remain as it anciently was. Causes may yet be determined on demurrer, and that being an issue of law is determined by the Court. Final judgment may also be taken on default, when the whole demand in certainty is thereby admitted; * * * These are all controversies respecting property in the same sense with the present, but they are none of them trials or cases for trials by jury. There is no *trial* of a cause, standing on demurrer or default. *Trial* refers to a dispute and *issue* of fact, and not to an issue of law, or inquisition of damages. * * *

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

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

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

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

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

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

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

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

to due process of law. A state may authorize any just and reasonable method of determining the amount of compensation for land taken for the public use, without violating the Fourteenth Amendment or the similar provisions of the state Constitutions. Most of the state Constitutions contain some specific provision in regard to trial by jury, but none of them require jury trial in all justiciable controversies that may arise. The usual requirement is that the right to jury trial shall remain "inviolate,' or the idea is expressed in some other phraseology, that no law shall be enacted cutting off trial by jury in such cases as it was customary to employ it when the Constitution was adopted. As it has always been customary in almost every state to have the damages in eminent domain cases determined by three or more appraisers or commissioners without the intervention of a jury at any stage of the proceedings, it is held in such states that there is no constitutional right of jury trial in eminent domain cases."

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

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

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

"The right to a trial by jury, guaranteed under our Constitution, applies only to cases in which the prerogative existed at common law, or was procured by statute at the time the Constitution was adopted. The right to a trial by jury is not guaranteed in those cases where the right and the remedy have been created by statute since the adoption of the Constitution. *Groves v. Ware*, 182 N.C. 553, 109 S.E. 568; *McInnish v. Bd. of Education*, 187 N.C. 494, 122 S.E. 182; *Hagler v. Highway Commission*, 200 N.C. 733, 158 S.E. 383; *Unemployment Comp. Com. v. Willis*, 219 N.C. 709, 15 S.E. 2d 4; *Belk's Dept. Store, Inc. v. Guilford County*, 222 N.C. 441, 23 S.E. 2d 897; *Utilities Commission v. Trucking Co.*, 223 N.C. 687, 28 S.E. 2d 201. This contention of petitioners is without merit."

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

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

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

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

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

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

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

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

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

scription of the land conveyed. *Elizabeth City v. Commander,* 176 N.C. 26, 96 S.E. 736. As was said in *Collins v. Land Co.,* 128 N.C. 563, 39 S.E. 21, 'a map or plat referred to in a deed becomes a part of the deed as if it were written therein.' *Ins. Co. v. Carolina Beach,* 216 N.C. 778, 3 S.E. 2d 21; *Pearson v. Allen,* 151 Mass. 79. 'Where a deed contains two descriptions, one by metes and bounds and the other by lot and block according to a certain plat or map, the controlling description is the lot according to the plan, rather than the one by metes and bounds. *Nash v. R. R.,* 67 N.C. 413.'*Hayden v. Hayden,* 178 N.C. 259, 100 S.E. 515; 130 A.L.R. 643, note."

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

This assignment of error is overruled.

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

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

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

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

The appellants further assign as error the admission in evidence of a duly authenticated photostatic copy of the release executed by T. Frank and Katie Frank on 5 March 1929, defendant's Exhibit "D." It appears that the genuineness of the signature of Katie Frank, which appears on the release, was challenged by the plaintiffs but proven by admissible evidence. An identification technician for the Mecklenburg County Police, "an expert as found by the court," testified that the signature of Katie Frank on the release and her signature on her last will and testament, which was defendant's Exhibit "C," were, in the opinion of the witness, made by one and the same person.

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

This assignment of error is also overruled.

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

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

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

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

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

It further appears from the evidence that in the construction of Project 8.16567, begun on 8 January 1962 and completed on 17 October 1962, that the paving, as well as the curb and gutter, was constructed wholly within the 100-foot right of way of the Wilkinson Boulevard.

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

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

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

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

Affirmed.

CHARLES B. SMITH, BNF., PLAINTIFF v. EDDIE MARTIN SIMPSON AND SARAH ELIZABETH SIMPSON, GDN. OF WAYNE ROSSER SIMPSON, AND THOMAS ROBERT MCCANTS, DEFENDANTS.

(Filed 11 December 1963.)

1. Appeal and Error § 44—

Where the pleadings, evidence and record of the trial affirmatively show that plaintiff predicated his assertion of a defendant's liability under the family purpose doctrine solely upon the basis of such defendant's ownership of the vehicle, plaintiff is in no position to complain if the court submits the issue upon the theory advanced by plaintiff.

2. Automobiles § 55—

The application of the family purpose doctrine does not depend upon ownership of the vehicle, and a person who is not the owner but who maintains or provides an automobile for the use, pleasure, and convenience of his family and who controls or has the right to control its use for such purposes, and who actually or impliedly authorizes members of his family to so use it, is liable under the family purpose doctrine for the negligent operation of the car by a family member, be he a minor or adult, a spouse, parent, brother, sister, niece, or even more remote kin, provided such person is a *bona fide* member of the household.

3. Same; Parent and Child § 7—

A parent may not be held liable for the negligent operation of an automobile by his child merely by reason of the relationship, an automobile not being a dangerous instrumentality, and there being no contention that the parent knew that the child was a reckless driver so as to present the question of liability under G.S. 1-538.1.

4. Automobiles § 55— Evidence held insufficient predicate for application of family car doctrine.

Evidence disclosing that the child, on his own initiative, negotiated the purchase of an automobile for himself, that he made the down payment with his own money and obligated himself to pay the balance of the purchase price out of his own earnings, but that because of his minority the seller would not accept his credit, so that, in order to consummate the sale, his father executed the note and conditional sales contract for the balance of the purchase price and applied for and obtained in his own name the certificate of title, registration card, and liability insurance, and that when the purchase was consumated the keys were delivered to the son and that he retained them continuously and exercised exclusive control in the use of the car and paid for its maintenance, *is held* insufficient predicate for the application of the family purpose doctrine.

5. Parent and Child § 4—

If the father, with full knowledge of the facts and acquiescence therein, permits his son to receive his own earnings and does not restrict him in the use thereof, there is an emancipation *pro tanto.*

6. Appeal and Error § 41—

The admission of incompetent evidence over objection cannot be held prejudicial where thereafter substantially similar evidence is admitted without objection.

SHARP, J., dissenting.

PARKER and BOBBITT, JJ., join in the dissent.

APPEAL by plaintiff from *Olive, J.,* September 1962 Session of MOORE, docketed and argued as case No. 452 at the Spring Term 1963.

Action to recover damages for personal injuries resulting from a three-car collision.

The collision occurred about 11:30 P.M., 17 October 1960, on U. S. Highway No. 1 about 1 mile south of Vass in Moore County. At the point of the accident U. S. No. 1 is a 2-lane paved highway, 21 feet wide, and runs generally north and south. Plaintiff was a passenger in a 1960 Chevrolet operated by Wayne Rosser Simpson (hereinafter referred to as Wayne). The Chevrolet was registered in the name of Eddie Martin Simpson (hereinafter Mr. Simpson). Wayne was the minor son of Mr. Simpson, who was not in the car. Wayne was driving northwardly, came up behind a tractor-trailer and attempted to pass. When he got alongside the tractor-trailer two south-bound cars were meeting the tractor-trailer, the first a Plymouth and the second a Pontiac operated by Thomas Robert McCants. The Plymouth pulled to the shoulder. Wayne side-swiped it and ran head-on into the Pontiac.

In the collision with the Pontiac plaintiff sustained injuries which paralyzed him from his waist down.

Plaintiff instituted this action against Wayne, Mr. Simpson and McCants. The jury found that plaintiff was injured by the negligence of Wayne and awarded $20,000 damages. It found that McCants was not guilty of actionable negligence and that Mr. Simpson was not liable under the family purpose doctrine. From a judgment upon the verdict plaintiff appeals.

Bryan & Bryan and Wilson & Bain for plaintiff appellant.

Quillin, Russ & Worth for Thomas Robert McCants, defendant appellee.

Haywood and Denny for Eddie Martin Simpson and Sarah Elizabeth Simpson, Guardian ad litem of Wayne Rosser Simpson, defendant appellees.

MOORE, J. None of plaintiff's exceptions relating to Wayne are brought forward in his brief—they are therefore abandoned. He seeks a new trial as to Mr. Simpson and McCants.

(1). It is contended that the court erred in its instructions to the jury on the second issue relating to the liability of Mr. Simpson under the family purpose doctrine.

Plaintiff alleges in paragraph 7 of his complaint that "Eddie Martin Simpson owned the 1960 Chevrolet . . . , . . . the said automobile was owned and furnished by Eddie Martin Simpson for the use, pleasure, and convenience of his family; and that the defendant Wayne Rosser Simpson, who was a member of the family of Eddie Martin Simpson . . . , was permitted and allowed to use and operate the said 1960 Chevrolet for his own use, pleasure and convenience; and that he was . . . operating the said 1960 Chevrolet owned by his father pursuant to the family purpose for which it was furnished, and with the permission of his father . . . ." Mr. Simpson, answering, admitted that the automobile was registered in his name but denied the allegations of paragraph 7 of the complaint.

The evidence bearing upon the allegations of paragraph 7 of the complaint is in all material aspects uncontradicted and tends to establish the following facts: At the time of the accident Wayne was 18 years of age, lived in his father's home and went to school. He had always lived with his father. Mr. Simpson was a farmer and also operated a filling station. Wayne worked on the farm and was a member of his father's household. His father was head of the house. Wayne testified that he respected his father and was obedient to him. Until about

a month before the accident Wayne had owned a 1957 Chevrolet, the title to which was registered in his own name (source not disclosed). In 1960 Wayne made a profit from a tobacco crop on acreage he himself had rented from a pulpwood company—he did the work, bought the fertilizer and paid all expenses of producing the crop. His father permitted him to keep these earnings. Wayne negotiated for the purchase of a new 1960 Chevrolet—his father had no part in the negotiations. The down payment was the 1957 Chevrolet and $400 in cash from his tobacco crop earnings; the balance was to be paid out of his tobacco crop the next fall. When the Motor Company refused to accept credit papers executed by Wayne, because he was a minor, Mr. Simpson, at Wayne's request, executed the note and conditional sales contract for the $1754.09 balance, applied for and took the title certificate in his name, and obtained in his name liability insurance. The insurance was an assigned risk policy because Wayne, the principal driver, was a minor. Wayne paid the premium. The registration card was mailed to Mr. Simpson who retained it in his possession. After the credit papers were signed Wayne drove the car home—the keys were delivered to him and he kept them continuously thereafter. Wayne bought the gas and oil for the car and stood for the repairs. He kept the car in his father's yard, drove it to school and anywhere he wanted to go without obtaining specific permission from his father. Mr. Simpson testified that Wayne "has been going on his own since he was 16 without asking me *(sic)* when he could come or go." Neither Mr. Simpson nor any other member of the family, except Wayne, used the Chevrolet. Mr. Simpson owned a pickup truck and an Oldsmobile which anybody in the family could use. He listed the Chevrolet for taxes along with his other motor vehicles, but no taxes had been paid at the time of the accident. Wayne testified: "I was the only one who used the Chevrolet. It was mine."

The court submitted to the jury this (second) issue: "Was the defendant, Eddie Martin Simpson, the owner of the 1960 Chevrolet automobile for use as a family purpose automobile, and was Wayne Rosser Simpson using the 1960 Chevrolet automobile under such family purpose?" The jury after hearing the court's charge answered the issue "No."

After defining the family purpose doctrine the judge gave the following instruction:

> ". . . (I)f another person had bought and paid for the automobile and had it in their control and use, and the person in whose name it was registered was actually not the owner and had no control of the use of it, then the person who really purchased it

and owned it, paid for it, and had the control and use of it would be the real owner."

In applying the law to the facts of the case the judge told the jurors that in order to answer the second issue YES they must find that:

". . . Eddie Martin Simpson had provided this automobile for the members of the family and Wayne Rosser Simpson was one, that at the time he was operating the automobile as a member of the family, (and that it was owned by Eddie Martin Simpson) and provided for the use and convenience and pleasure of the family . . . ."

He further instructed the jury:

". . . (I)f you are not satisfied by the greater weight of the evidence that Eddie Martin Simpson was the owner of the 1960 Chevrolet automobile for use as a family purpose automobile, and that Wayne Rosser Simpson was using said 1960 Chevrolet automobile at the time in question under such family purpose, it would be your duty to answer it 'No'."

The plaintiff excepted to the charge for that the judge made the application of the family purpose doctrine to the facts of this case depend upon the father's beneficial ownership of the Chevrolet rather than upon his right to control it.

The question raised is not that the family purpose doctrine was not submitted to the jury, but that it was limited so as to be applicable only if they found that Mr. Simpson owned the automobile. It will be observed that the plaintiff alleges that Mr. Simpson owned the automobile, and plaintiff's theory of the application of the doctrine, as set out in the complaint, is that the car was owned by Mr. Simpson. Plaintiff did not note an exception to the form or submission of the issue. Issues arise upon the pleadings. *Williams v. Highway Commission*, 252 N.C. 514, 518, 114 S.E. 2d 340. A reading of the record of the trial leads to the definite impression that in offering evidence and cross-examining witnesses plaintiff focused his attention on the task of proving that Mr. Simpson owned the vehicle. The charge of the court was clearly based on the theory set out in plaintiff's pleadings. Plaintiff is in poor position to complain when the judge has tried the case in accordance with guide lines he himself has laid down. However, we choose to disregard these valid but technical principles of procedure. We consider the matter of sufficient moment to warrant an inquiry whether, assuming that Wayne was the beneficial owner of the auto-

mobile, there was sufficient evidence to require a submission of an issue as to Mr. Simpson's liability.

It is not essential to the application of the family purpose doctrine that the one upon whom it is sought to fix liability for the negligent operation of a family car be the owner. In *Matthews v. Cheatham,* 210 N.C. 592, 188 S.E. 87, the minor daughter of male defendant won an automobile in a contest and took title in her own name; she was a member of her father's household, kept the car in her father's garage with his automobile, and drove it only with the specific consent of her parents; all members of the family used it and the father *maintained* it, bought the gasoline and oil and paid for repairs, and listed and paid taxes on it; her mother was driving it at the time of the accident. In support of the ruling that the evidence was sufficient to take the case to the jury as to the father's liability, this Court said:

> "In *Watts v. Lefler,* 190 N.C. 722, at p. 725, this Court quotes with approval the following statement from Berry on Automobiles (4th Ed.) sec. 1280: 'The rule is followed in some of the states in which the question has been decided, that one who *keeps* an automobile for the pleasure and convenience of himself and family, is liable for injuries caused by the negligent operation of the machine while it is being used for the pleasure or convenience of a member of his family.'
>
> "Huddy's Encyclopedia of Automobile Law (9th Ed.), Vol. 7-8, page 324, states the rule: 'The person upon whom it is sought to fasten liability under the 'family car' doctrine must *own, provide,* or *maintain* an automobile for the general use, pleasure, and convenience of the family. Liability under this doctrine is not confined to owner or driver. It depends upon control and use'." (Emphasis added.)

"It is said to be one of the indispensable requisites of the family purpose doctrine that the person on whom it is sought to fasten liability under that principle *owns, maintains,* or *provides* an automobile for the general use, pleasure, and convenience of the family." (Emphasis added.) 5A Am. Jur., Automobiles and Highway Traffic, s. 601, p. 604. "An indispensable requisite of the family purpose doctrine is that the person on whom it is sought to impose liability own, maintain, or furnish the automobile, and have or exercise some degree of control over its use. Thus, where the head of the family does not own, maintain, or control the family automobile, he is not liable under the family purpose doctrine for negligence in its use by a member of his family; liability may not be imposed on the head of a family by rea-

son of his knowledge and consent to its use for a family purpose where he does not have ownership, possession, or control of the vehicle, but where the head of the family controls and maintains the vehicle he may be liable under the family purpose doctrine even though he does not own it." 60 C. J. S., Motor Vehicles, s. 433c, p. 1070. See also the discussions in *Goode v. Barton,* 238 N.C. 492, 78 S.E. 2d 398; *Foran v. Kallio,* 355 P. 2d 544 (Wash. 1960); *Richardson v. True,* 259 S.W. 2d 70 (Ky. 1953); *McNamara v. Prather,* 127 S.W. 2d 160 (Ky. 1939); *Euster v. Vogel,* 13 S.W. 2d 1028 (Ky. 1929). It would seem that in *Lynn v. Clark,* 252 N.C. 289, 113 S.E. 2d 427, in using the expression "owned, provided *and* maintained" we inadvertently used the word "and" instead of "or." So far as the facts of that case are concerned the inadvertence is of no importance—the defendant mother admitted ownership of the car.

In discussing *Small v. Mallory,* 250 N.C. 570, 108 S.E. 2d 852, and *Matthews v. Cheatham, supra,* the commentator in 38 N. C. L. Rev. 250, 251, says:

> "It seems that the true test for determining which member of the family is to be held liable under the doctrine is one of control. The basic question to be determined then is who controls the car. . . .
>
> "The factors of ownership and maintenance have been used as a further guide in determining which member of the family controls the car. . . . (I)n *Goode v. Barton* it was expressly held immaterial whose funds were used to purchase the car, since liability under the doctrine 'is not confined to owner or driver . . . [but] depends upon control and use.' The 'use' referred to here can only mean that use for which the car was bought, i.e., use by the family as a general purpose car. Since ownership, both legal and equitable, has been held not to be determinative of control, it would seem that *maintenance* is the more important guide in determining control and, hence, in predicting family member on whom liability will fall. In taking this view of the doctrine, North Carolina is in line with the weight of authority." (Emphasis added).

"To impose liability under the (family purpose) doctrine it is essential to establish that the party on whom liability would be imposed actually or impliedly authorized the use of the vehicle. It must be subject to his control. The test is not who owns the vehicle but control or the right to control. Since ownership presumptively indicates the right to 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, 125 S.E. 2d 310.

It is the law then in North Carolina that one, not the owner, who *maintains* or *provides* an automobile for the use, pleasure and convenience of his family, controls or has the right to control it in such use, and actually or impliedly authorizes members of his family to so use it, is liable under the family purpose doctrine for the negligent operation of the car by a family member, causing injury. It has been held that the family purpose may extend to and be exercised by only one member of the family. *Goode v. Barton, supra.*

In considering plaintiff's exception to the charge, we assume as the exception requires us to do and as the jury seems to have found, that the motor vehicle was not owned by Mr. Simpson but was owned by Wayne. There is no evidence that Mr. Simpson maintained it or that he, or any members of his family other than Wayne, used or directed the use of it or exercised any control of it. Wayne was a minor son of Mr. Simpson, and at the time of the accident was a member of his household. The inquiry then is whether Mr. Simpson *provided* the Chevrolet for Wayne and had the right thereby, or for some other reason, to *control* its use.

It may be that the use by us of the expression "control and right to control" without some explanation and restriction has led the bench and bar into uncertainty. The question here as to Mr. Simpson's liability does not relate to his right to control his minor son, but his legal right to control the use of the 1960 Chevrolet. We are too inclined to think of the family purpose doctrine as a sort of antidote to juvenile delinquency or a palliative for traditional youthful recklessness. The doctrine is not confined to situations involving parent and minor child. It applies with equal force when the child is an adult. "It makes no substantial difference as regards the liability of a parent (under the family purpose doctrine) whether the child is a minor or an adult. The question of liability does not depend upon the relation of parent and child, and the parent is under no more legal obligation to supply an automobile for the use and pleasure of a minor child than he is for the use and pleasure of an adult child." *Watts v. Lefler,* 190 N.C. 722, 725, 130 S.E. 630. A person may be liable under the doctrine for damage caused by the negligence of spouse, parent, brother, sister, nephew, niece, grandchild or other of more remote kinship, or of one not of kin, provided he is a bona fide household member. *Tart v. Register,* 257 N.C. 161, 125 S.E. 2d 754; *Manning v. Hart,* 255 N.C. 368, 121 S.E. 2d 721; *Westmoreland v. Gregory,* 255 N.C. 172, 120 S.E. 2d 523; *Small v. Mallory, supra; Stansel v. McIntyre,* 237 N.C. 148, 74 S.E. 2d 345;

White v. McCabe, 208 N.C. 301, 180 S.E. 704; *McGee v. Crawford,* 205 N.C. 318, 171 S.E. 326; 60 C. J. S., Motor Vehicles, s. 433d, p. 1071.

"The mere fact of the relationship does not render a parent liable for the torts of his child. Liability of the parent must be predicated upon evidence that the child was in some way acting in a representative capacity such as would make the master responsible for the servant's tort, or on the ground that the parent procured, commanded, advised, instigated or encouraged the commission of the tort by his child, or that the parent was independently negligent, as in permitting the child to have access to some dangerous instrumentality." 3 Strong: N. C. Index, Parent and Child, s. 7, p. 529; *Insurance Co. v. Faulkner,* 259 N.C. 317, 130 S.E. 2d 645; *Langford v. Shu,* 258 N.C. 135, 128 S.E. 2d 210; *Griffin v. Pancoast, supra; Lane v. Chatham,* 251 N.C. 400, 111 S.E. 2d 598; *Hawes v. Haynes,* 219 N.C. 535, 14 S.E. 2d 503; *Bowen v. Mewborn,* 218 N.C. 423, 11 S.E. 2d 372. G.S. 1-538.1 has no application in the instant case. Plaintiff does not seek to impose liability herein upon Mr. Simpson on the ground that he knew Wayne was a reckless driver. And an automobile is not an inherently dangerous instrumentality. *Linville v. Nissen,* 162 N.C. 95, 77 S.E. 1096; 8 N. C. L. Rev. 259. The State of North Carolina passes upon the qualifications of and issues drivers licenses to children over 16 years of age, and as a matter of public policy places its stamp of approval on the operation by them of motor vehicles. The relationship does not alone make a parent answerable for the negligent conduct of his minor child. There must be something besides parenthood to connect him with the wrong before he may incur liability. *Linville v. Nissen, supra.* The question in a case such as the one at bar is whether the child, be he a minor or an adult, was acting for the parent, was using the automobile for the purpose for which the parent provided it. *Watts v. Lefler, supra.* The very genesis of the family purpose doctrine is agency. The question of liability for negligent injury must be determined in that aspect. *Vaughn v. Booker,* 217 N.C. 479, 8 S.E. 2d 603. The right and duty of a parent to control the activities of his minor child is not involved. It matters not whether Wayne was a minor or an adult. If Mr. Simpson had the right to control the 1960 Chevrolet, it must rest upon some ground other than the mere relationship of parent and child.

Ownership of personal property ordinarily carries with it the right of control and use. *Griffin v. Pancoast, supra.* For the purposes of this discussion, Wayne owned the car, not Mr. Simpson. A person having possession of an automobile by reason of a duty or license to preserve or use it, or by bailment, or acquiescence of the owner, or other spe-

cial right, has the right to control its use. Examples: As executor, *Chappell v. Dean,* 258 N. C. 412, 128 S.E. 2d 830; as president of corporation, *Hexter v. Burgess,* 184 S.E. 769 (Ga. 1936). Under the family purpose doctrine one who *provides* or *maintains* an automobile for the pleasure and convenience of his family is deemed to have the right, in the absence of circumstances requiring a different result, to control its use. In the instant case there is no evidence that Mr. Simpson maintained the car or had any special possessory right with respect thereto, so the question is whether he *provided* it. If he did not, there is no other status or relationship which bestows upon him the right of control.

The evidence is that Wayne personally negotiated with the Motor Company and agreed upon the terms of purchase of the automobile. He made the down payment by delivery of his 1957 Chevrolet, title to which was in his name, and payment of $400 in cash from his own earnings. When the purchase was consummated, the keys were delivered to him, he retained them continuously and exercised exclusive control and use of the car. He bought the gasoline and oil and took care of repairs. He paid the insurance premium. He was obligated to pay the balance of the purchase price from his tobacco crop, his own earnings. Because the Motor Company would not accept the credit instruments of a minor, Mr. Simpson, at Wayne's request, executed the note and conditional sale contract to secure the balance of the purchase price, applied for and obtained in his name the certificate of title, registration card and liability insurance. He listed the car for taxes. So far as the record discloses Mr. Simpson did not pay one cent on the purchase and maintenance of the car. What he *provided* was credit. His position was the same as if he had become co-maker on a note at the bank as an accommodation for Wayne. It was a service that a friend might have rendered as well. If Wayne defaulted Mr. Simpson had procedures for his protection. The question has been raised in some cases whether, by permitting a minor to use his earnings in purchasing a car, the parent was thereby providing the car. *Foran v. Kallio, supra; Robinson v. Ebert,* 39 P. 2d 992 (Wash. 1955). A father is entitled to the earnings of an unemancipated child. But where a father permits his minor son to work for himself and receive the earnings of his own labor to do with as he wishes, there has been an emancipation with respect thereto. *Jolley v. Telegraph Co.,* 204 N.C. 136, 167 S.E. 575; *Lowrie v. Oxendine,* 153 N.C. 267, 69 S.E. 131; *Ingram v. Railroad,* 152 N.C. 762, 67 S.E. 926.

With respect to emancipation and the purchase of an automobile, the facts in *James v. James,* 226 N.C. 399, 38 S.E. 2d 168, are strikingly parallel to those in the instant case. Plaintiff's evidence tended to show

that a minor lived in his father's home as a member of the household but worked elsewhere and was permitted to receive and use his wages as his own, he bought a Ford and made the down payment by transfer of his old Chevrolet and some cash, his father executed the credit papers and took title in his name, the car was kept at his father's home, he, the son, paid the installments and the credit papers were delivered to him when the indebtedness was fully paid. Thereafter, the son married and was killed in service in World War II. His father claimed ownership of the automobile. The son's widow claimed it as an *inter vivos* gift from the son, and brought this suit for its possession. The father testified that he had fed and clothed his son, he, the father, bought the car and paid one-half the cost and made repairs, and the credit papers were delivered to him when final payment was made. There was judgment for plaintiff, widow. This Court granted a new trial on grounds not pertinent here. On the question of emancipation, the Court said: ". . . (T)he defendant argues that during the period covered by the installments alleged to have been paid by his son, the latter was a minor and that defendant was by law entitled to his earnings. If that principle can be extended to property purchased by the earnings of the son under the circumstances here outlined, the fact that the father, with the full knowledge of the facts and acquiescence therein, permitted the expenditure and purchase, if the evidence should so disclose upon a second trial, may, with other pertinent evidence, be taken into consideration upon the question of emancipation." In the case at bar the facts are not in dispute. Mr. Simpson permitted Wayne to receive his earnings and did not restrict Wayne in the use thereof. It was Wayne's decision to buy the car, he negotiated all of the terms of purchase. If the question of emancipation is pertinent here, which is extremely doubtful, there was, under the undisputed facts, an emancipation *pro tanto.*

We are of the opinion that Mr. Simpson did not provide the automobile. His part in the transaction was only incidental and secondary. His acts amounted to an accommodation, an extension of credit. The decision to purchase and acquire the car was made by Wayne. The transaction was Wayne's idea, he managed it and took responsibility for it. In order to qualify as a provider under the family purpose doctrine one must be a principal mover, one who intends to provide for another or others the particular thing, the automobile, and takes steps on his own responsibility to see to the consummation of the transaction, and contributes substantially of his own means toward that end without expectation of reimbursement or compensation. The court did not err in failing to submit the second issue to the jury on

the theory of "control or right to control," apart from ownership in Mr. Simpson. There was ample evidence to warrant the court in submitting the issue on the theory of ownership by Mr. Simpson, especially in the light of G.S. 20-71.1. The court did so present the matter. The jury has determined the question.

It was suggested that the decision we have reached would overrule *Tart v. Register, supra; Elliott v. Killian,* 242 N.C. 471, 87 S.E. 2d 903, and *Goode v. Barton, supra.* These cases are admittedly of the borderline variety, but they are distinguishable from the case at bar. In the *Tart* case, the driver of the car at the time of the accident was a minor. The car was given her by her mother and uncle as a graduation gift. She, the minor, worked and earned wages, bought the gas and oil for the car and paid for the upkeep, drove the car to and from work and wherever she pleased without special permission of her mother, in whose household she lived as a member of the family. The title was in the mother's name. The mother had a car of her own but also used the daughter's car at times. We held the evidence sufficient to go to the jury as to the liability of the mother under the family doctrine. It will be observed that the mother *provided* the car for the use of the daughter, and the mother also *used* the car without the specific consent of the daughter. In *Elliott* a minor, member of his father's household, purchased a car and made a part of the down payment—his father paid a part. His father executed credit papers, took title and insurance in his, the father's, name, paid part of the insurance premiums, paid some of the installments on the note, and drove the car at times. The car was also used at times for the benefit of other family members. Obviously there was evidence that the father was a principal in *providing* the car and exercised *control.* In *Goode* the minor son of the adult defendant was a student at the University. The car was purchased by the father, with funds belonging to the son. The title certificate was in the name of the father. The car was *maintained* with funds provided by the father.

At best the family purpose doctrine is an anomaly in the law. This Court was reluctant to adopt it initially. As the use of motor vehicles increased the Court gradually expanded the application of the doctrine. We are not disposed to extend the doctrine in this State beyond the limits already reached. *Grindstaff v. Watts,* 254 N.C. 568, 574, 119 S.E. 2d 784. The importance of the doctrine in North Carolina has been greatly reduced by the Financial Responsibility Acts. G.S., Ch., 20, arts. 9 and 9A. See 38 N. C. L. Rev. 249, footnote 4.

(2). This brings us to a consideration of plaintiff's exceptions bearing upon the third issue, McCants' negligence.

McCants offered no evidence. Over the plaintiff's objection, followed by a motion to strike, the court permitted the investigating officer to testify on cross-examination, in answer to a question by counsel for Simpson, as follows:

> "Mr. McCants said that he was proceeding up a hill behind a car, which he estimated about eight car lengths behind this vehicle. (He said) 'suddenly I was aware of the vehicle coming over the hill from the opposite direction meeting us. He was on his side and everything seemed O. K. until the car ahead of me swerved right toward the ditch, and I realized there was a second vehicle approaching over the hilltop, and in my lane. This pair of headlights approaching seemed to be even to the right of the center of my lane. It all happened so suddenly that I don't recollect having time to swerve toward the ditch. I think that the fact that his headlights were so far over in my lane I could not swerve right'."

Thereafter, without objection, the officer said:

> "Mr. McCants indicated that he was following behind the Buie vehicle proceeding in a southerly direction proceeding up a hill behind a car; that the car in front swerved to the right toward the ditch, then he saw there was a second vehicle ahead of him and that the vehicle ahead of him was coming towards him. . . . My report indicates that Mr. McCants noticed the danger of the accident one hundred feet ahead and that he was going fifty miles per hour at that time. Mr. McCants told me he was going approximately fifty miles per hour at the time of the collision."

J. L. Jones, a witness for plaintiff, also testified without objection:

> "He (McCants) told me he was following the taillights of a car and they disappeared and the headlights was right in his face, and that he did not have time to put on brakes."

The patrolman's recitation of McCants' narrative of events preceding the accident, to which plaintiff objected, was clearly incompetent as hearsay. Since McCants did not testify, it was not corroborative. It was not an admission against his own interest; it was a self-serving declaration which, if true, completely exonerated McCants of any blame for the accident. Although offered by the defendant Simpson by way of cross-examination, it did not tend to exonerate Simpson of negligence; it tended only to contradict plaintiff's case against McCants. *Brothers v. Jernigan,* 244 N.C. 441, 94 S.E. 2d 316; Stansbury:

North Carolina Evidence, 2d Ed. ss. 140, 167; 4 Wigmore on Evidence, 3d Ed., s. 1048.

However, the substantially similar statements made by McCants thereafter admitted without objection cured the error. Strong, North Carolina Index, Appeal and Error, s. 41; *Hall v. Atkinson,* 255 N.C. 579, 122 S.E. 2d 200. The other exceptions relating to the exclusion of evidence have been carefully considered. They are without merit.

The charge of the court, when read contextually, properly presented the law applicable to plaintiff's contention that McCants was following the Buie car too closely without keeping a proper lookout. On all the evidence, the jury concluded that the negligence of young Simpson in attempting to pass the tractor-trailer in the face of oncoming traffic was the sole proximate cause of this unfortunate collision. As to the defendant McCants, plaintiff has failed to show any prejudicial error in the trial below.

In the trial below we find

No error.

SHARP, J., *dissenting* as to the defendant Eddie Martin Simpson. The family purpose doctrine has been stated and restated many times by this Court and, collectively, the cases define it as follows: Where the head of a household owns, keeps, provides, or maintains an automobile for the convenience and pleasure of his family, he is liable for injuries caused by the negligent operation of the vehicle by any member of his family who is using the vehicle for the purpose for which it was provided. *Watts v. Lefler,* 190 N.C. 722, 130 S.E. 630; *Grier v. Woodside,* 200 N.C. 759, 158 S.E. 491.

The necessity of affording greater protection to the ever increasing number of persons injured on our highways originated the family purpose doctrine. The rationale is that a father, or other head of a household who has provided an automobile for the pleasure and convenience of his family, has made their transportation for this purpose his business, and the family-member operator is regarded as representing the family-member provider in such use. The result puts the financial responsibility of the *paterfamilias* behind the vehicle he has furnished for his family's use while it is being thus operated. Dependent members of a family are most often financially irresponsible and the minor members, like Wayne Simpson in this case, unable to obtain adequate insurance coverage.

Under the pleadings and evidence, as the opinion makes clear, Mr. Simpson can be held liable in this case only if the family purpose doctrine is applicable to the Chevrolet which Wayne was operating

at the time he negligently injured the plaintiff. The facts relating to its purchase, title, and use are fully set out in the majority opinion and are not in dispute. Therefore, the legal consequences to Mr. Simpson of Wayne's negligence would be the subject of a peremptory instruction to the jury.

It is established that liability under the family car doctrine does not depend upon ownership of the automobile if it is subject to the control of the head of the household. Therefore, the fact that Mr. Simpson never attempted to control either the car or the comings or goings of his son is not determinative of his legal liability for plaintiff's injuries. "The test is not who owns the vehicle but *control or the right to control.*" (Italics mine). *Griffin v. Pancoast*, 257 N.C. 52, 125 S.E. 2d 310; *Matthews v. Cheatham*, 210 N.C. 592, 188 S.E. 87; *Goode v. Barton*, 238 N.C. 492, 78 S.E. 2d 398; *Elliott v. Killian*, 242 N.C. 471, 87 S.E. 2d 903; *Tart v. Register* and *Flowers v. Register*, 257 N.C. 161, 125 S.E. 2d 754. Therefore, the decisive question here is whether Mr. Simpson had the right to control the use of the Chevrolet which Wayne was driving on the occasion in question.

This right is in no wise dependent upon his right to control his minor son and, under this evidence, his liability for Wayne's negligent operation of the automobile would have been unchanged had Wayne been an adult. Of course, in the exercise of his parental authority, Mr. Simpson did have the right to control Wayne's use of the automobile. Whatever the actualities, the *legal* right of a parent to control his minor child is in no degree diminished or nullified when the child becomes the owner of an automobile. "A parent can, and often should, forbid his minor child to use an automobile . . . the entire ownership of which may rest in the minor." *Robinson v. Ebert*, 180 Wash. 387, 39 P. 2d 992. Certainly, the right to control his child does not give a father the unrestricted right to control the child's property. Because a father could forbid his son to drive the son's car on a Saturday night, it does not follow that he could legally require the son to turn the car over to another member of the family for the evening. However, in this case, we are not concerned with the liability of a father for the tort of his son while operating an automobile owned and maintained *solely* by the minor son. In such a case this Court has held the family purpose doctrine inapplicable. *Griffin v. Pancoast, supra.*

Here, Wayne kept the keys to the Chevrolet but his father held the legal title to it. The registration card and the insurance were in Mr. Simpson's name. He listed it for taxes in his name. Although Wayne had made the down payment, Mr. Simpson had primarily obligated himself to pay $1,754.09, the balance of the purchase price due in the

fall of 1961. The holder of the note and conditional sales contract securing that balance certainly looked to Mr. Simpson as the principal obligor and not as an accommodation endorser. Wayne's only hope of paying for the car was his expectation of a profitable tobacco crop in 1961. However, his 1960 crop had netted him only four hundred dollars.

In the most practical sense, Mr. Simpson had *provided* this automobile for his son's pleasure and convenience and had made it possible for him to operate it upon the highways of the state. To hold otherwise is to be unrealistic. Without his father's credit and permission, Wayne could neither have acquired the automobile, maintained it, nor kept it at his father's home where he lived and was supported as an unemancipated child. Indisputably, Mr. Simpson wanted his son to enjoy the status and convenience which the unrestricted use of an automobile gives a teenager today. Therefore, Wayne's operation of the vehicle for that purpose became Mr. Simpson's business when he provided his son with the use of a Chevrolet registered in Mr. Simpson's name, insured in his name, and obtained with his credit. In my opinion, as long as Mr. Simpson allowed title to the automobile to remain in his name for that purpose, he had the right to control it even though equitably he and Wayne were joint owners of the vehicle.

"The fact that a parent has title to a motor vehicle is, in and of itself, sufficient to justify the application of the family purpose doctrine where the doctrine is otherwise applicable, even though the vehicle has been entirely paid for by the child in question, and the child has the beneficial ownership thereof." 8 Am. Jur. 2d, Automobiles and Highway Traffic § 590.

It does not take a vehicle out of the scope of the family car doctrine that it was provided for one member of the family alone. *Goode v. Barton, supra.* Surely, if a wealthy father with eight children living in his household provided an automobile for each child, it could not be successfully contended that each car did not come within the family purpose doctrine. This doctrine is not restricted to a single car.

The evidence in this case illustrates graphically the factors which originally brought the family purpose doctrine into being as an instrument of public policy. 38 N.C.L. Rev. 249; McCall, The Family Automobile, 8 N.C.L. Rev. 256. It suggests that the abdication by parents of the right and duty to control their teenage children, whom they enable to acquire automobiles which they cannot afford and lack the discretion to operate safely, may be the explanation of the following statistics furnished by the North Carolina Department of Motor Vehicles:

In 1960, 32.11 percent of all drivers involved in motor vehicle accidents in this State were in the 16 through 24 age group. Nationwide, the percentage for this age group was 28.86 percent. In 1961, persons under 20 years old composed 6.64 percent of the drivers in this State but they had 14.29 percent of the accidents. More drivers in the 16 to 20 age bracket were killed than in any other. In the nation, traffic accidents are the leading cause of deaths among persons between the ages of 15 and 24.

Since this Court first recognized it in *Linville v. Nissen,* 162 N.C. 95, 77 S.E. 1096 (1913) (See *Griffin v. Pancoast, supra,* p. 55) it has said many times that the family purpose doctrine is "firmly embedded in the law of this state." *Grindstaff v. Watts,* 254 N.C. 568, 119 S.E. 2d 784; *Ewing v. Thompson,* 233 N.C. 564, 65 S.E. 2d 17; *Elliott v. Killian, Goode v. Barton, supra.* However, the majority now declares that the doctrine is an anomaly in the law which the Court is not disposed to extend; that the Court was reluctant to adopt it initially; and that its importance has been greatly reduced by the Financial Responsibility Act. The plaintiff in this case, made a paraplegic by the gross negligence of Wayne, cannot be expected to agree. The insurance on Wayne's Chevrolet was an assigned risk "because Wayne, the principal driver, was a minor." Five thousand dollars was the limit of the coverage.

To hold Mr. Simpson liable would not extend the doctrine beyond the limits we have already reached. This case comes within the rule of *Tart v. Register* and *Flowers v. Register, Elliott v. Killian,* and *Goode v. Barton, supra,* and it cannot be distinguished from *Register.* In *Register,* the mother held title to the automobile which she and another had given her minor daughter. The daughter bore the expense of the car. The fact that the mother occasionally used the daughter's car instead of her own, could make no difference in her liability for the daughter's negligent operation of it. In this case, can it be doubted that Mr. Simpson would have used the Chevrolet had he ever needed an automobile at a time when his Oldsmobile was unavailable? It is noted that in this case Mr. Simpson's credit is *presently* providing the car for Wayne whereas in *Register* the mother's provision was a *fait accompli* when she gave the car (completely paid for so far as the record in that case reveals) to the daughter.

The majority opinion defines a provider as follows: "In order to qualify as a provider under the family purpose doctrine one must be a principal mover, one who intends to provide for another or others the particular thing, the automobile, and takes steps on his own responsibility to see to the consummation of the transaction, and contributes

substantially of his own means toward that end without expectation of reimbursement or compensation."

This definition appears to have been tailored to fit the mother in *Register*. It fails to fit Mr. Simpson only because it includes the requirement that a provider must not expect reimbursement or compensation. Thus does the majority seek here to avoid the result of *Register*. It is assumed that by the descriptive phrases, "a principal mover" and one who "takes steps on his own responsibility," are not meant to suggest or require that the idea of purchasing the car must *originate* with the provider. No doubt many a father, who never thought to make such an expenditure, has succumbed to the importunities and blandishments of a son or daughter who thought the family needed another car.

Certainly, in a legal sense, Mr. Simpson became the principal mover and he took steps on his own responsibility when he consummated the purchase of the Chevrolet by signing the note and conditional sales contract to secure the balance due on the automobile, when he had the title issued in his name and applied for the license, and when he applied for the insurance—an assigned risk. Incidentally that insurance policy would cover Wayne, not as the owner of the car, but because he was operating it with the consent of the named insured, Mr. Simpson!

Under the majority's definition of a *provider*, in the absence of an admission, it will be extremely difficult for a plaintiff ever again to prove that an automobile registered in the father's name, but used by a son for his own pleasure and convenience, is a family purpose car. All that the solvent, inadequately insured father need do to avoid liability is to assert that he paid for the car, took title in his own name, and made it available for the use of his teenage son (an assigned risk!) upon the boy's promise to reimburse him some day. The law would not hold the son to such a contract. The father could no more recover the purchase price of the car from a minor son who chose to disaffirm the contract than could a dealer who had sold an automobile to a minor. Should this Court permit such an unenforceable contract to nullify the family purpose doctrine which was created in the public's interest to protect it from financially irresponsible minors? I do not think so.

In failing to make the application of the family purpose doctrine dependent upon the father's right to control the automobile being operated by Wayne as distinguished from his beneficial ownership therein, it is my opinion that the trial judge committed error requiring a new trial as to the defendant Eddie Martin Simpson. I concur in the majority opinion that there is no error in the trial as to McCants.

PARKER & BOBBITT, JJ., join in the dissenting opinion.

BARBARA JEAN FARMER, MINOR, BY HER NEXT FRIEND, W. H. FARMER, SR. v. NELSON FERRIS, RUTH FERRIS, CARL D. FERRIS, AND KING AMUSEMENT COMPANY, INC.

(Filed 11 December 1963.)

1. Trial § 6—

A stipulation by the parties is a judicial admission and binding upon them.

2. Appeal and Error § 49—

The findings of fact by the court upon the hearing of a motion to quash service and dismiss the action and cross action against defendant are conclusive on appeal if supported by competent evidence, notwithstanding that there may be evidence *contra.*

3. Constitutional Law § 24; Process § 13—

Whether a foreign corporation has sufficient contacts within the state of the forum to subject it to service of process in an action *in personam,* and whether the manner of service is a reasonable method of notification to it of the action, present a question of due process which must be decided in accordance with the decisions of the Supreme Court of the United States upon the facts of each particular case upon the basis of what is fair and reasonable and just under the circumstances.

4. Same— Evidence held to support findings that foreign corporation was doing business in the State so as to subject it to service of process by service on Secretary of State.

Evidence tending to show that a nonresident corporation, engaged in the business of selling amusement parks rides and devices, advertised its wares through the mails and in a magazine of general circulation in this State, that as a result of such advertising it sold, over a period of some four years, 27 shipments of goods to various customers in this State, that it delivered the amusement ride in question to the purchaser in this State by its truck operated by its employee, and invoked the protection of the laws of this State by having the conditional sales contract securing the balance of the indebtedness recorded in this State, etc., and that the action in suit arose out of an alleged defective weld performed by the corporation in reconditioning the ride for sale, with cross action by the resident defendants on the ground that the nonresident corporation was primarily liable, *is held* sufficient to support the court's finding that the corporation had sufficient contacts in this State, within the purview of G.S. 55-144, to render it amenable to service of process by service on the Secretary of State, G.S. 55-146, and such service upon the Secretary of State who forwarded the summonses, complaint, and cross action by registered mail to it, does not violate due process of law. Fourteenth Amendment to the Constitution of the United States and Article I, § 17, of the Constitution of North Carolina.

5. Courts § 20—

Where an act performed in another state in reconditioning machinery in a defective manner results in injury to a person in this State in the use of such machinery, the place of the wrong is in this State.

APPEAL by defendant King Amusement Company, Inc., from *Parker, Joseph W., J.*, April 1963 Session of NEW HANOVER.

Civil action to recover damages for personal injuries allegedly caused by defendants' actionable negligence when a secondhand or used mechanical swing or ride known as a "Merry Mixer," sold and delivered to the individual defendants by the corporate defendant and operated by the individual defendants as partners, in which plaintiff was riding as a paying customer, collapsed due to a defective weld that weakened the shaft supporting a section of seats on the ride, thereby throwing plaintiff from her seat to the ground, heard upon King Amusement Company's two special appearances and motions to quash the service of summons and complaint upon it, and to quash the service of the cross action of the individual defendants upon it, and of the order making it a defendant to the individual defendants' cross action, and to dismiss plaintiff's action and the individual defendants' cross action against it.

From an order denying King Amusement Company's motions, it appeals.

Carter, Murchison, Fox & Newton by James C. Fox for King Amusement Company, Inc., defendant appellant.

Aaron Goldberg for plaintiff appellee.

James, James & Crossley by John F. Crossley for Nelson Ferris, Ruth Ferris and Carl D. Ferris defendant appellees.

PARKER, J. The trial judge heard the motions upon thirteen stipulations by the parties, and upon evidence, made elaborate findings of fact and conclusions of law, and rendered an order as set forth above. It appears from the record that the individual defendants as partners operate an amusement business at Carolina Beach, North Carolina, consisting of the operation of mechanical swings and rides.

This is a summary of the judge's crucial findings of fact:

The King Amusement Company, Inc., of Mt. Clemens, Michigan, is a foreign corporation, which has never been domesticated in North Carolina, has never been authorized to do business in this State, and has never appointed an agent for service of process upon it in this State. This action was instituted 26 April 1962, and summons was issued and served upon the Secretary of State of North Carolina. (The following does not appear in the order, but it does in the stipulations by the parties: The summons served on the Secretary of State was forwarded next day by him by registered mail to King Amusement Company. The complaint was later served on the Secretary of State, who

forwarded it by registered mail to King Amusement Company.) The individual defendants duly filed an answer to the complaint, in which they alleged a cross action against King Amusement Company based upon averments of primary negligence arising out of the breach of implied and express warranties, which was also served upon the Secretary of State. (This appears in the stipulations by the parties and not in the order: An order was entered by the court making King Amusement Company a party defendant to the cross action filed against it by the individual defendants, and a copy of this order, a summons, a copy of the answer and cross action of the individual defendants, and a copy of the original summons and of the complaint were served upon the Secretary of State and sent by him by registered mail to King Amusement Company.)

For some years prior to the institution of this action, King Amusement Company has sent through the mails three or four times a year to amusement park operators in North Carolina mimeographed lists of amusement rides and amusement park devices for sale, both new and used, with the prices listed thereon, thereby soliciting orders. During the same period it has advertised in BILLBOARD, a magazine with a general circulation in the United States and in North Carolina.

From 24 March 1958 through 26 April 1962, the date of the institution of this action, King Amusement Company, as a result of such advertising, sold 27 shipments of goods to various customers in North Carolina. The purchases were made by mail or telephone call. Since that time sales and shipments to people in North Carolina have continued. There were sales and shipments prior to 1958. The sales prices of these various shipments have ranged from a low of $2 to a high of $12,000. The prices of several shipments were in excess of $1,000 a shipment. These various shipments were by parcel post, air and railway express, railway freight, and by King Amusement Company using its own truck driver and representative. King Amusement Company delivered an amusement ride on 20 July 1953. It delivered on 17 December 1959 the "Merry Mixer" here. Since the institution of this action, it, by its representative David Hartway, has delivered three amusement rides to Atlantic Beach, North Carolina.

Defendant Carl Ferris saw at Carolina Beach an advertisement of King Amusement Company in which the "Merry Mixer" here was offered for sale. Whereupon, he talked by telephone with W. O. King, president of King Amusement Company. During the conversation King, acting for King Amusement Company, offered to sell the "Merry Mixer" for a price of $12,000, to be delivered at Carolina Beach, North Carolina. Carl Ferris accepted the offer. In December 1959 Carl Ham-

mond, a truck driver of King Amusement Company, delivered the "Merry Mixer" to the individual defendants at Carolina Beach, North Carolina, and the individual defendants Carl D. Ferris and Nelson L. Ferris executed a conditional sales contract for the "Merry Mixer," which was sent back to King Amusement Company in Michigan and is recorded in New Hanover County, North Carolina. This was the "Merry Mixer" which collapsed on 20 June 1960, thereby injuring plaintiff.

King Amusement Company was prior to 22 December 1959, and now is, one of the largest concerns selling and delivering new and used rides in North Carolina. On and before 5 October 1959 there were King Amusement Company designed and built rides in North Carolina as follows: one or more at White Lake, one or more at Carolina Beach, two or more just outside Monroe, one or more near Asheville, and one or more near Boone. Further, there were and are other rides in North Carolina not manufactured by King Amusement Company, but rebuilt by it and sold and delivered by it in North Carolina.

At the commencement of the present action, the sole property owned by King Amusement Company in North Carolina, or in which it had an interest, consisted of indebtedness due from its North Carolina customers and conditional sales contracts executed by its North Carolina customers like the one here.

Based upon his findings of fact, the trial judge made the following conclusions of law:

> "1. Service of process was had upon the defendant King Amusement Company, Inc., in this case in full compliance with the procedural requirements of G.S. 55-146 as authorized by G.S. 55-145, both as to service of the original action and also as to the cross action by the defendants Ferris.
>
> "2. That the cause of action stated in the complaint against King Amusement Company, Inc. arises out of a transaction which falls within the terms of G.S. 55-145(a), (2), (3) and (4) and accordingly the service which was had in this case under G.S. 55-146 brought the defendant King Amusement Company within the jurisdiction of this Court for purposes of an *in personam* judgment.
>
> "3. The cause of action stated in the cross action against King Amusement Company, Inc. arises out of a transaction which falls within the terms of G.S. 55-145(a) (1) as well as (2), (3) and (4) and the service under G.S. 55-146 brought the defendant King Amusement Company, Inc. within the jurisdiction of this Court for purposes of an *in personam* judgment under such cross action.

"4. The activities which the King Amusement Company, Inc. has carried on in this State have been throughout the period in question regular, systematic and continuous and have resulted in a substantial volume of interstate business between said Company and persons in this State.

"5. The causes of action stated in the complaint and in the cross action against King Amusement Company, Inc. arise out of the activities of the said company referred to in the preceding paragraph.

"6. The activities of the King Amusement Company, Inc. carried on in North Carolina as above found establish such direct, substantial and uninterrupted contacts by that Company with this State as to make it reasonable and just for this Court to exercise its jurisdiction over said Company in this case as authorized by G.S. 55-145 and G.S. 55-146.

"7. Under all the facts before this Court, no right of the King Amusement Company, Inc. under the Fourteenth Amendment to the United States Constitution or under Article I, Section 17, of the North Carolina Constitution, will be violated by this Court's exercise of the jurisdiction conferred upon it by G.S. 55-145 over said Company."

Whereupon, the trial judge decreed that King Amusement Company's two motions to quash the service of summons and the complaint upon it, and to quash the service of the cross action by the individual defendants upon it and of the order making it a defendant, and to dismiss the action and the cross action against it be overruled, and that it be allowed thirty days from the date of the order within which to answer or otherwise plead to the complaint and to the individual defendants' cross action.

Appellant assigns as error all the findings of fact, except the finding of fact that it is a foreign corporation, which has never been domesticated in North Carolina, has never been authorized to do business in this State, and has never appointed an agent for service of process upon it in this State.

The trial judge heard appellant's two motions upon thirteen stipulations by the parties, and upon affidavits offered by the parties. A stipulation by the parties is a judicial admission, and binding upon them. *Moore v. Humphrey*, 247 N.C. 423, 101 S.E. 2d 460. The challenged findings of fact find support in the stipulations entered into by the parties and in the evidence offered by the parties, except as follows: The trial judge found as a fact that King Amusement Company "war-

ranted the ride to be in good condition when delivered." The affidavit of Carl D. Ferris is to the effect he, at Carolina Beach, North Carolina, saw an advertisement of King Amusement Company in which it advertised a "Merry Mixer" for sale, that he called it by telephone and talked to W. O. King, its president, in Michigan, that they discussed price and terms and delivery, and W. O. King made him a price including delivery to Carolina Beach, North Carolina, and he accepted his offer; that King Amusement Company mailed him the contract of sale and a conditional sales contract, which he and his son signed and mailed it back to King Amusement Company; that it and its agents guaranteed to them that the ride was in good condition when it was sold to them. This variance between the finding of fact and the evidence is not material on this appeal. Further, the trial judge found as a fact that at the commencement of this action the sole property owned by King Amusement Company in North Carolina, or in which it had an interest, consisted of indebtedness due from its North Carolina customers and conditional sales contracts executed by its North Carolina customers like the one here. There is no evidence in the record to show that at the commencement of this action any of its customers in North Carolina owed it anything, with the possible exception of the individual defendants, or that it held any conditional sales contracts in North Carolina, with the possible exception of the one here. It introduced in evidence the conditional sales contract here executed by two of the individual defendants, which instrument is duly registered in New Hanover County, North Carolina. The third affidavit of W. O. King, president of King Amusement Company, is to the effect that the conditional sales contract here was purchased by the Funds for Business Company of New York City and had been transferred to it. His affidavit does not state that it was transferred without recourse. It is familiar learning that the findings of fact here are conclusive, if supported by competent evidence, notwithstanding that there be evidence *contra*. Strong's N. C. Index, Vol. 4, Trial, sec. 57, p. 365.

The essential question for decision is: Do the findings of fact of the trial judge, which are supported by competent evidence, show that King Amusement Company, which is not present within the territory of the forum, has sufficient minimum contacts with the state of the forum, and that there has been a reasonable method of notification to it of this suit, so that the maintenance in the State Court of this suit *in personam* against it and the maintenance of the cross action *in personam* in this suit against it are not prohibited by the "due process" clause of the Fourteenth Amendment to the United States Constitution, and do not offend "traditional notions of fair play and substantial

justice?" This question must be decided in accord with the decisions of the United States Supreme Court. *Putnam v. Publications,* 245 N.C. 432, 96 S.E. 2d 445; *International Shoe Co. v. Washington,* 326 U.S. 310, 90 L. Ed. 95, 161 A. L. R. 1057; *McGee v. International Life Ins. Co.,* 355 U.S. 220, 2 L. Ed. 2d 223.

Whether the type of activity conducted within the State is adequate to satisfy the requirements depends upon the facts of the particular case. *Perkins v. Benguet Consolidated Mining Co.,* 342 U.S. 437, 445, 96 L. Ed. 485, 492. It seems, according to the most recent decisions of the United States Supreme Court, that the question cannot be answered by applying a mechanical formula or rule of thumb, but by ascertaining what is fair and reasonable and just in the circumstances. In the application of this flexible test, a relevant inquiry is whether defendant engaged in some act or conduct by which it may be said to have invoked the benefits and protections of the law of the forum. *Hanson v. Denckla,* 357 U.S. 235, 253, 2 L. Ed. 2d 1283, 1298; *International Shoe Co. v. Washington, supra,* U.S. p. 319, L. Ed. p. 104.

In *McGee v. International Life Ins. Co., supra,* the question involved was the jurisdiction of California over a Texas insurance company for the purpose of suit on a contract of insurance. In this case, the nonresident defendant solicited a re-insurance agreement with a resident of California. The offer was accepted in that State and the insurance premiums were mailed from there until the insured's death. It appeared that neither the defendant nor the Empire Mutual Insurance Company, an Arizona corporation, whose insurance obligations defendant assumed, had ever had any office or agent in California. And so far as the record disclosed defendant had never solicited or done any insurance business in California apart from the policy involved in this case. Although the "systematic and continuous activity" of the *International Shoe Company* case was not present, the Court, noting the interest California has in providing effective redress for its residents when nonresident insurers refuse to pay claims on insurance they have solicited in that State, upheld jurisdiction of the California court because the suit "was based on a contract which had substantial connection with that State." In this case the Court commented on the trend toward expanding State jurisdiction over nonresidents, stating that:

> "In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of busi-

> ness conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity."

In speaking of this trend, in *Hanson v. Denckla, supra,* U.S. p. 251, L. Ed. p. 1296, the Court said:

> "But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts."

The crucial findings of fact here, which are supported by competent evidence, show the following substantial contacts of King Amusement Company with North Carolina: It is one of the largest concerns selling new and used rides in North Carolina. For some years prior to the institution of this action it has sent through the mails three or four times a year to amusement park operators in North Carolina mimeographed lists of amusement rides and amusement park devices, both new and used, with the prices listed thereon, thereby soliciting orders. During this period it has advertised in BILLBOARD, a magazine with a general circulation in the United States and in North Carolina. Appellant's contention that by such advertising it did not solicit orders and sales in this State is not realistic. It is inconceivable that appellant spent money in advertising its products for sale for any purpose other than to solicit sales and orders. In *Frene v. Louisville Cement Co.,* 134 F. 2d 511, 516, the Court very aptly said: "Solicitation is the foundation of sales. Completing the contract often is a mere formality when the stage of 'selling' the customer has been passed. No business man would regard 'selling,' the 'taking of orders,' 'solicitation' as not 'doing business.' The merchant or manufacturer considers these things the heart of business."

From 24 March 1958 through 26 April 1962, appellant sold 27 shipments of goods to various customers in North Carolina as a result of such advertising. The purchases were made by mail or telephone call. The sales prices of these shipments varied from $2 to $12,000. These various shipments were made by parcel post, air and railway express, railway freight, and by appellant's own truck drivers. According to a schedule attached to the first affidavit of appellant's president, appellant's truck driver, Carl Hammond, delivered the "Merry Mixer" to the individual defendants at Carolina Beach, North Carolina. According to appellant's evidence, appellant had the conditional sales contract, securing an indebtedness of $12,150 (there was a down payment

of cash in the amount of $3,000) to it by the individual defendants for the purchase of this "Merry Mixer," duly recorded in the public registry of New Hanover County, North Carolina, thereby invoking the benefits and protection of the law of this State. A schedule attached to the second affidavit of appellant's president shows that appellant on 7 August 1962 delivered to Sam Prell, Atlantic Beach, North Carolina, by its truck driver David Hartway, one kiddie circus train, one kiddie utility fire engine, and one kiddie utility boat, and the amount of sale was $8,000.

The suit was brought on the ground that the "Merry Mixer" while in operation by the individual defendants at Carolina Beach, North Carolina, collapsed due to a defective weld that weakened the shaft supporting a section of seats on the ride, thereby proximately causing plaintiff's injuries. The complaint alleges, *inter alia*, that King Amusement Company had negligently welded the shaft and nuts thereon, and that plaintiff's injuries were suffered as a proximate result thereof. The alleged wrong in the instant case did not originate in the conduct of a servant or agent of appellant present in North Carolina, but arose instead from acts performed where appellant did the aforesaid welding. Only the consequences to plaintiff occurred in North Carolina. It is apparently well established, however, that in law the place of a wrong is in the State where the last event takes place which is necessary to render the actor liable for an alleged tort. Restatement, Conflict of Laws, sec. 377; *Gray v. American Radiator and Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E. 2d. 761.

The cross action of the individual defendants alleges in substance that if they are liable for plaintiff's injuries, then King Amusement Company is primarily liable.

We have far more in this case than the solicitation of orders in one state for acceptance in another, contemplating interstate shipment of goods.

We think it is apparent that King Amusement Company has sufficient minimum contacts, in fact substantial contacts, with North Carolina, and that there has been a reasonable method of notification to it of this suit and of the cross action therein by the individual defendants, so that the maintenance of this suit *in personam* against it and the maintenance of this cross action *in personam* against it in the North Carolina Court are not prohibited by the "due process" clause of the Fourteenth Amendment to the Federal Constitution, and do not offend "traditional notions of fair play and substantial justice," and are not inhibited by Article I, section 17, of the State Constitution. The Illinois and Minnesota Supreme Courts in the following cases involving a sub-

stantially similar factual situation have held that the State Court had jurisdiction over a foreign corporation: *Gray v. American Radiator and Standard Sanitary Corp., supra; Adamek v. Michigan Door Company,* 260 Minn. 54, 108 N.W. 2d 607. See *Smyth v. Twin State Improvement Corp.,* 116 Vt. 569, 80 A. 2d 664, 25 A. L. R. 2d 1193, and annotation thereto; *Nelson v. Miller,* 11 Ill. 2d 378, 143 N.E. 2d 673; *McMahon v. Boeing Airplane Co.,* 199 F. Supp. 908. *Moss v. Winston-Salem,* 254 N.C. 480, 119 S.E. 2d 445, relied on by appellant is easily factually distinguishable. Little purpose can be served by discussing other cases in detail, since the existence of sufficient "contact" with the state of the forum depends upon the particular facts in each case.

We conclude that the State Court has jurisdiction over King Amusement Company for the purpose of the maintenance of this suit and of the cross action therein by the individual defendants, by virtue of the relevant provisions of G.S. 55-145 as specified in the trial judge's order. The crucial findings of fact supported by competent evidence support the judge's conclusions of law, which are correct, and they in turn support his order. Appellant's assignments of error to all the findings of fact, which are supported by competent evidence, and to all the conclusions of law and to the order are overruled. The order below is

Affirmed.

CHARLES EDWARD HUTCHINS, JR. v. CAROLYN GENEVIEVE DAVIS HUTCHINS.

(Filed 11 December 1963.)

1. **Deeds § 12—**

A quitclaim deed transfers the grantor's title as effectively as any other form of conveyance.

2. **Husband and Wife § 12—**

Separation agreements ordinarily are revoked by the subsequent renewal of marital relations by the parties, but a duly executed conveyance of property in accordance with the settlement is not revoked.

3. **Same: Husband and Wife §§ 11, 17—**

The separation agreement between the parties, duly acknowledged as required by G.S. 52-12, provided that the wife did thereby quitclaim any and all right, title and interest in particularly described property held by the entireties, and she therein agreed to execute a warranty deed conveying such interest, but the deed was not acknowledged in conformity with G.S. 52-12. The parties thereafter resumed the marital relationship. *Held:*

The deed of separation constituted a conveyance to the husband all of the wife's right, title, and interest in such property, and the resumption of the marital relationship did not affect the executed conveyance.

4. Pleadings § 30—

In passing upon plaintiff's motion for judgment on the pleadings, the facts alleged in defendant's pleadings must be accepted as true.

5. Assistance, Writ of; Courts § 9; Judgments § 20—

Even though judgment that the husband is the owner of the property in question is proper upon the facts admitted in the pleadings, the judgment may not provide that the wife be ejected from the premises so long as a prior order in an independent action giving the wife possession of the property remains in effect, since even if modification of such prior order be proper, it may be done only by motion in the cause in which it was entered.

APPEAL by defendant from *Walker, Special Judge,* April 1963 Session of SURRY.

Civil action to establish plaintiff's ownership and right to possession of real property in which the court, granting plaintiff's motion therefor, entered judgment on the pleadings.

There are thirteen numbered paragraphs (exclusive of the prayer for relief) in the complaint. Answering, defendant admitted categorically the allegations of paragraphs Nos. 1-9, inclusive, and of paragraphs Nos. 11 and 13.

The facts so admitted are summarized, except when quoted, as follows:

Formerly, plaintiff and defendant were husband and wife. On November 6, 1961, in an action in the Superior Court of Surry County, North Carolina, defendant obtained an absolute divorce on the ground of two years' separation.

On or about July 26, 1958, plaintiff and defendant, then husband and wife, separated; and on that date they entered into a separation agreement "which was duly executed by both parties, with privy examination and acknowledgment of the defendant before Justice of the Peace H. M. Foy."

Paragraph 2 of said separation agreement of July 26, 1958, provides:

"It is further understood and agreed that the husband will pay to the wife in a lump sum the amount of Two Thousand and Five Hundred ($2,500.00) Dollars simultaneously with the execution of this agreement and in consideration of the payment of the sum of $2,500.00 by the husband to the wife, the wife does hereby release, discharge and quitclaim any right to support, maintenance, alimony, alimony *pen-*

dente lite, and any and all rights of action, causes of action, claims or demands which she might or could hereafter assert against the said husband by virtue of the marital relationship presently existing between the said husband and wife, the parties herein. In addition to the foregoing and in consideration of the payment of the aforementioned sum by the husband to the wife, *the wife does hereby covenant, contract and agree to execute a warranty deed conveying any and all right, title and interest which she now owns in and to the home heretofore occupied by the parties as husband and wife, said deed to be simultaneously executed with the execution of this contract,* and *she does hereby quitclaim and release any and all right, title and interest in and to that certain dwelling house heretofore occupied by the parties, situated on the south side of Highway #601, in White Plains, as described in Deed Book 181, page 421 and 440, Surry County Registry, to which reference is hereby made, and said deed is hereby incorporated by reference.*" (Our italics).

On July 26, 1958, plaintiff and defendant executed a warranty deed conveying to Thomas M. Faw the property in White Plains described in paragraph 2 of the separation agreement of July 26, 1958, referred to hereafter as the subject property; and on July 28, 1958, Thomas M. Faw and wife, Virginia S. Faw, conveyed the subject property to plaintiff.

On some date between July 28, 1958, and August 27, 1958, plaintiff and defendant resumed marital relations. They separated again on August 27, 1958, at which time they "duly executed and acknowledged" another separation agreement. Paragraph 2 of the separation agreement of August 27, 1958, in part, provides: "In addition to the foregoing and in consideration of the payment of the aforementioned sum by the husband to the wife, the wife does hereby release, quitclaim, and discharge any and all right, title and interest in and to any of the real property now owned by the husband or heretofore owned by the parties as tenants by the entireties and does specifically release her inchoate right of dower in and to the real property owned by the husband, party of the first part herein."

On August 27, 1958, simultaneous with the execution of the separation agreement of that date, plaintiff and defendant again conveyed the subject property to Thomas M. Faw; and on the same date Thomas M. Faw and wife, Virginia S. Faw, conveyed the subject property to plaintiff.

In November, 1958, plaintiff and defendant again resumed marital relations. They separated again in 1959.

The said separation agreements and deeds were recorded in the office of the Register of Deeds of Surry County.

In the deeds to Faw, the property is described by metes and bounds and also by reference to the deeds by which it was conveyed to plaintiff and defendant, to wit, the deeds recorded in Book 181, Page 421, and in Book 181, Page 440, said Registry.

There was no private examination of the wife or certificate in accordance with G.S. 52-12 in connection with the execution and acknowledgment of *the deeds to Faw*.

Plaintiff's controverted allegations are summarized below.

Plaintiff alleged he was ousted from the subject property in 1959; that defendant has had possession thereof but has paid no rent; and that a fair rental value is $125.00 per month. Answering, defendant admitted she had had possession; that she had paid no rent; and that $125.00 per month is a fair rental value. She alleged plaintiff was not unlawfully ousted but that defendant was given possession of the subject property in November, 1959, by an order of the Superior Court of Surry County.

Plaintiff's allegations that he is the owner of the subject property, subject to outstanding deeds of trust thereon, and is entitled to possession thereof, and that defendant has no right, title or interest therein or to possession thereof, are denied by defendant.

Defendant, for a further answer and defense, alleged in substance the following: Two children, then 13 and 18 years of age, were born of the marriage of plaintiff and defendant. At the November Term, 1959, of the Superior Court of Surry County, his Honor, Allen H. Gwyn, the Presiding Judge, upon motion of the present defendant, entered an order, after a hearing for relief *pendente lite,* in which the present defendant was granted possession "of the homeplace," to wit, the subject property, as a place of residence for the present defendant and her minor children. There has been no final judgment in the cause in which said order was entered. The separation agreements were nullified by the resumption(s) of marital relations. Plaintiff and defendant, since said absolute divorce, have been and are owners of the subject property as tenants in common. In any event, defendant is entitled to possession under Judge Gwyn's order unless and until it is modified.

Plaintiff did not reply to the allegations of defendant's said further answer and defense.

Plaintiff moved for judgment on the pleadings on the asserted ground that "the properly pleaded allegations of the answer, even if taken to be true for the purpose of this motion, do not constitute a valid and legal defense to the claim and demands set forth in the com-

plaint or to any part thereof." After a hearing on plaintiff's said motion Judge Walker entered judgment which, after recitals, provides:

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff is owner of the previously described realty herein, to the exclusion of the defendant; and that the defendant is taxed with the costs of this action.

"IT IS FURTHER ORDERED that no ejectment should issue in this case against the defendant until the time for appealing this judgment has expired, or, should the judgment be appealed, until this case has been decided upon appeal. Should said appeal not be perfected, the plaintiff is entitled to have the defendant ejected from the premises."

Defendant excepted, appealed and assigns as error "the granting of plaintiff's motion for judgment on the pleadings . . ."

Craige, Brawley, Lucas & Horton for plaintiff appellee.
Otis M. Oliver and Foy Clark for defendant appellant.

BOBBITT, J. "It is well established in this jurisdiction that where a husband and wife enter into a separation agreement and thereafter become reconciled and renew their marital relations, the agreement is terminated for every purpose in so far as it remains executory. (Citations). Even so, a reconciliation and resumption of marital relations by the parties to a separation agreement would not revoke or invalidate a duly executed deed of conveyance in a property settlement between the parties." *Jones v. Lewis,* 243 N.C. 259, 261, 90 S.E. 2d 547, and cases cited; *Harrell v. Powell,* 251 N.C. 636, 641, 112 S.E. 2d 81; *Stanley v. Cox,* 253 N.C. 620, 629, 117 S.E. 2d 826.

Too, "(i)t is well settled in this State that a conveyance from one spouse to the other of an interest in an estate held by the entireties is valid as an estoppel when the requirements of the law are complied with in the execution thereof." *Jones v. Lewis, supra,* p. 262, and cases cited; *Edwards v. Arnold,* 250 N.C. 500, 506, 109 S.E. 2d 205.

Prior to the separation agreement of July 26, 1958, plaintiff and defendant, husband and wife, owned the subject property as tenants by the entirety.

Plaintiff contends defendant, by the terms of the separation agreement of July 26, 1958, conveyed to him, as part of the property settlement then made, all her right, title and interest in the subject property. If so, under *Jones v. Lewis, supra,* the subsequent reconciliation(s) and resumption(s) of marital relations did not revoke or invalidate such conveyance.

In paragraph 2 of the separation agreement of July 26, 1958, it is provided that "she (defendant) does hereby quitclaim and release any and all right, title and interest" in and to the subject property. In addition, defendant agreed "to execute a warranty deed conveying any and all right, title and interest" she owned in the subject property, "said deed to be simultaneously executed with the execution of this contract."

On July 26, 1958, the date of the separation agreement, plaintiff and defendant executed a warranty deed for the subject property to Thomas M. Faw; and thereafter, under date of July 28, 1958, Thomas M. Faw and wife, Virginia S. Faw, conveyed the subject property to plaintiff.

The only reasonable inference is that the deed to Faw and the separation agreement were executed simultaneously in accordance with the express terms of the separation agreement. The terms of these documents disclose their interrelation as parts of a single transaction. *Sales Co. v. Weston,* 245 N.C. 621, 625, 97 S.E. 2d 267.

It is alleged and admitted that the separation agreement of July 26, 1958, "was duly executed by both parties, with privy examination and acknowledgment of the defendant before Justice of the Peace H. M. Foy." Defendant's brief states "(t)he certificate required by G.S. 52-12 appears on both separation agreements."

"The title to real property may be as effectually conveyed or transferred by a quitclaim deed as by a warranty deed or any other form of conveyance." 26 C. J. S., Deeds § 118; *Peel v. Calais,* 224 N.C. 421, 427, 31 S.E. 2d 440; *Hayes v. Ricard,* 245 N.C. 687, 691, 97 S.E. 2d 105.

Mindful of the essential parts of a valid deed, *Griffin v. Springer,* 244 N.C. 95, 92 S.E. 2d 682, and cases cited, it is our opinion, and we so hold, that defendant by the terms of paragraph 2 of the separation agreement of July 26, 1958, conveyed to plaintiff all of her right, title and interest in the subject property.

Whether, as contended by defendant, the deed of July 26, 1958, to Faw is void because not executed and acknowledged in accordance with G.S. 52-12 is not determinative. However, with reference thereto, it should be noted that this deed may not be considered a separate and distinct transaction. Rather, the agreement for the execution of such deed is an integral part of the separation agreement of July 26, 1958, and defendant's obligation to execute such deed was necessarily considered by the justice of the peace before he executed the certificate (required by G.S. 52-12) attached to said separation agreement of July 26, 1958.

In *Fisher v. Fisher*, 217 N.C. 70, 6 S.E. 2d 812, heard on demurrer to complaint, this Court considered a different factual situation. The separation agreement then considered contained no reference to the specific property in controversy. Nor did it refer to property held by the parties thereto as tenants by the entirety. The separation agreement provided that the wife was to hold "all real estate and personal property which she may now own, or hereafter acquire," free from all rights of the husband, and that the husband was to hold "any real or personal property which he may now own, or hereafter acquire, other than that hereby specifically mentioned," free from any claim on the part of his wife. Moreover, as stated in the opinion of Winborne, J. (later C.J.): "Careful examination fails to reveal any *indicia* in the deed of separation that the deed to the trustee should be executed as a part of the separation agreement, nor is there in the deed to the trustee any reference to the deed of separation."

Having reached the conclusion that defendant, by said separation agreement of July 26, 1958, whether considered alone or in conjunction with said deed of July 26, 1958, conveyed to plaintiff all her right, title and interest in the subject property, we need not consider defendant's contention that G.S. 52-12.2, a curative statute, is unconstitutional. Decision on this appeal is not based on G.S. 52-12.2.

In passing upon plaintiff's motion for judgment on the pleadings, we must accept as true the facts alleged in defendant's further answer and defense. It appears therefrom that Judge Gwyn in an order dated November 30, 1959, granted defendant the possession of the subject property as a place of residence for herself and two children. The facts with reference to the present status of the action in which such order was entered are not disclosed. For present purposes, we must assume there has been no modification of Judge Gwyn's order. Whether such order, if presently in effect, should be modified in the light of subsequent events is properly determinable upon motion in the cause in which it was entered. Suffice to say, until the facts with reference to the present status of said order and of the action in which it was entered are ascertained, no judgment or writ of ejectment should be entered or issued in this cause.

There is error in the portion of the judgment in which it is adjudged that plaintiff is entitled to have defendant ejected from the subject property. Hence, the judgment is modified by striking therefrom the paragraph containing these provisions, to wit, the second (final) paragraph of the judgment proper. As so modified, the judgment of the court below is affirmed.

In the circumstances, it is ordered that each party be and is taxed with one-half of the costs incident to the appeal.

Modified and affirmed.

FRANCIS J. FUCHS, JR. v. VIRGINIA F. FUCHS.

(Filed 11 December 1963.)

1. Divorce and Alimony § 22—

A court rendering a decree of divorce has jurisdiction to hear a motion in the cause thereafter made for an allowance for the support of the children of the marriage, notwithstanding the original decree did not refer to the custody or support of the children or to a prior separation agreement between the parties providing, *inter alia*, for their support.

2. Divorce and Alimony § 23—

Upon a motion for an increase in the allowance for support of the children of the marriage, the wife's allegation attacking the subsequent marriage of the husband on the ground that the divorce of the second wife from her prior husband was invalid and that therefore the husband was not under legal obligation to support the second wife and her minor child, *held* irrelevant and should have been stricken on motion, there being no contention that the defendant husband was not financially able to provide adequate support for his minor children of the first marriage. G.S. 1-153.

3. Same; Husband and Wife § 11—

Provisions in a separation agreement for the support of the minor children of the marriage cannot deprive the courts of their inherent statutory jurisdiction to protect the interest and provide for the welfare of the infants, nevertheless, in the absence of evidence to the contrary, it will be presumed that the amount mutually agreed upon is just and reasonable.

4. Divorce and Alimony § 23—

It is error for the court to allow a motion for increase in the allowance for the support of minor children of the marriage solely upon the ground that the husband's income has increased, without evidence of any change of circumstances affecting the welfare of the children or any increase in their needs.

5. Same—

In fixing the allowance for the support of minor children of the marriage the court should consider the earnings of the husband as well as the needs of the minor children. Fixing the amount of such support by dividing the income of the husband by the number of people dependent upon him for support, is not approved.

APPEAL by plaintiff from *Johnston, J.*, 15 July 1963 Civil Session of FORSYTH.

The parties hereto were formerly husband and wife, having been lawfully married on 6 September 1947. There were born of this marriage two children, to wit, Julia Caron Fuchs on 23 February 1949, and Donna O'Neil Fuchs on 4 September 1954.

The plaintiff and defendant separated by mutual consent on 30 April 1960. On 6 October 1961, they entered into a separation agreement in which it was agreed that the defendant wife was to have the exclusive supervision, custody, care and control of the aforesaid minor children, but providing for visitation by the plaintiff husband at such times and under such circumstances as shall be reasonable. Under the terms of the agreement the plaintiff agreed that on or before the 10th day of each month, beginning with October 1961, he would pay to the defendant wife the sum of $100.00 for the support of each of the aforesaid minor children until each reaches the age of eighteen years, it being understood that the husband's liability shall terminate prior to the eighteenth birthday as to either child who shall sooner become self-supporting, or shall marry or die.

The agreement also provided that the plaintiff husband shall pay to the defendant wife $200.00 per month, beginning with October 1961, on or before the 10th day thereof, and each month thereafter for her own support and maintenance until such time as she shall die or remarry.

The separation agreement further provided that the liability of the plaintiff husband with respect to the maintenance and support of his wife and two minor children under the provisions of the agreement shall be subject to modification for change of circumstances to the same extent and in the same manner as though determined by a court of competent jurisdiction without the consent of either party.

The plaintiff instituted an action in the Superior Court of Forsyth County for an absolute divorce from the defendant, and a judgment dissolving the marriage between the plaintiff and defendant was entered in said action on 28 May 1962. The decree of absolute divorce does not refer to the custody or support of the children born of the dissolved marriage; nor does it mention the separation agreement theretofore entered into by the parties.

The plaintiff made the payments required of him by the terms of the separation agreement through February 1963, at which time he advised the defendant that he would no longer make the payment of $200.00 per month to her on the ground that she had breached the agreement by refusing to permit him to visit the children and refused

to let the children visit him or write him or to acknowledge the receipt of gifts he had sent to his children. The plaintiff, however, continued to send $100.00 per month for each child in accordance with the terms of the separation agreement for the support of the minor children through July 1963.

The defendant filed a verified motion in the cause in the Superior Court of Forsyth County, dated 11 June 1963, in the action in which the plaintiff secured an absolute divorce from the defendant, praying that the plaintiff be required to pay not less than $400.00 per month for the support and maintenance of the two minor children involved herein, until such time as each child attains the age of 21 years.

The movant introduced no evidence as to the needs of the minor children and only set out the following reason for asking that the amount be increased over the amount agreed upon in the separation agreement: "In view of plaintiff's means and condition in life, $200.00 per month for the support of two children is not a reasonable amount."

The plaintiff in apt time requested the court to find all the facts upon which the court might enter an order relating to the pending motion of the defendant.

The court found no facts relating to the needs of the minor children, but simply found that the plaintiff, having married a woman with one minor child, was responsible for the support of five persons, namely, his two minor children by his first wife, his wife and her minor child, and himself. The court then found as a fact that the plaintiff's net income, after certain allowable deductions, was $953.00 per month, which the court divided by five, resulting in a quotient of $190.60. The court then found as a fact that the sum of $190.60 per month for the support of each minor child is required in order to maintain these minor children in accordance with the plaintiff's means and condition in life.

The court further found that plaintiff was in arrears for the period beginning with February through July 1963 (notwithstanding the statement in the defendant's motion that payments in the sum of $400.00 per month were paid by the plaintiff through February 1963), and ordered the plaintiff to pay the defendant an additional sum of $1,157.20 for child support from February 1963 through July 1963, and further ordered the plaintiff to pay into the office of the Clerk of the Domestic Relations Court of Forsyth County the sum of $381.20 per month, beginning August 1, 1963 and continuing a like amount on the first day of each and every calendar month thereafter until further order of the court.

The plaintiff appeals, assigning error.

W. Scott Buck for plaintiff appellant.
Clyde C. Randolph, Jr., for defendant appellee.

DENNY, C.J. It clearly appears from the record herein that the plaintiff and the defendant were legally divorced in an action duly instituted in the Superior Court of Forsyth County, North Carolina, by a decree entered in said action on 28 May 1962; that the motion filed in the cause for an increase in the allowance for the support of the minor children born of the marriage between the plaintiff and the defendant was filed as a motion in the cause in said divorce action as provided by G.S. 50-13. *Weddington v. Weddington*, 243 N.C. 702, 92 S.E. 2d 71; *Story v. Story*, 221 N.C. 114, 19 S.E. 2d 136.

Therefore, the motion to dismiss the defendant's motion on the ground that the court below had no jurisdiction to hear the matter is without merit, and this assignment of error is overruled.

The plaintiff assigns as error the refusal of the court below to strike all of paragraphs 15, 16 and 17 from the defendant's motion in the cause and in admitting in evidence the affidavit of T. F. Spillman in support of said allegations.

These allegations are to the effect that plaintiff's present wife has a minor child by a previous marriage to one T. F. Spillman; that Dorothy J. Spillman, the wife of T. F. Spillman, obtained a "quickie" divorce in Nevada; that said divorce is without legal effect and is invalid for the reason that process was never served on T. F. Spillman and that he made no voluntary appearance in said action through counsel or otherwise. It is further alleged that the marriage between the plaintiff and Dorothy J. Spillman is bigamous and that plaintiff is under no legal obligation to support his purported second wife and her minor child.

The court below denied the motion to strike but held the questions raised in the allegations complained of did not require a ruling with respect to the validity of the marriage between the plaintiff and Dorothy J. Spillman, and assumed that the plaintiff is legally obligated to support himself, his present wife, the former Dorothy J. Spillman, and her 8-year-old-child.

In the hearing below, the court may not have been prejudiced by the above allegations. However, in our opinion, these allegations not being material to a decision in connection with the relief sought, there being no contention that plaintiff is not financially able to provide adequate support for his two minor children by his first marriage, should have been stricken and the affidavit of T. F. Spillman excluded from evidence. G.S. 1-153; *Council v. Dickerson's, Inc.*, 233 N.C. 476, 64 S.E. 2d 554. This assignment of error is sustained.

The right of a married woman to support and maintenance is held in this jurisdiction to be a property right. The right of support being a property right, a wife may release such right by contract in the manner set out in G.S. 52-12. *Kiger v. Kiger,* 258 N.C. 126, 128 S.E. 2d 235, and cited cases.

In the last cited case, we said: "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 plaintiff and the defendant having been divorced, the defendant is not entitled to alimony, and she does not seek such in this case. She must rely upon her rights under the terms of the separation agreement for her own support and maintenance.

We are advertent to the fact that no agreement or contract between husband and wife will serve to deprive the courts of their inherent as well as their statutory authority to protect the interests and provide for the welfare of infants. They may bind themselves by a separation agreement or by a consent judgment, but they cannot thus withdraw children of the marriage from the protective custody of the court. *Story v. Story, supra; S. v. Duncan,* 222 N.C. 11, 21 S.E. 2d 822.

However, we hold that where parties to a separation agreement agree upon the amount for the support and maintenance of their minor children, there is a presumption in the absence of evidence to the contrary, that the amount mutually agreed upon is just and reasonable. We further hold that the court upon motion for an increase in such allowance, is not warranted in ordering an increase in the absence of any evidence of a change in conditions or of the need for such increase, particularly when the increase is awarded solely on the ground that the father's income has increased, therefore, he is able to pay a larger amount.

In the case of *Bishop v. Bishop,* 245 N.C. 573, 96 S.E. 2d 721, this Court said: "Ordinarily, in entering a judgment for the support of a minor child or children, the ability to pay as well as the needs of such

child or children will be taken into consideration. Such decree is subject to alteration upon a change of circumstances affecting the welfare of the child or children. G.S. 50-13; *Griffin v. Griffin* 237 N.C. 404, 75 S.E. 2d 133; *Hardee v. Mitchell, supra* (230 N.C. 40, 51 S.E. 2d 884); *Story v. Story, supra.*"

In *Commonwealth v. Gershman,* 181 Pa. Super. 76, 122 A. 2d 813, the husband and wife entered into a separation agreement in which it was agreed that the wife was to have custody of the two minor children born of the marriage. These children at the time were about six and two years of age. A consent order was entered in the Municipal Court of Philadelphia against the husband in the sum of $50.00 per week for the support of the two minor children. This amount was identical with that mutually agreed upon for the support of these children and incorporated in the separation agreement. Thereafter, the parents were divorced. Later, the wife petitioned the court to increase the amount for the support of these children. The court, upon proof that the take-home pay of the father of the children had increased, entered an order granting a small increase in the weekly allowance for the support of the children. Upon appeal, the Court said: "There is nothing in this record indicating the necessity for any unusual expenditure in the maintenance of these children. * * * Respondent has remarried and now has a wife, and another infant child by this marriage, to support. In determining the amount of an order for the support of children a reasonable allowance should be made for the living expenses of their father in the light of his earnings. Com. ex rel. *Bush v. Bush,* 170 Pa. Super. 382, 86 A. 2d 62. The fact that respondent, after complying with the support order, had but $69 left each week, for the support of his present family, was given no consideration in this proceeding. Moreover, Judge Willits considered that respondent's basic liability was fixed by the agreement at $50 per week and ordered the respondent to pay more, on a showing of an increase in weekly earnings, and on that ground alone. The increase is trivial in amount but there is error of law in the order. * * * In a support proceeding the issue before the court involves a consideration of the needs of the children, and an order for their maintenance in an amount, fair and not confiscatory in the light of the father's earning ability. * * * The needs of the children were not considered in this case and no testimony was taken on that question." The order from which the appeal was taken was set aside and the original order reinstated.

In our opinion, the appellant herein is entitled to another hearing in which the court will take into consideration the earnings of the plaintiff and his living expenses as well as the needs of these minor chil-

dren. Moreover, we do not approve the method used in the court below in arriving at the amount awarded for the support of the minor children involved herein.

Furthermore, the order making the increased allowance retroactive to and including February 1963, without evidence of some emergency situation that required the expenditure of sums in excess of the amounts paid by the plaintiff for the support of his minor children, is neither warranted in law nor equity.

The order entered in the hearing below is vacated and the cause remanded for further findings and determination in accord with this opinion.

Error & remanded.

PAUL A. BATTS v. JACK LEWIS FAGGART, EDWARD LEE FUTRELL, MORGAN TRUCKING COMPANY, AND EQUIPMENT LEASING COMPANY.

(Filed 11 December 1963.)

1. Negligence § 7—

Separate and distinct factors may concur and join in producing a single injury, in which event the author of each is jointly and severally liable to the injured party.

2. Negligence § 8—

Whether an intervening act insulates the original wrong depends upon whether there is an unbroken connection between the original wrong and the injury so that the injury is the natural and probable consequence of the original negligence and should have been foreseen in the light of the attending circumstances.

3. Automobiles §§ 35, 43— Allegations held insufficient to show that injuries were the result of the first of two collisions.

Plaintiff's allegations were to the effect that he was traveling south and that as he was making a left turn at a cross-over in the median of a four-lane highway he was struck from the rear by the vehicle negligently operated by the first defendant, that this collision stunned him, that when he regained his senses his car was standing crossways in the middle of the northbound lanes of the highway, that he proceeded to drive forward and turn his vehicle to the left in a northern direction to proceed into the eastern lane when he was hit from the rear by the vehicle driven north at excessive speed by the second defendant, who had a clear view for some 900 feet before reaching the place of the accident, and that the second defendant failed to apply his brakes, and crashed into the rear of his car.

There was no allegation of damage resulting from the first collision. *Held:* Demurrer of the first defendant for failure of the complaint to state a cause of action against him should have been sustained, since the facts alleged fail to show a causal relation between the first collision and plaintiff's injuries.

4. Pleadings § 18—

If the demurrer of one of two defendants is sustained for failure of the complaint to state a cause of action against him, the question presented by the demurrer for misjoinder of parties and causes is eliminated.

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

Plaintiff's action is to recover damages from defendants, jointly and severally, on account of personal injuries he alleges he sustained on account of their joint and concurrent negligence. The hearing below was on the demurrer to the complaint filed by defendant Faggart.

Plaintiff bases his action on the facts alleged in paragraph 7 of his complaint, to wit:

"7. That on said 16th day of December, 1961, at about the hour of 2:15 A.M., plaintiff was driving his automobile in a southerly direction on said Highway Nos. 29 & 70; that said Highway Nos. 29 & 70 is a dual highway, with two lanes of said highway adapted for the use of traffic traveling in a southern direction, and two lanes of said highway adapted for the use of traffic traveling in a northern direction, with said southbound and northbound lanes of traffic being separated and divided by a median; that at various places on said highway there are cross-over driveways leading through said median, built for the purpose of enabling and permitting traffic to drive through the median and cross from the southbound lanes of traffic and vice versa; that plaintiff was lawfully operating his said automobile on the right or outside lane of the southbound traffic lane on said highway, when he approached a cross-over driveway leading through the median on said highway, at the intersection of said highway and the Piney Woods Road, known as State Road #2048; that plaintiff, intending to make a left turn into the cross-over driveway and through the median at said intersection, turned on his left-turn signal light approximately 300 feet before he reached the said cross-over drive leading through said median, and pulled and turned his car into the left and inside lane of traffic on the southbound lane of said highway; that as plaintiff was making a left turn into said cross-over driveway, and while the rear end of his automobile was extending out into the left or inside lane in said highway, the defendant Jack Lewis Faggart, operating his 1956 Buick automobile, . . . was traveling on the inside southbound lane

along said highway without keeping a proper lookout and observing traffic upon said highway; that said defendant Faggart failed to slow down his automobile while plaintiff was lawfully making said turn, and he ran into the rear end of plaintiff's automobile in a violent manner, and his head and other parts of his body came in violent contact with the interior of his said automobile and he was momentarily stunned and shocked; that plaintiff regained his senses while his said automobile was stopped crossways in the middle of said northbound lanes of traffic on said highway, and he was proceeding to drive his car forward and turn the same to the left in a northern direction to proceed into the eastern or outside lane of the northbound lanes of traffic; that while plaintiff was proceeding to drive into and along said eastern and outside lane as aforesaid, the defendant Edward Lee Futrell was approaching the scene while traveling in a northern direction along the northbound lanes of Highway Nos. 29 & 70; that he came over the top of a hill approaching the scene of plaintiff's peril, and while he was 900 feet from plaintiff, he had an unobstructed view of plaintiff and the scene of his peril; that . . . the defendant Futrell was operating said tractor-trailer at an unlawful and excessive rate of speed of more than 60 miles per hour; that he did not apply his brakes or slow down said tractor-trailer as he approached plaintiff's automobile on the eastern or outside lane of said highway, and he ran into the rear end of plaintiff's automobile with such terrific force that he knocked and drove plaintiff's automobile off the pavement and across the eastern shoulder for a distance of approximately 100 feet and up a four-foot embankment located off the eastern side of said highway, and the large trailer of said truck crushed and pinned plaintiff's automobile against the said bank, at which time plaintiff was knocked unconscious, and a few moments thereafter his said automobile caught on fire, and while plaintiff was pinned inside his said automobile the same was burning, and plaintiff suffered burns over various parts of his body in addition to other injuries hereinafter alleged."

Plaintiff alleges the tractor-trailer was operated by defendant Futrell on said occasion as agent of the corporate defendants and in the discharge of his duties as such agent.

Plaintiff alleges the respects in which defendant Faggart was negligent, alleges the respects in which defendant Futrell and the corporate defendants were negligent, and alleges that the joint and concurrent negligence of defendants proximately caused his injuries.

Defendant Faggart demurred on two grounds, namely: 1. That the complaint fails to state a cause of action against him (a) in that plaintiff does not allege he was injured or damaged as a result of the first

collision, and (b) the facts alleged disclose the negligence of defendant Futrell was the sole proximate cause of plaintiff's alleged injuries. 2. That there is a misjoinder of parties and causes of action in that the complaint alleges two separate and distinct causes of action occurring at different times, causing different injuries and damages, one by plaintiff against defendant Faggart and the other by plaintiff against defendant Futrell and the corporate defendants.

The court overruled said demurrer. Defendant Faggart excepted, appealed and assigns as error the overruling of his said demurrer, asserting his demurrer was "interposed as a matter of right for misjoinder of parties and causes of action."

W. H. Steed and Charles F. Lambeth, Jr., for plaintiff appellee.
Walser & Brinkley for defendant appellant Faggart.

BOBBITT, J. Faggart asserts, as his first ground of demurrer, that the complaint does not allege a cause of action against him. If this be true, there is no misjoinder of parties and causes of action. *Shaw v. Barnard,* 229 N.C. 713, 51 S.E. 2d 295; *Jordan v. Maynard,* 231 N.C. 101, 56 S.E. 2d 26; *Wetherington v. Motor Co.,* 240 N.C. 90, 81 S.E. 2d 267.

The complaint contains no allegation of injury or damage proximately caused by the first collision, to wit, when plaintiff's car was struck by the car operated by Faggart. Plaintiff seeks to recover for injuries caused by the second collision, to wit, when plaintiff's car was struck by the tractor-trailer operated by Futrell.

The complaint alleges the second collision and plaintiff's injuries were proximately caused by the negligence of Futrell while acting as agent for the corporate defendants. The crucial question is whether, upon the facts alleged, the alleged negligence of Faggart, conceding his negligence proximately caused the first collision, may be considered a (concurring) proximate cause of the second collision. If not, plaintiff has alleged no cause of action against Faggart and his demurrer should be sustained on that ground, not for misjoinder of parties and causes of action.

"There may be two or more proximate causes of an injury. These may originate from separate and distinct sources or agencies operating independently of each other, yet if they join and concur in producing the result complained of, the author of each cause would be liable for the damages inflicted, and action may be brought against any one or all as joint tort-feasors." *Barber v. Wooten,* 234 N.C. 107, 109, 66 S.E. 2d 690; *Riddle v. Artis,* 243 N.C. 668, 670, 91 S.E. 2d 894. "This

principle is applicable when the facts are such as to justify the view that the several acts of negligence on the part of two different persons concur in contributing proximately to the injury complained of." *Tillman v. Bellamy,* 242 N.C. 201, 204, 87 S.E. 2d 253.

Plaintiff contends the facts alleged in the complaint support his allegations that the second collision was proximately caused by the joint and concurring negligence of all defendants. Faggart contends it appears from the facts alleged by plaintiff that the negligence of Futrell was the sole proximate cause of the second collision and that his (Faggart's) negligence was not a concurring proximate cause.

"The doctrine of intervening negligence is well established in our law. Its essential elements and governing principles are well defined and elaborately explained in former decisions of this Court. Further elaboration here is unnecessary." *Riddle v. Artis, supra,* and cases cited; *Smith v. Grubb,* 238 N.C. 665, 78 S.E. 2d 598, and cases cited.

This Court, in *Butner v. Spease,* 217 N.C. 82, 87, 6 S.E. 2d 808, and prior cases, has quoted with approval this statement from the opinion of Mr. Justice Strong in *R. R. v. Kellogg,* 94 U.S. 469, 475: "The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

The facts alleged disclose: As a result of the first collision, the plaintiff "was momentarily stunned and shocked." When he "regained his senses," his car "was stopped crossways in the middle of said northbound lanes of traffic." Upon regaining his senses, plaintiff proceeded to drive his car forward, to turn to his left and to proceed into and along "the eastern or outside lane" for northbound traffic. The tractor-trailer operated by Futrell, traveling north, "approached plaintiff's automobile on the eastern or outside lane of said highway, and he ran into the rear end of plaintiff's automobile with such terrific force . . ." Futrell had "an unobstructed view of plaintiff and the scene of his peril" for a distance of 900 feet. Notwithstanding, he did not apply his brakes or slow down but continued at a speed of more than 60 miles per hour and crashed into the rear of plaintiff's car.

Under the facts alleged, the second collision did not occur when plaintiff's car "was stopped crossways in the middle of said northbound lanes of traffic." Nor did it occur while plaintiff was "stunned and shocked." On the contrary, it occurred after plaintiff had "regained his senses" and had operated his car onto and was proceeding north along the eastern or outside lane for northbound traffic. Plaintiff had regained control of his car and was operating it in the proper lane for northbound traffic when the tractor-trailer operated by Futrell overtook plaintiff's car and crashed into the rear thereof. Futrell's view of these occurrences was unobstructed. Absent the first collision, if plaintiff, traveling south, had turned left, crossed the median and turned left into and proceeded north along the eastern or outside lane for northbound traffic his car would have been in the same position as when overtaken and struck by the tractor-trailer. In our view, plaintiff's factual allegations affirmatively disclose that negligence on the part of Faggart in proximately causing the first collision was not a proximate cause of the second collision.

In *Barber v. Wooten, supra,* and in *Riddle v. Artis, supra,* the decisions stressed by plaintiff, demurrers interposed on the ground of misjoinder of parties and causes of action were overruled. These cases are readily distinguishable. In *Barber,* the plaintiff was a passenger. In *Riddle,* the plaintiff was an operator. In each, the complaint alleged the plaintiff was seriously injured and unable to extricate herself (himself) as a result of the first collision. In each, it appears from the plaintiff's allegations that the car occupied by the plaintiff was not operated by anyone between the first and succeeding collision(s).

In other decisions cited by plaintiff, *the evidence* was held sufficient to require submission of an issue as to the joint and concurrent negligence of the defendants. In *Lewis v. Hunter,* 212 N.C. 504, 193 S.E. 814, the plaintiff's intestate, a pedestrian, as a result of being struck by the car of defendant Hunter, was lying prostrate and unconscious in the street when struck by the car of defendant Spears. In *West v. Baking Co.,* 208 N.C. 526, 181 S.E. 551, the plaintiff's intestate, a pedestrian, was struck, knocked down and injured by the car of one defendant and while attempting to rise was struck by the truck of the other defendants. Successive collisions are not involved in *Tillman v. Bellamy, supra,* and in *Bumgardner v. Allison,* 238 N.C. 621, 78 S.E. 2d 752.

While not cited by plaintiff, it seems appropriate to refer to *Hall v. Coble Dairies,* 234 N.C. 206, 67 S.E. 2d 63, where a judgment sustaining the defendants' demurrer to the complaint was reversed. There, the complaint alleged that, as a result of a collision proximately caus-

ed by the defendants' negligence, the plaintiff was "severely shocked and shaken up;" that after getting out of his car, the plaintiff was "still in a dazed and addled condition from shock caused by the collision;" and that, while in said condition, plaintiff was struck and injured by a car operated by an unidentified motorist.

Judge Gambill's order overruling Faggart's demurrer is erroneous and is vacated. Faggart's demurrer should have been sustained on the first ground asserted therein, namely, that the complaint does not allege facts sufficient to constitute a cause of action against him, thereby eliminating the question as to misjoinder of parties and causes of action. The cause is remanded with direction that such order be entered.

It is noted that defendant Futrell and the corporate defendants are not parties to this appeal. This decision does not affect the pendency of the action as between plaintiff and these defendants or their rights and liabilities *inter se*. In this connection, see *Shaw v. Barnard, supra; Jordan v. Maynard, supra; Wetherington v. Motor Co., supra.*

Error and remanded.

J. W. ROSSER, ADMINISTRATOR OF THE ESTATE OF MARTHA C. ROSSER, DECEASED v. FAYE BUCHANAN SMITH.

(Filed 11 December 1963.)

1. Appeal and Error § 51—

Where defendant introduces testimony, only the motion to nonsuit made at the close of all of the evidence will be considered on appeal.

2. Trial § 21—

In passing upon motion to nonsuit made at the close of all of the evidence, so much of defendant's evidence as may be favorable to plaintiff or which tends to explain and make clear the evidence offered by plaintiff will be considered in an addition to plaintiff's evidence, but defendant's evidence which tends to establish a different state of facts or tends to impeach plaintiff's evidence is to be disregarded.

3. Negligence § 11—

The law imposes upon a person *sui juris* the duty to use ordinary care to protect himself from injury, and the degree of such care should be commensurate with the danger to be avoided.

4. Automobiles § 33—

It is the duty of a pedestrian to look before attempting to cross a highway in a rural section and to keep a timely lookout for approaching

motor traffic in the exercise of the duty to use ordinary care for her own protection, and the law will hold her to the duty of seeing what she could and should have seen if she had exercised such care.

5. **Automobiles § 42k— Evidence held to show contributory negligence as a matter of law on part of pedestrian.**

Plaintiff's evidence and defendant's evidence not in conflict therewith tended to show that defendant was driving at a lawful speed on a wet highway, that plaintiff's intestate, an elderly woman, who was hard of hearing, but who was not wearing her hearing aid at the time, without lifting her half-bent head stepped onto the highway from a side road without stopping when she had a clear view of defendant's approaching vehicle and that defendant, when she first saw intestate, slackened speed and when about 500 feet from intestate applied her brakes, skidded some 56 feet and turned left in an effort to avoid hitting plaintiff, but was unable to avoid collision and traveled some three or four car lengths thereafter. Defendant's evidence also tended to show that she timely sounded her horn. *Held:* Nonsuit should be entered on the ground that plaintiff's evidence discloses contributory negligence of intestate proximately contributing to her injuries so clearly that no other reasonable conclusion can be drawn therefrom.

APPEAL by plaintiff from *Martin, S.J.*, May 1963 Civil Session of LEE.

Civil action to recover damages for wrongful death allegedly resulting from defendant's negligence.

Plaintiff in his complaint alleges in substance: His intestate, Martha C. Rosser, was a well and able-bodied woman about 64 years old. At 7:55 a.m. on 14 November 1961 she was walking across the highway in front of her house and approaching a mail box on the other side of the highway. At the same time defendant was driving her automobile in a southerly direction on the highway at an unlawful rate of speed, in a careless and reckless manner, and without due care and in a manner so as to endanger or be likely to endanger persons on the highway, and pulled it to the left of the lane of traffic she was traveling in, running it across the center of the highway and against his intestate, knocking her about forty feet and inflicting injuries upon her resulting in her death at 11:00 p.m. that night.

Defendant in her answer admits that she was driving her automobile on the highway in a southerly direction at the time complained of, and that it struck plaintiff's intestate resulting in injuries to her from which she died that night, but denies that she (defendant) was negligent in any manner in the operation of her automobile at the time. She further conditionally pleads the contributory negligence of plaintiff's intestate as a bar to recovery, which is substantially as follows: As her automobile approached the scene of the accident, plaintiff's intestate, a pedestrian, without looking for traffic upon the highway com-

menced to cross from the west to the east shoulder of the highway immediately and directly in front of her automobile, which was in plain view, and failed to heed the blowing of her horn. Whereupon, in an effort to avoid striking plaintiff's intestate, she swerved her automobile to its left, and the right front of it struck plaintiff's intestate. If defendant was negligent in any manner, which is denied, then plaintiff's intestate by her own negligence contributed proximately to her injuries resulting in death, in that: One. She failed to keep a proper lookout before entering upon and attempting to cross the highway. Two. She failed to see defendant's approaching automobile which in the exercise of ordinary care for her own safety she could and should have seen, or if she did see it, she failed to yield to it the right of way. Three. She failed to heed the sound of the horn of defendant's automobile, which warning was given in sufficient time for her to avoid being struck if she had heeded it. Four. Her hearing was impaired and she had a mechanical hearing aid, but she attempted to cross the highway without wearing it and without looking for approaching traffic, thereby failing to exercise ordinary care for her own safety.

From a judgment of compulsory nonsuit entered at the close of all the evidence, plaintiff appeals.

Gavin, Jackson & Williams by Clawson L. Williams, Jr., for plaintiff appellant.

Pittman, Staton & Betts by William W. Staton for defendant appellee.

PARKER, J. Plaintiff's sole assignment of error is to the judgment of compulsory nonsuit.

Plaintiff's intestate was struck by defendant's automobile about 7:55 a.m. on 14 November 1961 on rural road #1415, known as the Colon road, in Lee County. This is a hard-surfaced road running generally north and south, with pavement twenty feet wide and with shoulders five feet wide on each side. At the point plaintiff's intestate was struck, the road is straight and level with clear visibility 500 to 600 feet north of this point and with clear visibility about the same distance to the south of this point. At this point the posted speed limit was 55 miles an hour. It had been raining that day and the road was wet. Plaintiff and his intestate, who was his wife, lived about 1,000 feet west of this road, and there was a mail box on the east side of the road. A lane or driveway or side road ran from this road to their home.

Plaintiff's evidence, considered in the light most favorable to him, shows the following: His sole eye witness to the collision was H. G.

Daurity, who was driving a truck in a northerly direction on the Colon road, and who testified in substance: He was traveling about 30 or 35 miles an hour. About 250 feet ahead of him he saw plaintiff's intestate coming out of a side road leading to her house, about 10 or 12 feet from the pavement of the Colon road and walking "kind of fast." She was walking partly with her head down, and she walked on out into the Colon road and started across the Colon road to a mail box. He did not notice whether she looked up or not. She went on into the Colon road without stopping. She did not look up and down the highway before she entered that he could tell. She walked right on out into the highway. At that time he saw an automobile driven by the defendant in a southerly direction on the Colon road at a speed of about 30 or 35 miles an hour about 250 feet from the woman and approaching her. Defendant's automobile pulled sharply across the Colon road to the left, struck the woman about the middle of the road, and then went probably three or four car lengths and stopped. When defendant's automobile struck Mrs. Rosser, it was going about 15 miles an hour. When Mrs. Rosser was struck she sort of hung on the front of the car until it stopped and then slid off on the road. The windows on his car were up, his windshield wipers were working. He heard no horn. There was no other traffic on the road at the time. He stopped his automobile about 150 feet from where the defendant's automobile stopped. Mrs. Rosser was carried from the scene to the Lee County Hospital where she died that night about 11:00 p.m.

R. E. Chester, a state patrolman, who went to the scene testified in substance: There were 56 feet of skid marks on the right-hand side of the road to the center of the highway, and from where these ended there were "skivered" marks 40 feet in length leading to the rear of defendant's automobile. These "skivered" marks are light, burn marks or tire marks, but he could not say for sure they were skid marks. He examined defendant's automobile at the scene. It had a slight dent in the hood and grille bar to the right of its center as you sit in the driver's seat. The skid marks came down the right-hand side of the road to the right of the center line, and as they approached the place where the driveway to the Rosser home intersected the highway, they broke sharply across to the left.

Inez Rosser, daughter-in-law of plaintiff, testified that she had the following conversation with defendant that night in the Lee County Hospital: "She told me she was riding along; she saw this woman in the road and said she thought, 'Why don't that woman get out of the road?' She said, 'I blowed my horn,' and said, 'She kept right on coming in the road.' She said, 'the next thing I knew I had hit her.' She told me she caught her on the bumper. That is all she told me."

At the close of plaintiff's evidence, the court denied defendant's motion for judgment of compulsory nonsuit, and defendant then introduced evidence.

Defendant testified in substance: She was traveling south on the highway at a speed of about 40 or 45 miles an hour. When she was about 150 or 200 feet from the road leading to Mrs. Martha C. Rosser's home, she saw Mrs. Rosser on the road leading to her house ten or twelve feet from the edge of the pavement, walking towards the highway with her head kind of tilted down. She "let up" on her accelerator. When she saw Mrs. Rosser was not going to look and kept on walking, she blew her horn and applied her brakes just as Mrs. Rosser stepped on the highway. When she applied her brakes, her car skidded. Mrs. Rosser kept walking across the highway with her head down. She did not look to the right or to the left. When her car skidded, she turned to the left to try to avoid hitting Mrs. Rosser. The right hood and grille of her car struck Mrs. Rosser about two or three feet from the center line of the road and in her lane of traffic. Her car traveled about two and a half car lengths after it struck Mrs. Rosser. After Mrs. Rosser was struck, she "kind of rested up" on the hood of the car, and when it stopped, she fell off.

Defendant testified in substance on cross-examination: She could tell Mrs. Rosser was an elderly woman when she came into the road. South of the driveway leading to the Rosser house is a curve. After she got around the curve good, she could see Mrs. Rosser. "I suppose that's about 500 feet; I don't know. After I got around the curve good, I saw her, she continued to go into the road. I continued to drive down the road. When I first applied my brakes, that is where I skidded my wheels." She had slowed down to 10 or 15 miles an hour when she hit Mrs. Rosser. Mrs. Rosser was in her lane of traffic when she turned to her left in an endeavor to avoid striking her. With her brakes applied, her car skidded 56 feet before it struck Mrs. Rosser. At that time her child was down on the floorboard.

Plaintiff J. W. Rosser testified before defendant introduced any evidence that his intestate was slightly hard of hearing, that two months before her death a hearing aid was bought for her, that she did not like to wear it, that she did not have it on at the time she was struck, and that he found it afterwards at home.

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

Defendant offered evidence. The only motion for judgment of compulsory 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, 95 S.E. 2d 541.

Consequently, in passing on the motion plaintiff is entitled to have his evidence taken in the light most favorable to him and to the benefit of every reasonable inference to be drawn therefrom, and to have considered so much of defendant's evidence, if any, as is favorable to him or which tends to explain or make clear that which has been offered by him. However, so much of defendant's evidence as tends to establish a different state of facts or which tends to contradict or impeach plaintiff's evidence is to be disregarded. *Singletary v. Nixon,* 239 N.C. 634, 80 S.E. 2d 676; *Atkins v. Transportation Co.,* 224 N.C. 688, 32 S.E. 2d 209.

Mrs. Rosser was struck at a place on the highway where the posted speed limit was 55 miles an hour. The evidence of the greatest speed of defendant's automobile at the time comes from defendant, to wit, 40 or 45 miles an hour. The only other motor vehicle in sight at the time was that driven by H. G. Daurity, which was approaching defendant and was several hundred feet away. The time was 7:55 a.m. There is no evidence of fog or of anything to obstruct the view. There is no evidence in the record that defendant under the circumstances was operating her automobile at an excessive or unlawful rate of speed, or that she was driving it in a reckless and careless manner.

Defendant's evidence on direct examination is that when she was 150 or 200 feet from the road leading to Mrs. Rosser's home, she saw Mrs. Rosser on the road leading to her house ten or twelve feet from the edge of the pavement, walking toward the highway with her head kind of tilted down, and she "let up" on her accelerator. On cross-examination she testified she could tell Mrs. Rosser was an elderly woman when she came into the road. After she got around the curve good, she could see Mrs. Rosser. "I suppose that's about 500 feet; I don't know." The testimony of H. G. Daurity, witness for plaintiff, is that he saw plaintiff's intestate coming out of a side road leading to her house, about ten or twelve feet from the pavement of the Colon road and walking "kind of fast." She was walking partly with her head down, and she walked on out into the Colon road and started across the Colon road to a mail box. She did not look up and down the highway before she entered that he could tell. Plaintiff's witness, Inez Rosser, testified defendant told her that night at the Lee County Memorial Hospital she saw this woman in the road, that she blew her horn, that she kept on coming in the road, and the next thing she knew she hit her. From the place where Mrs. Rosser was struck, skid marks lead south for 56 feet, which permits a reasonable inference that defendant applied her brakes when she was that distance from Mrs. Rosser.

It was the duty of defendant both at common law and under the express provisions of G.S. 20-174(e) to "exercise due care to avoid colliding" with Mrs. Rosser on the highway. *Landini v. Steelman,* 243 N.C. 146, 90 S.E. 2d 377. Even if we concede that plaintiff's evidence, and defendant's evidence favorable to him, would permit a jury to find that defendant failed to exercise due care to avoid striking Mrs. Rosser after she saw her, it is manifest that plaintiff's own evidence so clearly shows negligence on the part of his intestate, which proximately contributed to her injuries and death, that no other conclusion can be reasonably drawn therefrom.

The law imposes upon a person *sui juris* the duty to use ordinary care to protect himself from injury, and the degree of such care should be commensurate with the danger to be avoided. *Holland v. Malpass,* 255 N.C. 395, 121 S.E. 2d 576; *Alford v. Washington,* 244 N.C. 132, 92 S.E. 2d 788; 65 C. J. S., Negligence, sec. 116, p. 706. It was the duty of Mrs. Rosser to look before she started across the highway. *Goodson v. Williams,* 237 N.C. 291, 296, 74 S.E. 2d 762, 766. It was also her duty in the exercise of reasonable care for her own safety to keep a timely lookout for approaching motor traffic on the highway to see what she should have seen and could have seen if she had looked before she started across the highway. *Garmon v. Thomas,* 241 N.C. 412, 416, 85 S.E. 2d 589, 592.

Plaintiff's own evidence shows that his intestate about 64 years old was slightly hard of hearing, that a hearing aid had been bought for her, and that she was not wearing it when she walked onto the highway and was struck by defendant's automobile. That defendant's automobile was near his intestate and approaching on the highway and was plainly visible, if she had looked at the time she walked onto the wet road and was walking across it. In addition, his evidence is that she walked onto the highway and was crossing it with her head partly down and without looking at all up and down the highway. "There are none so blind as those who have eyes and will not see." *Baker v. R. R.,* 205 N.C. 329, 171 S.E. 342. In brief, his evidence shows that his intestate exercised no care at all for her own safety in walking onto and crossing the highway in front of defendant's approaching automobile. Plaintiff has proved himself out of court and the trial court properly nonsuited him. *Lincoln v. R. R.,* 207 N.C. 787, 178 S.E. 601.

Affirmed.

MELVIN E. MOORE v. JAMES WILLIAM YOUNG.

(Filed 11 December 1963.)

1. Judgments § 29—

A conviction of defendant of involuntary manslaughter in the death of plaintiff's wife resulting from the same collision will not bar defendant driver from maintaining a cross action against plaintiff driver, since a judgment ordinarily binds only the parties and those in privity with them so that the estoppel is mutual.

2. Automobiles §§ 35, 37; Pleadings § 34—

In defendant driver's cross action against plaintiff driver, plaintiff is not entitled to plead a prior conviction of defendant of involuntary manslaughter in the death of plaintiff's wife resulting from the same collision, and therefore defendant's motion to strike allegations in regard thereto from plaintiff's reply should have been allowed.

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

Action and cross action arising out of a collision that occurred April 29, 1961, on N. C. Highway #242, near Benson, North Carolina, between a 1953 Cadillac operated by plaintiff and a 1950 Chevrolet pick-up truck operated by defendant.

The pleadings consist of (1) the complaint, (2) the answer, including further defense and cross complaint, and (3) the reply to said further defense and cross complaint. Each party alleged the collision and resulting injuries and damage were caused solely by the negligence of the other or, conditionally, that the other's action (cross action) was barred by his contributory negligence.

A settlement of *plaintiff's action* was negotiated, without the knowledge, consent or approval of defendant, by and between plaintiff and defendant's liability insurance carrier; and pursuant thereto a consent judgment, which dismissed *plaintiff's action* "as of nonsuit," was entered "(w)ithout prejudice to the defendant's counterclaim."

When the case was called for trial of defendant's cross action, the court, over defendant's objection, permitted plaintiff to amend his reply by alleging the following:

> "In case #10,118, entitled '*State vs. James W. Young,*' the defendant in this action, James W. Young, was found guilty on Friday, Feb. 15, 1962 (*sic*), during a mixed term of court in the Superior Court of Johnston County, of involuntary manslaughter on a bill of indictment arising out of the same accident as alleged in plaintiff's amended reply; that he was sentenced to one to two years in prison, and suspended for three years upon condition that

he pay a fine of $250.00 and costs; that no appeal was taken from this verdict and judgment; that the plaintiff specifically pleads the judgment in the criminal court as a complete bar, and requests that this action be dismissed as being *res adjudicata.*"

It was stipulated that defendant was prosecuted for involuntary manslaughter at February Criminal Session 1963 of Johnston Superior Court on account of said collision of April 29, 1961; that defendant pleaded "not guilty"; that the jury returned a verdict of "guilty as charged"; and that no appeal was taken by defendant from said verdict and the judgment pronounced thereon.

After a hearing of said plea in bar on said stipulated facts, the court, being of the opinion the said verdict and judgment of involuntary manslaughter constituted a bar to defendant's said cross action, entered judgment dismissing defendant's said cross action and taxing defendant with the costs. Defendant excepted and appealed.

Smith, Leach, Anderson & Dorsett and C. K. Brown for plaintiff appellee.

J. R. Barefoot and C. C. Canady, Jr., for defendant appellant.

BOBBITT, J. In *Trust Co. v. Pollard,* 256 N.C. 77, 123 S.E. 2d 104, an action for wrongful death, the plaintiffs alleged that, in a criminal prosecution for the murder of their intestate, the defendant was convicted of the crime of manslaughter. This Court held the defendant's motion to strike these allegations should have been allowed because evidence in support thereof would have been incompetent. Reference was made to our decisions in civil actions growing out of automobile collisions in which it was held incompetent to show the operator (a party) of one of the vehicles had been convicted of reckless driving, *Swinson v. Nance,* 219 N.C. 772, 15 S.E. 2d 284, or of driving under the influence of intoxicating liquor, *Watters v. Parrish,* 252 N.C. 787, 115 S.E. 2d 1, on account of his conduct in relation to *the very collision* on which the civil action was based. Indeed, it was held incompetent to impeach *the testimony* of such operator by asking him on cross-examination as to his said criminal conviction.

The decision in *Trust Co. v. Pollard, supra,* is based on "(t)he general and traditional rule supported by a great majority of the jurisdictions . . . that, in the absence of a statutory provision to the contrary, evidence of a conviction and of a judgment therein, or of an acquittal, rendered in a criminal prosecution, is not admissible in evidence in a purely civil action to establish the truth of the facts on which the verdict of guilty or of acquittal was rendered . . ." How-

ever, in *Trust Co. v. Pollard, supra,* this Court, in opinion by *Parker, J.*, after citing and discussing *Eagle, Star and British Dominions Ins. Co. v. Heller* (Va.), 140 S.E. 314, 57 A.L.R., 490, hereafter referred to as *Heller,* then reserved the question whether "a convicted criminal" may assert rights based on the criminal conduct for which he was convicted.

In *Taylor v. Taylor,* 257 N.C. 130, 125 S.E. 2d 373, in accord with prior decisions of this Court relating to similar husband-wife factual situations and in accord with *Heller,* this Court held that where the plaintiff had been convicted of the wilful abandonment of his wife without providing adequate support for her, his said conviction was a bar to his action for absolute divorce on the ground of two years' separation based on the "separation" involved in the criminal prosecution. Decisions in accord with *Heller,* not referred to in *Taylor v. Taylor, supra,* include: *Connecticut Fire Insurance Company v. Ferrara* (C.C.A. 8th), 277 F. 2d 388; *Mineo v. Eureka Security Fire & Marine Ins. Co.* (Pa.), 125 A. 2d 612; *Teitelbaum Furs, Inc. v. Dominion Insurance Company* (Cal.), 375 P. 2d 439.

In *Taylor v. Taylor, supra,* this statement appears: "As in *Heller,* our decision is limited to a factual situation where the plaintiff is seeking to profit from criminal conduct for which he has been prosecuted and convicted."

Defendant's cross action is based on the alleged actionable negligence of plaintiff. Plaintiff asserts defendant's conviction of involuntary manslaughter as in effect establishing defendant's contributory negligence as a matter of law. Clearly, under *Trust Co. v. Pollard, supra,* in his action against defendant plaintiff could not have alleged defendant's conviction of involuntary manslaughter to establish actionable negligence. It is noted that the burden of proof on the contributory negligence issue arising on defendant's cross action rests upon plaintiff in like manner as on the negligence issue in an action by plaintiff to recover from defendant.

In 8 Am. Jur. 2d, Automobiles and Highway Traffic § 944, it is stated: "In actions to recover for injuries sustained allegedly as a result of the negligent operation of a motor vehicle, evidence of prior criminal convictions for the same acts is generally excluded, either because of the often perfunctory nature of the 'criminal' proceedings in such cases and the fact that such cases and the fact that such convictions are frequently uncontested, or because of traditional reasons as to variations in parties, procedures, and the like. In some jurisdictions statutes have been enacted which expressly provide that no evidence of the conviction of any person for the violation of a statute or ordi-

nance relating to the operation of motor vehicles is admissible in any court in any civil action."

Whether this Court will extend or strictly limit the application of the legal principle on which *Taylor v. Taylor, supra,* is based, must be determined in relation to specific factual situations. Suffice to say, we hold it does not apply to the factual situation now under consideration.

Obviously, the conviction for involuntary manslaughter involved the death of a person other than the present plaintiff. (Note: The *briefs* advise us that plaintiff's wife was killed as a result of the collision.) It is not alleged that defendant has been convicted of an assault on this plaintiff with a deadly weapon, to wit, an automobile.

Assume, *arguendo,* an action for the alleged wrongful death of plaintiff's wife in which judgment was recovered against defendant on the basis of a jury finding that the death of plaintiff's wife was proximately caused by the actionable negligence of defendant. In such case, plaintiff would not be a party or privy to such action and would not be bound thereby. This judgment would not constitute *res judicata* as to defendant's actionable negligence (or his contributory negligence) in a separate suit involving an action and cross action between plaintiff and defendant.

"Generally, to constitute a judgment an estoppel there must be identity of parties, of subject matter and of issues. *Hardison v. Everett,* 192 N.C. 371, 135 S.E. 288. It is a principle of elementary law that the estoppel of a judgment must be mutual, and 'ordinarily the rule is that only parties and privies are bound by a judgment.' *Rabil v. Farris,* 213 N.C. 414, 196 S.E. 321; 116 A.L.R. 1083. When used with respect to estoppel by judgment, 'the term "privity" denotes mutual or successive relationship to the same rights of property.' Greenleaf on Evidence, Redfield Ed., Vol. 1, sec. 189, p. 216." *Leary v. Land Bank,* 215 N.C. 501, 505, 2 S.E. 2d 570. For exceptions (not applicable here) to these well settled rules, see *Light Co. v. Insurance Co.,* 238 N.C. 679, 79 S.E. 2d 167; *Coach Co. v. Burrell,* 241 N.C. 432, 85 S.E. 2d 688; *Thompson v. Lassiter,* 246 N.C. 34, 97 S.E. 2d 492.

In *Coach Co. v. Burrell, supra,* it is stated: "The great weight of authority seems to be that a judgment for the plaintiff in an action growing out of an accident is not *res judicata,* or conclusive as to issues of negligence or contributory negligence, in a subsequent action growing out of the same accident by a different plaintiff against the same defendant. *Tarkington v. Printing Co.; Dunston v. Printing Co.,* 230 N.C. 354, 53 S.E. 2d 269; Anno. 133 A.L.R., p. 185 IIIb." See also, Annotation, "Judgment in action growing out of accident as *res judicata,* as to negligence or contributory negligence, in later action growing out of

same accident by or against one not a party to earlier action," 23 A.L.R. 2d 710, § 5, p. 717; Restatement, Judgments § 93; *Meacham v. Larus & Brothers Co.,* 212 N.C. 646, 194 S.E. 99; *Light Co. v. Insurance Co., supra; Morgan v. Brooks,* 241 N.C. 527, 85 S.E. 2d 869.

If in the (assumed) wrongful death action, the jury's answer as to defendant's actionable negligence would not be *res judicata* in plaintiff's action, we perceive no sound reason why defendant's conviction of the involuntary manslaughter of plaintiff's wife should be considered in effect *res judicata* with reference to the issues raised in plaintiff's action or in defendant's cross action. Obviously, plaintiff was not a party to the criminal prosecution in which defendant was convicted of involuntary manslaughter. Moreover, the subject of the criminal prosecution, the death of plaintiff's wife, is not the subject of this action.

For the reasons stated, we are of opinion, and so decide, that the defendant's conviction of the involuntary manslaughter of plaintiff's wife is not a bar to defendant's cross action herein and that, for reasons set forth in *Trust Co. v. Pollard, supra,* the court erred in permitting plaintiff to amend his reply so as to allege facts relating to defendant's said conviction. Accordingly, the judgment of the court below is reversed and the cause is remanded to the end that an order be entered striking from plaintiff's reply the allegations relating to defendant's conviction of involuntary manslaughter.

Reversed and remanded.

JAMES R. LYNN v. H. A. WHEELER AND R. P. HARRISON, JR., TRADING AS ROBINWOOD RACE TRACK.

(Filed 11 December 1963.)

1. Negligence § 24a—

In order to be entitled to have the issue of negligence submitted to the jury, plaintiff must offer evidence permitting a legitimate inference of defendant's negligence in regard to at least one of the particulars asserted in the complaint and that such negligence proximately caused plaintiff's injury.

2. Games and Exhibitions § 2—

The operators of an automobile race track are not insurers of the safety of a patron but are under duty to exercise care commensurate with the known or reasonably foreseeable dangers to prevent injury.

3. Same— Evidence held insufficient to make out case of negligence on part of proprietors of race track.

Plaintiff was injured when hit by a wheel cast from a racing car as it was negotiating the fourth turn during the last race. Plaintiff's evidence was to the effect that the track was smooth at the beginning of the race but that after about two and one-half hours of racing a depression developed between the third and fourth turns, and there was no evidence that the barriers for the protection of patrons provided by defendant were lower than was the custom in the business or that injuries to patrons might reasonably have been foreseen unless a higher fence or barrier was erected. *Held:* The evidence fails to disclose negligence on the part of defendant in regard to the erection of barricades or in the maintenance of the track, and there being no evidence of negligence on the part of defendant in respect to the other particulars alleged in failing to provide adequate lights or in failing to inspect and prevent unsafe vehicles from entering the race, nonsuit was proper.

APPEAL by defendants from *Riddle, J.*, April 8, 1963 Civil Session, GASTON Superior Court.

The plaintiff instituted this civil action to recover damages for the personal injuries he sustained while a spectator at defendants' automobile race track. The plaintiff was attending a regularly scheduled race on the night of September 2, 1961. He purchased a ticket and took a seat in the third row up in the grandstand, not far from the fourth turn of the track. In the last, or feature race, a right rear wheel on one of the racing vehicles separated from the vehicle and ran against a dirt enbankment between the track and the grandstand, vaulted the barricades, struck the plaintiff, inflicting serious injuries. The plaintiff alleged the injuries were caused by the defendants' negligent failure (1) to erect adequate barricades to protect the customers from flying wheels or other parts from the racing vehicles, (2) to provide adequate lights so that customers could see and dodge flying wheels, (3) to maintain the track so that the racing vehicles would not cast wheels or loose parts, (4) to take corrective measures to protect customers from the hazards incident to racing at the Robinwood track, (5) to provide adequate inspection to discover and prevent the entry into the race of unsafe vehicles.

The defendants denied all allegations of negligence and alleged as further defenses (1) the plaintiff was familiar with automobile racing, knew the dangers thereof, nevertheless voluntarily exposed himself, (2) at the time of the accident the plaintiff was under the influence of intoxicants which prevented him from seeing and dodging the loose wheel as other customers near him had done, (3) the flying wheel vaulted into the air to a height of approximately 50 feet and over the barricade in a manner so unforeseeable as to be the result of an unavoidable accident.

At the close of the plaintiff's evidence the defendants moved for involuntary nonsuit. The court overruled the motion and submitted two issues to the jury: (1) The defendants' negligence and (2) the plaintiff's damages. The court refused to submit an issue of contributory negligence tendered by the defendants. The jury answered the issue of negligence against the defendants and awarded the plaintiff $70,000.00 in damages. From the judgment in accordance with the verdict, the defendants appealed, assigning numerous errors.

Whitener & Mitchem, Basil L. Whitener, Wade W. Mitchem for plaintiff appellee.

Kennedy, Covington, Lobdell & Hickman by W. T. Covington, Jr., Edgar Love, III, for defendant appellants.

HIGGINS, J. In this case the plaintiff alleged the defendants in five particulars failed to exercise reasonable care for his safety while he was attending their automobile races as a paying customer; and that their negligence as charged proximately caused his injury and damage. Proof substantially as alleged in at least one of the particulars is essential to recovery. *Messick v. Turnage*, 240 N.C. 625, 83 S.E. 2d 654; *Smith v. Barnes*, 236 N.C. 176, 72 S.E. 2d 216. The motion to nonsuit challenged the sufficiency of the evidence to go to the jury on any of the particulars alleged. To support a verdict there must be both allegation and corresponding proof. *Chambers v. Allen*, 233 N.C. 195, 63 S.E. 2d 212; *Maddox v. Brown*, 232 N.C. 542, 61 S.E. 2d 613. The evidence must permit a legitimate inference of defendants' actionable negligence and plaintiff's resulting injury and damage.

The plaintiff failed to offer any proof either (2) that lighting of the track was inadequate or (5) that there was a negligent failure to inspect the vehicles entered in the race. There was no evidence of failure to inspect or that the Hudson when it entered the race was mechanically defective in any manner which reasonable inspection would have disclosed. (3) With respect to the condition of the track, the plaintiff's witness McRainey, a spectator, testified: "At the beginning of the race the condition of the track was smooth. At the end of the race the track was in fair to good condition. That night there was a small beating out or hole effect between the third and fourth turns, . . . not a large area, approximately a foot wide, two or three feet long. . . . It was not over three to four inches deep. . . . The hole began to appear during the final race . . . I did not see the wheel come off. The car was in the fourth turn when I first saw it after the wheel was dropped. The wheel was ahead of the car at the time I saw it."

Plaintiff's witness Carson testified: "(H)is right rear tire came off just as he came out of the turn. . . . The car . . . spun and the tire came off the car, hit the bank and went straight up and over," into the stands. Plaintiff's witness Fox testified: "I saw the Hudson come out of the fourth turn and it looked like the wheel came off of it and hit the bottom of the bank and shot straight up and came over;" into the seats provided for spectators.

According to all the evidence the accident occurred during the last or feature race. The track had been used for about two and one-half hours for other races, including the warmup or trial heat for the feature. Nothing in the evidence indicates the condition of the track surface was unusual or dangerous. The evidence disclosed the Hudson spun in negotiating the fourth turn, cast the wheel, injuring the plaintiff. The depression in the track was between the third and fourth turns—not in the turn where the Hudson went out of control. The depression developed during the last race. The evidence offered was insufficient to permit any inference the defendants were negligent in maintaining the track.

Specification No. (4) is embodied in No. (1) since the injury alleged was caused by a flying wheel while the plaintiff was in the viewing stands. Consequently the plaintiff must get to the jury, if at all, on specification No. (1)—failure to erect adequate barriers to protect spectators during the races.

(1) According to all the evidence the racing surface was excavated, leaving a dirt bank three to four feet high alongside the track between it and the viewing stands. The bank originally was perpendicular. However, erosion from the top had reduced it slightly from a vertical angle. A few feet from this bank the defendants had erected a chain fence to a height of three to four feet. This fence was secured to light poles about 45 feet apart. Above the chain fence for its full length and likewise secured to the light poles, the defendants had erected a fox wire barricade to an additional height of six to eight feet. The plaintiff testified he occupied a seat on the third row from the bottom behind the barricade. Other witnesses said he was eight to ten rows back of the barricade. The closest seats to the track were 15 to 20 feet from the embankment. The racing Hudson went into a spin at the turn. The right rear wheel broke loose, ran ahead of the vehicle on the track until it struck the dirt bank, vaulted the entire barricade and landed in the stands, injuring the plaintiff.

The plaintiff testified he had been to other tracks at Lowell, Hickory, Charlotte, North Wilkesboro, and Martinsville, Virginia. The Lowell barricades consisted of two heavy boards secured to poles five

or six feet high. However, he admitted these boards were on the inside of the track to protect the infield enclosure. He also testified that some kind of wire which "looked heavy" goes all the way up to the top of the grandstand at Hickory. No evidence was given as to its height. If any barricades existed at the other tracks with which he is familiar, he did not testify with respect thereto, neither did he offer evidence of the condition at other race tracks.

The plaintiff, a paying customer, was an invitee at the race. The defendants, though not insurers of his safety, nevertheless were charged with the duty of exercising reasonable care for his safety. Justice *Bobbitt*, in *Lane v. Drivers Association*, 253 N.C. 764, 117 S.E. 2d 737, quoting from *Justice Parker* in *Williams v. Strickland*, 251 N.C. 767, 112 S.E. 2d 533, fixes the test by which to determine a race track operator's liability to his customers: "The general rule is that the owner or operator of an automobile race track is charged with the duty of exercising reasonable care, under the circumstances present, for the safety of patrons, that is a care commensurate with the known or reasonably forseeable danger."

Justice Parker, in *Williams v. Strickland*, *supra*, amplifies the rule: "If the need is obvious or experience shows that an automobile race of the character and in the place proposed requires, in order to afford reasonable protection to spectators, the erection of fences or similar barriers between the track and the places assigned to them, it becomes a part of the duty in exercising reasonable care for their safety to provide fences or barriers, the adequacy of which is dependent on the circumstances present, *principally the custom of the business.*" (emphasis added). Here no evidence is offered to show any custom at other tracks operated under like circumstances, except at Lowell and Hickory as previously noted.

The record fails to show facts from which the jury may infer that a barrier higher than 13 to 16 feet was the custom of the business or that injury to some spectator similarly situated is reasonably foreseeable unless a higher fence or barrier is erected. If a higher fence is standard for the business, evidence to that effect should have been offered.

After careful consideration we conclude the evidence disclosed by the record is insufficient to permit any inference of actionable negligence on the part of the defendants. The court should have allowed the demurrer to the evidence. The other serious questions raised by the appeal do not require discussion. The judgment entered in the court below is

Reversed.

STATE v. ALONZO LEE HARRINGTON.

(Filed 11 December 1963.)

1. Automobiles §§ 38, 58—

In a prosecution for manslaughter growing out of the operation of an automobile it is competent for a 13 year old boy to testify as to the speed of the car from his observation of the movement of the lights of defendant's car along the highway for a considerable distance.

2. Automobiles § 59—

Evidence in this case that defendant was driving some 60 miles per hour in going from open country into a residential district at which a highway sign cautioned motorists to "reduce speed," and that defendant, while attempting to pass a preceding vehicle, struck two small children in his lane of travel, together with other facts and circumstances adduced by the evidence, *is held* sufficient to be submitted to the jury on the issue of defendant's culpable negligence.

3. Automobiles § 57; Negligence §§ 16, 32—

In a prosecution for manslaughter in the deaths of children 7 and 10 years of age, contributory negligence, as such, has no relevancy, but is pertinent only upon the question of whether the conduct of the minors was such that defendant's negligence did not constitute a proximate cause of their deaths, and therefore the presumption that the infants were incapable of contributory negligence is not apposite.

4. Automobiles §§ 57, 60—

In a prosecution of a motorist for manslaughter in the deaths of two small boys who were struck by defendant's car as defendant was attempting to pass another vehicle traveling in the same direction, evidence that the children were walking on the hardsurface when they were struck and that the preceding car speeded up as defendant attempted to pass it, requires the court to instruct the jury upon the conduct of the children in walking on the hardsurface and the conduct of the other driver in increasing his speed as bearing upon the question of whether defendant's negligence was a proximate cause of the deaths.

5. Criminal Law § 136—

Where a new trial is awarded, provision of the judgment activating a prior suspended sentence, solely on the ground of the conviction, will be vacated.

APPEAL by defendant from *Johnston, J.*, January 7, 1963, Session of RICHMOND.

Defendant is charged with manslaughter in two bills of indictment. The bills were consolidated for trial. It is alleged that defendant did kill and slay Leon Chambers, age 10, and John Wesley Chambers, age 7. About 9:30 P.M. on 8 September 1962 defendant was driving north on "Long Drive," a 2-lane paved road, 23 feet in width, which runs

from U. S. Highway No. 1 into East Rockingham. In attempting to pass a car proceeding in the same direction defendant ran into and killed the named persons, who were walking in the west lane of the road.

Defendant pleaded not guilty. The jury found him guilty of involuntary manslaughter. The court imposed a prison sentence of 4 to 7 years.

In 1960 in another criminal action defendant had pleaded guilty to involuntary manslaughter, and a prison sentence of 2 to 4 years had been imposed and suspended for 5 years on specified conditions. After entry of judgment in the instant case, the court put into effect the former sentence of 2 to 4 years, to run concurrently with the sentence in the present case.

Defendant appeals from both judgments.

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

Webb & Lee and Joseph G. Davis, Jr., for defendant.

MOORE, J. Defendant assigns as error the admission of opinion testimony, as to the speed of defendant's car at the time of the accident, by Richard Chambers, 13 year old brother of the deceased children. The testimony is as follows: "I would say probably from in between sixty and seventy miles per hour. I heard the brakes on the car squeal real loud. . . . I saw Alonzo's (defendant's) car coming up from the south going north on the road. I saw another car at that time. It was coming up the road ahead of Alonzo. Alonzo did not pass the car until he got up there by our house and then he began to try to pass it. . . ." The witness was on the porch of his home about 18 feet from the highway and about 100 feet from the point of the accident.

"It is the general rule, adopted in this State, that any person of ordinary intelligence, who has had an opportunity for observation, is competent to testify as to the rate of speed of a moving object such as an automobile." *Lookabill v. Regan*, 247 N.C. 199, 100 S.E. 2d 521. There is no suggestion that the witness is possessed of less than ordinary intelligence; according to the evidence he had an opportunity for observation. The speed of an automobile at night may be judged by the movement of its lights. *State v. Hart*, 250 N.C. 93, 107 S.E. 2d 919. The weight of the testimony is a matter for the jury. *State v. Becker*, 241 N.C. 321, 85 S.E. 2d 327.

Defendant's motion for nonsuit was overruled. In this we find no error. The State's evidence tends to show that defendant at the time

of the accident was in the process of going from open country into a residential district, was cautioned by a highway sign to "reduce speed," and was driving 60 miles per hour from a 55 mile speed zone, and that there were skid marks on the highway 253 feet long after the accident. This evidence, together with other facts and circumstances, is sufficient to permit, but not compel, a jury to find that defendant was culpably negligent and that such negligence was a proximate cause of the death of the named persons. The following cases are in many respects factually similar to the case at bar: *State v. Gurley*, 257 N.C. 270, 125 S.E. 2d 445; *State v. Phelps*, 242 N.C. 540, 89 S.E. 2d 132; *State v. Huggins*, 214 N.C. 568, 199 S.E. 926; *State v. Cope*, 204 N.C. 28, 167 S.E. 456.

Defendant testified and contends that he was driving within the speed limit, was exercising reasonable care and his conduct was not the proximate cause of the accident. The State's evidence in many aspects is favorable to defendant. The driver of the car in front of defendant was in the better position to see the boys on the road. There is testimony by defendant and the State's eyewitnesses that the car defendant was attempting to pass increased speed as defendant came alongside, rendering it difficult, if not impossible, for defendant to pass or turn to the right. There is testimony by Richard Chambers, the only witness who testified to the movements of the deceased boys, that they went to the edge of the road and, after waiting for a south-bound car to pass, walked directly across the center of the road, and then turned north and walked on the hardsurface in the south-bound lane with their backs to northbound traffic; they had walked about 75 feet before they were overtaken by defendant; they were dressed in dark clothes and the street was of asphalt construction.

In apt time defendant requested the court to instruct the jury as follows:

> "G.S. 20-174 (d) provides: 'It shall be unlawful for pedestrians to walk along the traveled portion of any highway except on the left hand side thereof, and such pedestrian shall yield the right of way to approaching traffic.' It is the duty of a pedestrian walking along the left hand side of a highway to yield the right of way not only to traffic that approaches such pedestrian from the front but also to yield the right of way to traffic that approaches such pedestrian from the rear."

The court refused to give the requested instruction. It was said in *State v. Smith*, 238 N.C. 82, 76 S.E. 2d 363, that "contributory negligence as such has no place in the law of crimes." There the Court was

considering the question of nonsuit. Contributory negligence is no defense in a criminal action. However, in a case in which defendant is charged with manslaughter by reason of his alleged culpable negligence, the negligence of the person fatally injured, or of a third person, is relevant and material on the question of proximate cause. *State v. Phelps, supra.* It is true that the deceased boys were only 7 and 10 years of age. As a matter of law, a child under 7 years of age is incapable of negligence. An infant between the ages of 7 and 14 is presumed incapable of negligence, but the presumption is rebuttable. *Adams v. Board of Education,* 248 N.C. 506, 103 S.E. 2d 854; *Walston v. Greene,* 247 N.C. 693, 102 S.E. 2d 124. These are rules of law by which it is determined in civil cases whether the suit by an infant for negligent injury is barred by his contributory negligence. In a criminal action based on culpable negligence the presumption of incapability of negligence by an infant between the ages of 7 and 14 does not shift the burden of proof to, or cast any burden upon, defendant. The inquiry is whether the culpable conduct, if any, of defendant was a proximate cause of the death. If under all the circumstances the conduct of the infant was such as to create in the minds of the jury a reasonable doubt that the acts of defendant constituted a proximate cause of death, defendant should be acquitted.

The defendant is entitled to have the jury consider, on the question of proximate cause, whether the conduct of the driver of the vehicle he attempted to pass, or the conduct of the infants in violating G.S. 20-174 (d), or both together, was the proximate cause of the death of the infants. There is no conflict in the evidence relative to the conduct of the infants or of the driver of the other car—and if there were conflicting evidence, the rule would be the same. The contention of defendant that death was proximately caused by such conduct is, perhaps, his strongest line of defense. The charge of the court does not touch upon these matters in any respect. The jury must not only consider the case in accordance with the State's theory of the occurrence but also in accordance with the defendant's theory. *State v. Guss,* 254 N.C. 349, 118 S.E. 2d 906. Defendant in apt time requested that the law bearing upon his theory of the case be presented to the jury. He was merely asking the court to charge the law arising on the evidence. G.S. 1-180; *State v. Faust,* 254 N.C. 101, 118 S.E. 2d 769. Justice and the law countenance nothing less. Defendant is entitled to a new trial.

In activating the sentence which was suspended in the former judgment in case No. 6156, tried in 1960, the court was undoubtedly influenced by the verdict in the instant case. Therefore the judgment in case No. 6156, entered at the January Session 1963, is vacated. This,

of course, does not prevent the State from praying, at any time within the 5 year period of suspension, that the sentence in the 1960 case be put into effect, if a condition of its suspension is broken.

New trial.

CAROLINA POWER & LIGHT COMPANY v. JOHN E. WATERS.

(Filed 11 December 1963.)

1. Ejectment § 7—

A party asserting a right to go upon lands pursuant to an easement has the burden of establishing title to the easement, which it may do by showing title from a common source.

2. Boundaries § 9—

It will be presumed that the parties to a deed acted in good faith, the grantor intending to sell and the grantee intending to purchase, and such intent will not be thwarted if the language of the instrument is sufficient to permit the property sold to be identified.

3. Same—

A deed describing the lands over which grantor conveyed the easement in suit as lying in a named county, that the lands were "formerly known as West lands," across which ran a power line already owned by the grantee and that the property was bound on one side by the lands of a named person and on the other side by the lands of another named person, *held* sufficiently definite to permit the introduction of evidence *aliunde* to fit the lands to the description.

APPEAL by plaintiff from *Bundy, J.*, First April Regular Civil Session 1963 of WAKE.

Plaintiff alleged: It owned a right of way for the purpose of constructing and maintaining an electric transmission line as described in a deed to it from Southern Insurance & Realty Co., dated 30 July 1927; defendant had prevented it from exercising its rights under said right of way deed and had prohibited it from constructing a line on that part of said right of way which crossed the land owned and occupied by defendant, being the land conveyed to defendant and his wife, Margaret, by R. L. Bryan and wife in August 1961.

Defendant admitted he had prevented plaintiff from entering on the land conveyed to him and his wife. He denied that plaintiff had any legal right to construct or maintain a power line thereon. He prayed that the deed under which plaintiff asserted the right to construct and

maintain be declared a cloud on his title. Margaret, wife of defendant, was on her motion permitted to intervene. She adopted the answer of her husband.

The court, being of the opinion that the deed under which plaintiff asserted title was void, allowed defendant's motion to nonsuit, and plaintiff appealed.

Charles F. Rouse for plaintiff appellant.

Lake, Boyce & Lake by I. Beverly Lake, Jr., for defendant appellees.

RODMAN, J. Defendant's denial of plaintiff's title placed the burden of establishing that fact on plaintiff. An approved method of proving title is to show the parties claim under a common source and plaintiff has the older and superior title from that source. *Mobley v. Griffin,* 104 N.C. 112; *Taylor v. Scott,* 255 N.C. 484, 122 S.E. 2d 57; *Tripp v. Keais,* 255 N.C. 404, 121 S.E. 2d 596.

For the purpose of showing the parties derived their titles from a common source, plaintiff offered the deed of 30 July 1927. This deed is recorded in Book 528, p. 249, Register's Office of Wake County. It then offered a deed dated August 1961, from R. L. Bryan and wife to defendant, and next a deed dated 10 January 1948 from Alan Grinsted and wife to Bryan and wife. This deed recites the property conveyed is subject to an easement conveyed in favor of Carolina Power & Light Company appearing of record in Book 528, p. 249. The court excluded each of these deeds because, as it stated in the judgment of nonsuit, the deed to plaintiff from Southern Insurance & Realty Co. was null and void as a matter of law. The only reason advanced for holding the deed void is the assertion that the description is too vague to permit the reception of evidence to identify the servient estate.

If the court was correct in the conclusion it reached, manifestly plaintiff could not show that both parties traced title to a common source, since the excluded deed of 30 July 1927 was plaintiff's only source of title to the easement here claimed.

The description in the deed to plaintiff reads as follows: ". . . the right, privilege and easement to construct and operate . . . two tower lines . . . over, upon and across that certain tract or parcel of land situated in .... Township, Wake County, North Carolina, formerly known as West lands. The course of the said lines having been heretofore located and marked out for the construction, operation and maintenance of said lines and is described as follows:

"Parallel with and approximately 60 feet on each side of the present tower line now located on said property, said lines beginning on a westerly line of the lands of Bettie H. Reavis and continuing parallel with tower line above mentioned across property of grantors to an easterly property line of the lands of E. B. Crow, et al. It being understood that Carolina Power & Light Company already owns a right of way 100 feet in width upon which the present tower line is now situated and it is the intention of this instrument to grant an additional right of way 35 feet in width on each side of the present 100 foot right of way."

The deed to plaintiff recites a valuable consideration. Presumably the parties acted in good faith—grantor intended to sell and grantee intended to purchase. That purpose ought not to be thwarted if the language is sufficient to permit the property sold to be identified. *Duckett v. Lyda,* 223 N.C. 356, 26 S.E. 2d 918; *Robertson v. Robertson,* 253 N.C. 376, 116 S.E. 2d 849; *Lee v. Barefoot,* 196 N.C. 107, 144 S.E. 547; *Edwards v. Bowden,* 99 N.C. 80.

The deed says the land is in Wake County and was "formerly known as West lands." It further declares that plaintiff was, on 30 July 1927, the owner of a power line 100 feet across the property and that the property was bounded on the east by the lands of Bettie Reavis and on the west by the lands owned by E. B. Crow and others.

Where property either real or personal has a known and commonly used and recognized name, the use of this name to describe and identify the property sold is an adequate description, that is, it is sufficient to permit the introduction of evidence to show that the property claimed is in fact the property named. Individuals are usually identified by their names, but other means may be used to identify them, such, for instance, as fingerprints or scars.

For the purpose of identifying the property made subject to the easement, plaintiff was entitled to put in evidence the deed to it and then by parol proof show that the property was "formerly known as West lands." Plaintiff might also show that its grantor only owned one piece of land then crossed or subject to an easement for the maintenance of its power line and bounded on the east by Bettie Reavis and on the west by the lands of E. B. Crow and others. The court's refusal to receive the deed in evidence foreclosed plaintiff's opportunity to show where the property was located. Plaintiff may or may not be able to locate on the ground the land described in the deed, but it must not be foreclosed of that right on the theory that the description is so vague and indefinite as to render it impossible to fit any piece of land to the given description. *Self Help Corp. v. Brinkley,* 215 N.C. 615, 2 S.E. 2d

889; *Timber Co. v. Yarborough,* 179 N.C. 335, 102 S.E. 630; *Speed v. Perry,* 167 N.C. 122, 83 S.E. 176; *Norwood v. Totten,* 166 N.C. 648, 82 S.E. 951; *Allen v. Sallinger,* 108 N.C. 159; 26 C.J.S. 647.

Reversed.

THOMAS H. HOWELL, JR., BY HIS NEXT FRIEND, G. RAY MOTSINGER v. ERSKINE T. LAWLESS, AND JOHN T. THACKER, GUARDIAN OF ERSKINE T. LAWLESS.

(Filed 11 December 1963.)

Automobiles § 49—

The evidence in this case *is held* sufficient to be submitted to the jury on the question of plaintiff passenger's contributory negligence in voluntarily riding without protest in a car driven by defendant when plaintiff knew defendant to be under the influence of intoxicating beverages.

APPEAL by defendant from *McLaughlin, J.,* March 1963 Civil Session of FORSYTH.

Plaintiff, a guest passenger, was thrown from defendant's automobile when it failed to traverse a curve on Indiana Avenue just outside of the city limits of Winston-Salem. He instituted this action to recover for the resulting personal injuries. Defendant conceded his own negligence but, as a defense, plead the plaintiff's contributory negligence as follows:

> "The condition of the defendant, resulting from his having been drinking intoxicants, was one of the proximate causes of the automobile accident which occurred in the early morning of October 15, 1961, in which the plaintiff sustained some injuries. . . . (T)he plaintiff was also negligent in that he well knew that the defendant had been drinking intoxicating beverages, well knew that his ability to operate an automobile was substantially impaired as a result thereof, but nevertheless the plaintiff, with full knowledge of these facts, voluntarily rode with the defendant and remained in the automobile of defendant without protest as to the defendant's method of operating it. . . . and the negligent conduct of the plaintiff was one of the concurring proximate causes of such injuries as the plaintiff may have sustained."

The defendant offered no evidence. At the conclusion of plaintiff's evidence he tendered issues of negligence, contributory ngligence, and

damages. The judge declined to submit the issue of contributory negligence. The jury answered the two issues submitted in favor of the plaintiff and, from judgment on the verdict, defendant appealed. Relevant portions of the plaintiff's evidence appear in the opinion.

Clyde C. Randolph, Jr., for plaintiff appellee.
Deal, Hutchins & Minor for defendant appellant.

SHARP, J. The determinative question on this appeal is whether plaintiff's evidence, considered in the light most favorable to the defendant, contains any inference that the plaintiff himself was guilty of contributory negligence. *Wilson v. Camp,* 249 N.C. 754, 107 S.E. 2d 743. If there is more than a scintilla of such evidence, it is a matter for the jury. *Absher v. Raleigh,* 211 N.C. 567, 190 S.E. 897. Plaintiff's evidence discloses the following facts:

About 4:30 p.m. on October 14, 1961, plaintiff and defendant purchased six twelve-ounce cans of beer at a tavern. They then repaired to an ABC store where they bought a pint of one-hundred proof vodka. At 6:00 p.m. they arrived at the Dixie Classic Fair. Between that time and 10:30 p.m. each had consumed three beers and had taken three "medium" drinks directly from the bottle of vodka. They shared the vodka with a third person to whom they gave the half emptied bottle when they left the fairground. Between midnight and 12:30 a.m. plaintiff and defendant went to a grill where each had a sandwich. Shortly after 1:00 a.m. they were enroute home in defendant's automobile, traveling north on Indiana Avenue. The speed limit for the area was thirty-five miles per hour and the automobile was in good mechanical condition. Defendant drove the automobile into a sharp curve to the right at a speed of about fifty miles per hour. Its right wheels went off on the right shoulder of the road. The defendant quickly turned the vehicle back onto the pavement where it skidded and ran off the left side of the road, pushing over two trees and clipping a guy wire before coming to rest.

About thirty minutes after the accident an ambulance arrived and took plaintiff and the defendant to a hospital. Highway Patrolman Woods learned of the accident at 2:10 a.m. and went immediately to the scene where he examined the automobile which appeared to him to be a total loss. Later that night he interviewed the defendant at the emergency room of the Baptist Hospital. At the trial, the patrolman testified: "I do know that just as soon as I confronted him I could smell an alcoholic beverage; there was no doubt about what it was."

Plaintiff testified that neither he nor the defendant had drunk any alcoholic beverages after 10:30 p.m. He stated that during the evening the defendant had consumed as much as he had; that the effect of the vodka upon him "was still there to some extent" when he left the Fair; that he had ridden with the defendant when he was quite sober and on those occasions defendant had never attempted to take that curve at any such rate of speed. With reference to defendant's operation of the automobile, plaintiff testified: "(H)e wasn't reckless or nothing. I mean I wasn't scared to ride with him and I don't think anybody else would have been."

Whether a guest passenger who voluntarily enters an automobile being operated by a driver he knows has been drinking intoxicants is guilty of contributory negligence is a matter to be determined by the rules expounded in *Dinkins v. Carlton*, 255 N.C. 137, 120 S.E. 2d 543 and *Bell v. Maxwell*, 246 N.C. 257, 98 S.E. 2d 33. By those standards, the foregoing evidence is clearly sufficient to require the submission of the question of plaintiff's contributory negligence to the jury. In order that it may be submitted, there must be a

New trial.

WILSON TAYLOR v. E. B. GARRETT COMPANY, INC.

(Filed 11 December 1963.)

Automobiles § 41a—

Allegations that defendant's truck, approaching from the opposite direction, suddenly swerved into plaintiff's lane of travel, but with evidence that defendant's truck was moving slowly behind an unlighted truck and that defendant's truck had its left wheel some two to two and one-half feet to the left of the centerline of the highway, and that plaintiff ran into the wheel, held to warrant nonsuit for variance.

APPEAL by plaintiff from *Crissman, J.*, April 15, 1963 Civil Session of GUILFORD.

Plaintiff seeks compensation for personal injuries and property damage sustained when the automobile owned and operated by him collided with a truck-trailer owned and operated by defendant near Holly Hill, S. C., on 10 May 1959.

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

Everett, Everett & Everett by Robinson O. Everett for plaintiff appellant.

Jordan, Wright, Henson & Nichols by William D. Caffrey for defendant appellee.

PER CURIAM. To impose liability plaintiff alleged and defendant admitted: Plaintiff was traveling south and defendant's truck was going north on Highway 15; the collision occurred at night; plaintiff ran into defendant's truck and as a result of the collision turned over. To hold defendant responsible for the collision, plaintiff alleged and defendant denied: "Just as the plaintiff's car passed in the opposite direction, the rear portion of the defendant's truck suddenly and without notice swerved across the center line of the highway into the plaintiff's lane and collided with the plaintiff's car.

"Because it was night time and because he had no notice that the defendant's truck or any part thereof would move across the center lane and move into the southbound lane of Highway 15, the plaintiff, who was driving his car at the time, and who was driving carefully and prudently and in the southbound lane, had no opportunity to avoid the collision."

As an additional defense defendant alleged contributory negligence of plaintiff in that he operated his vehicle at an unlawful rate of speed and on the wrong side of the road.

Plaintiff testified the collision occurred on a two-lane concrete road 27 to 30 feet wide; the center of the road was marked by a yellow line; the terrain was flat; the collision occurred just as plaintiff was entering a slight curve to his right; he was traveling 50 m.p.h.; as he entered the curve, he had his bright lights on; he saw some 25 to 35 feet (or 50 to 60 feet as he later testified) ahead of him an unlighted truck-trailer in the northbound lane; it was either stopped or moving very slowly; he did not collide with that vehicle but collided with defendant's truck which was behind but very close to the unlighted truck; the headlights were burning on defendant's truck but could only be seen under the unlighted truck, causing plaintiff to think the unlighted truck was on fire; the left rear wheel of defendant's truck was some two to two and one-half feet across the center line of the road; plaintiff ran into the wheel of the truck which was on the wrong side of the road; this caused him to lose control and his vehicle to turn over.

Defendant forciby argues the evidence offered by plaintiff (defendant offered none) establishes contributory negligence as a matter of law. We do not find it necessary to decide that question. Plaintiff, if he is to recover, must do so by proving the allegations of his com-

plaint. There he alleges a sudden swerving of defendant's truck into his line of travel, a sudden emergency. He offers no evidence to establish that fact, but does testify to other facts which, under the South Carolina statutes, might constitute negligence.

The court, because of plaintiff's failure to establish defendant's negligence as alleged, properly allowed the motion for nonsuit. *Hall v. Poteat*, 257 N.C. 458, 125 S.E. 2d 924.

Affirmed.

VADA GRANT v. SAVANNAH FLORA SHADRICK
AND
CLYDE GRANT v. SAVANNAH FLORA SHADRICK.

(Filed 11 December 1963.)

1. Automobiles § 42c—

Evidence that defendant, traveling in the opposite direction, pulled out from behind the second car preceding her on the highway into plaintiff's lane of travel, *held* sufficient to take the issue of negligence to the jury.

2. Automobiles § 37—

Evidence that defendant pleaded guilty to a criminal charge arising out of the same accident is ordinarily competent, and the admission of such evidence in this case could not have prejudiced defendant in view of defendant's own theory of how the accident occurred.

APPEAL by defendant from *Crissman, J.*, February 18, 1963 Session of GUILFORD, High Point Division.

These civil actions, consolidated for trial, grow out of a collision that occurred July 3, 1961, about 2:00 p.m., on U. S. Highway No. 19, in Cherokee County, North Carolina, between a 1957 Dodge owned and operated by Clyde Grant (hereafter Grant) in which his wife, Vada Grant, was a passenger, and a 1958 Volvo owned and operated by defendant. The husband's action is to recover for personal injuries and damage to his car. The wife's action is to recover for personal injuries.

Each plaintiff alleged the collision and resulting damages were proximately caused by the negligence of defendant. Plaintiffs' crucial allegations were denied by defendant. She alleged the car in front of her stopped suddenly and without warning; that, in the emergency so created, she applied her brakes; and that her car skidded on the wet and slick pavement "to the left into the left-bound lane." Defendant did not plead contributory negligence in either case.

The only evidence was that offered by plaintiffs. In each action, issues as to negligence and damages were answered in favor of the plaintiff and the court, in accordance with the verdicts, entered judgments in favor of the plaintiffs and against the defendant. Defendant excepted, appealed and assigns as error (1) the denial of her motion for judgment of nonsuit and (2) the admission of certain evidence.

Morgan, Byerly, Post, Van Anda & Keziah for plaintiff appellees.
Deal, Hutchins & Minor for defendant appellant.

PER CURIAM. Each plaintiff's allegations as to defendant's negligence include the following: (1) she failed to exercise due care to keep a proper lookout; and (2) she "swerved her automobile" into the path of the Grant Car, "drove the same upon the left side of the highway," and "failed to yield the right of way" to the Grant car.

There was evidence tending to show: U. S. Highway No. 19, where the collision occurred, is approximately twenty feet wide. It is a two-lane ("blacktop") highway. Grant was proceeding north on his (right) side of said highway at a speed of approximately forty miles per hour. The highway was straight. As Grant approached the point of collision, he met a line of three cars proceeding south on their (right) side of said highway. As Grant approached, the third car, defendant's Volvo, "swerved out" from behind the second car, left its right side of said highway and collided with the Grant Dodge on Grant's right side of said highway.

When considered in the light most favorable to plaintiff, the evidence was sufficient to withstand defendant's motions for judgment of nonsuit and to support the verdicts.

Grant was permitted to testify, over defendant's objection, that a State Highway Patrolman who investigated the collision charged defendant with "failing to yield right of way" and that defendant, before a justice of the peace in Andrews, North Carolina, pleaded guilty to this charge. There was no contention that defendant's plea constituted *res judicata* or an estoppel with reference to any matter involved therein. The testimony was offered and admitted as evidence in the nature of an admission bearing upon whether defendant operated her car onto the left side of the highway and directly in the path of the approaching Grant car.

"Evidence of a plea of guilty to a criminal charge arising out of an automobile accident is generally admissible, but it is not conclusive, and may be explained." Blashfield, Cyclopedia of Automobile Law and Practice, Volume 9C, Permanent Edition, § 6196; 31 C.J.S., Evidence

§ 300(b); 8 Am. Jur. 2d, Automobiles and Highway Traffic § 944; Annotation, 18 A.L.R. 2d 1287, *1307*, and supplemental decisions.

The patrolman's testimony as to what occurred, if anything, before the justice of the peace in Andrews was subject to contradiction and explanation, the weight to be given his testimony and the matters referred to therein being for jury determination. Defendant did not testify or offer evidence. Defendant's pleading, as noted in our preliminary statement, is to the effect the collision occurred on her left (Grant's right) side of the highway. Under the circumstances, we perceive no prejudicial error in the admission of the patrolman's said testimony.

No error.

BETTY LOUISE MILKS, BY HER NEXT FRIEND, LLOYD E. MILKS, JR v. CLARK'S GREENSBORO, INC. AND M. W. BAILEY.

(Filed 11 December 1963.)

Judgments § 22—

Evidence that the individual defendant relied upon assurances by the corporate defendant and that the corporate defendant relied on its insurance agent and insurance carrier, who failed to forward the papers to an attorney until after a default judgment had been taken, *held* not to establish excusable neglect, since ordinarily the neglect of a responsible agent will be imputed to the principal.

APPEAL by defendants from *Shaw, J.*, Regular March 4, 1963, Session of ROCKINGHAM.

Action to recover damages for alleged malicious prosecution and false arrest, heard below on defendants' motion under G.S. 1-220 to set aside a judgment by default and inquiry on the ground of mistake, inadvertance, surprise and excusable neglect. Judge Shaw's order, based on findings of fact and conclusions of law to the effect defendants' neglect was inexcusable, denied defendants' said motion. Defendants excepted and appealed.

Scott, Folger, Ellington & Webster and Jordan, Wright, Henson & Nichols for plaintiff appellee.

Smith, Moore, Smith, Schell & Hunter for defendant appellants.

PER CURIAM. The essential facts, according to the court's unchallenged findings, may be summarized as follows:

The summons and complaint were duly served on each defendant on November 13, 1962. No answer, demurrer or other pleading having been filed by either defendant, judgment by default and inquiry was entered December 19, 1962, by the Clerk of the Superior Court of Rockingham County.

The copy of summons and complaint served on the corporate defendant was mailed November 13, 1962, by its Greensboro manager to the company's "New York office." The said Greensboro manager assured the individual defendant that the case would be handled in his behalf by the corporate defendant's insurance carrier or attorneys. In New York, the suit papers were delivered by the corporate defendant to Jay B. Rappaport, Inc., the corporate defendant's insurance agent, which mailed them to Trans-World Excess, Inc. South American Managers, Inc., received the suit papers from Trans-World Excess, Inc., on November 20, 1962. The suit papers were not received by attorneys until December 20, 1962, the day after the judgment by default and inquiry had been entered.

The court found that defendants have a meritorious defense. However, "(i)n the absence of a showing of excusable neglect, the question as to whether or not the defendant has a meritorious defense becomes immaterial." *Greitzer v. Eastham*, 254 N.C. 752, 755, 119 S.E. 2d 884, and cases cited.

The gist of the findings of fact is that the corporate defendant relied on its insurance agent and insurance carrier and that the individual defendant relied upon assurances by the corporate defendant that its insurance carrier or attorneys would act in apt time in his behalf. The finding that defendants' neglect is inexcusable is based on the fact that the defense of the action was not placed in the hands of any attorney by either defendant or by anyone acting in behalf of either defendant until after the judgment by default and inquiry had been entered. The factual situation is quite different from that considered in *Brown v. Hale*, 259 N.C. 480, 130 S.E. 2d 868.

"The rule is established with us that ordinarily the inexcusable neglect of a responsible agent will be imputed to the principal in a proceeding to set aside a judgment by default." *Stephens v. Childers*, 236 N.C. 348, 351, 72 S.E. 2d 849, and cases cited; *Greitzer v. Eastham, supra; Jones v. Fuel Co.*, 259 N.C. 206, 209, 130 S.E. 2d 324.

It is noted that *Abernethy v. Nichols*, 249 N.C. 70, 105 S.E. 2d 211, and the decisions on which it is based, relate to a factual situation quite different from that under consideration on this appeal.

Under our decisions, the facts set forth in the court's findings do not establish excusable neglect. Hence, the order denying defendants' motion must be and is affirmed.

Affirmed.

JIMMY LEWIS ATKINS v. WILLIAM ALLEN DOUB
AND
MERLIN GROVER ATKINS v. WILLIAM ALLEN DOUB.

(Filed 11 December 1963.)

1. Appeal and Error § 46—

The act of the trial court in setting the verdict aside in the exercise of its discretion is not reviewable in the absence of a showing of abuse of discretion.

2. Appeal and Error § 3—

Where the verdict is set aside in the court's discretion, there is no judgment from which an appeal may be taken, and on appeal from the action of the court setting the judgment aside appellant cannot present his contentions of error in denying his motion for judgment as of nonsuit.

3. Same—

Where notice of appeal is given solely from the refusal of the clerk to sign the judgment tendered after the verdict had been set aside by the trial judge, the appeal must be dismissed, since no appeal lies from the clerk of the Superior Court to the Supreme Court.

APPEAL by defendant from *Shaw, J.*, 25 March Civil Session 1963, of SURRY.

These actions were instituted against the defendant by James Lewis Atkins and Merlin Grover Atkins, respectively, to recover for personal injuries allegedly sustained in a motor vehicle collision resulting from the negligence of the defendant.

The defendant denied the material allegations of the complaint and set up a cross-action or counterclaim in each case. The cases were consolidated for trial by consent.

Of the seven issues submitted to the jury, three of them were answered as follows:

"1. Was the plaintiff, Merlin Grover Atkins, injured by the negligence of the defendant, as alleged in the complaint? Answer: No.

"2. Was the plaintiff, Jimmy Lewis Atkins, injured by the negligence of the defendant, as alleged in the complaint? Answer: No.

"3. Did the plaintiffs, by their own negligence, contribute to their injuries and damages, as alleged in the respective answers? Answer: Yes."

The remaining issues as to damages, as well as the issues relating to the defendant's cross-actions or counterclaims, were not answered.

The trial judge held that the verdict as rendered by the jury was incomplete, and set the verdict aside, in his discretion, on 27 March 1963.

Thereafter, on 1 April 1963, the defendant tendered judgment to the Clerk of the Superior Court based on the issues as answered by the jury. The Clerk refused to sign the tendered judgment on the ground that the verdict had been set aside by the trial judge.

It appears from the record that the only notice of appeal given below was from the refusal of the Clerk of the Superior Court to sign the tendered judgment.

The defendant purports to appeal to this Court, assigning error.

Allen, Henderson & Williams; Hiatt & Hiatt for plaintiff appellees.
Deal, Hutchins & Minor for defendant appellant.

PER CURIAM. When a trial judge, in the exercise of his discretion, sets aside a verdict, his action may not be reviewed in the absence of any suggestion of an abuse of discretion. *White v. Keller,* 242 N.C. 97, 86 S.E. 2d 795. There is no suggestion of an abuse of discretion in connection with the action of the trial judge in the court below.

The appellant contends the court below committed error in refusing to sustain his motion for judgment as of nonsuit at the close of all the evidence. However, an appeal will not lie at this time from the ruling of the judge denying the defendant's motion for judgment as of nonsuit. There being neither verdict nor judgment in the record, there is no basis upon which an appeal on this ground may rest. *White v. Keller, supra; Byrd v. Hampton,* 243 N.C. 627, 91 S.E. 2d 671.

These cases are still on the docket of the Superior Court of Surry County for trial on the issues raised by the pleadings.

An appeal does not lie directly to this Court from an adverse ruling by a clerk of the Superior Court.

Appeal dismissed.

BARBARA FLIPPIN KING v. ROBERT LEE MOORE AND JOE WILLIE MOORE.

(Filed 11 December 1963.)

APPEAL by plaintiff from *Shaw, J.*, 25 March 1963 Civil Session of SURRY.

Civil action to recover damages for personal injuries allegedly caused by the actionable negligence of defendant Robert Lee Moore in the operation of a family-purpose automobile owned by his father, the defendant Joe Willie Moore, he, the said Robert Lee Moore at the time residing in the home of his father as a member of his family.

Defendants filed a joint answer in which they admit that title to the automobile, which was driven by Robert Lee Moore, was registered in the name of Joe Willie Moore, and that he was driving the automobile at the time plaintiff was injured with the permission of his father, but deny that Joe Willie Moore kept and maintained the automobile as a family-purpose automobile and that Robert Lee Moore was negligent in the operation of the automobile. As a further defense and bar to any recovery by plaintiff, defendants conditionally plead contributory negligence of plaintiff in that after an all-night dance she entered as a passenger an automobile driven by Robert Lee Moore, when she well knew he had been drinking intoxicating liquor to the extent that his physical and mental ability to operate an automobile had been substantially impaired, and further when she well knew he had been without sleep for 36 hours, which also affected his ability to drive; and that during the night he had been driving at speeds of 65 to 70 miles an hour without protest on her part; that she voluntarily remained in his automobile while it was being so operated though she had ample opportunity to get out of the automobile; that this condition of Robert Lee Moore and his driving at excessive speed were the proximate causes of the automobile leaving the highway and of plaintiff's injuries, and that plaintiff's continuing under such circumstances to ride in the automobile when she had ample opportunity to get out was negligence on her part which proximately contributed to her injuries.

The parties offered evidence in support of the allegations in their pleadings.

The following issues were submitted to the jury and answered as shown:

"1. Was the plaintiff injured by reason of the negligence of the defendant Robert Lee Moore, as alleged in the plaintiff's complaint?

"ANSWER: Yes.

"2. Was the defendant Joe Willie Moore the owner of the 1955 Chevrolet automobile driven by the defendant Robert Lee Moore on June 18, 1961, which was involved in this collision; did he keep and maintain it for the use and convenience of members of his family; and was the defendant Robert Lee Moore operating the automobile at the time of the collision within the scope of such purpose?

"ANSWER: Yes.

"3. Did the plaintiff by her negligence contribute to her injuries?

"ANSWER: Yes.

"4. What amount of damages, if any, is the plaintiff entitled to recover of the defendants?

"ANSWER: ...."

From a judgment that plaintiff recover nothing from defendants and taxing her with the costs, she appeals.

Blalock & Swanson and C. Orville Light for plaintiff appellant.

Deal, Hutchins and Minor by John W. Minor for defendant appellees.

PER CURIAM. The jury, under application of well-settled principles of law, resolved the first two issues of fact in plaintiff's favor, and the third issue of fact against her. A careful examination of the assignments of error in respect to the admission of evidence and in respect to the charge, particularly as to the third issue, discloses no new questions or feature requiring extended discussion. Prejudicial error has not been made to appear. The verdict and judgment will be upheld.

No error.

AMERICAN NATIONAL FIRE INSURANCE COMPANY v. JOHN M. GIBBS, TRADING AND DOING BUSINESS AS GIBBS-WOOD TRANSPORT COMPANY, AND THE FIDELITY & CASUALTY COMPANY OF NEW YORK.

(Filed 19 December 1963.)

1. Insurance § 3; Principal and Surety § 1—

That part of a contract under which a company agrees to indemnify the assured for loss or damage from perils therein defined, with provision for

subrogation of the company to the right of assured against third persons, constitutes a contract of insurance, G.S. 58-3; while that part of the contract under which the company obligates itself to pay to any shipper or consignee, claims for which the assured would be liable by provision of statute (G.S. 62-121.26), with stipulation that the assured should reimburse the company for any such payment, is a surety contract.

2. Insurance § 87; Principal and Surety § 2—

The agreement in this case contained a contract insuring a carrier from loss by fire and theft, etc., and also a contract of suretyship in regard to claims of third persons under statutory provision (G.S. 62-121.26). *Held:* Provisions of the insurance contract that action be commenced within a specified time are not applicable to claims under the surety contract, and the surety's right of action for reimbursement of claims of third persons paid by it does not arise until such payment, and action brought within three years of such payment is not barred either under the contract or by the three year statute of limitations.

3. Principal and Surety § 10—

Where two sureties are liable for claims of third persons under provision of statute (G.S. 62-121.26) against the principal, the surety paying the entire claim may sue the other for contribution, but the cosurety is not liable, either under the bond or under the statute, for the entire amount, there being neither contractual nor statutory liability for indemnity.

APPEALS by defendants from *Bickett, J.*, March Assigned 1961 Civil Session of WAKE.

This action was begun by the issuance of summons on 14 March 1955.

Plaintiff seeks to recover from defendants the sum of $2,958.93 with interest from 30 May 1953. It alleges it disbursed that sum to creditors of defendant Gibbs at his request and to comply with the terms of its contract with Gibbs.

Liability of The Fidelity & Casualty Company of New York, hereafter Fidelity, is asserted by reason of a bond dated 29 January 1952 for the sum of $6,000, payable to the State of North Carolina.

Defendants denied liability in any sum and as additional defenses pleaded the three-year statute of limitations and a contractual provision fixing one year as the time in which an action could be maintained for the recovery of the amounts expended.

The parties waived jury trial. The court made findings of fact which, so far as necessary for a decision, are set out in the opinion. Based on the admissions in the pleadings, stipulations, and findings, the court concluded defendants were liable to plaintiff in the sum sued for; the action was not barred by contract stipulations or by the pleaded statute of limitations. It rendered judgment for the amount claimed. Each defendant excepted and appealed.

Joyner & Howison by W. T. Joyner, Jr., for plaintiff appellee.
Vaughan S. Winborne for defendant appellant Gibbs.
Vaughan S. Winborne for defendant appellant Fidelity & Casualty Company of New York.

RODMAN, J. Defendant Gibbs was, on and prior to 1 April 1951, a motor carrier holding motor carrier certificate C-422, issued by the North Carolina Utilities Commission. He did business under the name of "Gibbs-Wood Transport Company."

On 1 April 1951 plaintiff issued to Gibbs-Wood Transport Company its policy of insurance 9567. The policy declares its purpose is "to indemnify the Assured, for loss or damage from perils hereinafter defined, arising from its legal liability as a carrier and/or bailee under bills of lading and/or shipping receipts issued by the Assured on shipments of lawful goods and/or merchandise consisting principally of General Commodities and Unmanufactured Tobacco." The perils against which plaintiff assured Gibbs protection were for loss or damage to shipments caused by (a) fire, (b) perils of the sea, (c) collision, meaning thereby the violent and accidental contact of the conveyance with any other automobile, vehicle, or object, (d) overturning of the transporting conveyance, (e) collapse of bridges and culverts, (f) flood, (g) cyclone and tornado, (h) theft of an entire shipping package.

The policy contains these additional pertinent provisions: "SUBROGATION—In all cases of loss, the assured shall, at the request of said Company or its agents, assign and subrogate all their rights and claims against others to said Company at time of payment to an amount not exceeding the sum paid by this Company. This Company is not liable for any loss which, without their consent, has been settled or compromised with others, who may be liable therefor."

"NOTICE AND PROOF OF LOSS—Loss, if any, under this policy to be reported as soon as practicable with full particulars to the Company or its Agent. The assured shall file with the Company or its Agent, a detailed sworn proof of loss within ninety days from date of loss. Failure by the assured either to report said loss or damage or to file such written proofs of loss as above provided, or as required by law, shall invalidate any claim under this policy."

"SUIT AGAINST COMPANY—It is a condition of this policy that no suit, action or proceeding for the recovery of any claim under this policy shall be maintainable in any court of law or equity unless the same be commenced within twelve (12) months next after the time a cause of action for the loss accrues. Provided, however, that if by the laws of the state within which this policy is issued such limitation is

invalid, than *(sic)* any such claim shall be void unless such action, suit or proceeding be commenced within the shortest limit of time permitted by the laws of such state, to be fixed herein.

"SUIT AGAINST OTHERS BY ASSURED—It is expressly agreed that upon the payment of any loss or advancement or loan of moneys concerning the same, that the assured will at the request and expense of the Company and through such counsel as the Company may designate, make claim upon and institute legal proceedings against any carrier, bailee, or other parties believed to be liable for such loss, and will use all proper and reasonable means to recover the same."

Attached to the policy issued by plaintiff are two endorsements. These bear the same date as the policy. One is captioned: "ENDORSEMENT FOR MOTOR COMMON CARRIER POLICIES OF INSURANCE FOR CARGO LIABILITY UNDER SECTION 215 OF THE INTERSTATE COMMERCE ACT." The other is entitled: "ENDORSEMENT FOR MOTOR COMMON CARRIER POLICIES OF INSURANCE FOR CARGO LIABILITY UNDER SECTION 19 OF THE NORTH CAROLINA TRUCK ACT OF 1947." The language of the endorsements is substantially identical. Each recites that it is intended to assure compliance with the provisions of a designated statute. The endorsements obligated plaintiff to pay within the limits of liability to any shipper or consignee "for all loss of or damage to all property belonging to such shipper or consignee, and coming into the possession of the insured in connection with its transportation service, for which loss or damage the insured may be held legally liable . . ." The endorsement with respect to the North Carolina statute limited plaintiff's liability for losses occurring "on the route or in the territory authorized to be served by the insured or elsewhere within the borders of the State of North Carolina." The endorsement conforming to the federal statute contains no provision with respect to the area in which liability may be incurred. Each endorsement contains this language: "The insured agrees to reimburse the Company for any payment made by the Company on account of any loss or damage involving a breach of the terms of the policy and for any payment that the Company would not have been obligated to make under the provisions of the policy, except for the agreement contained in this endorsement."

Prior to 25 January 1952 defendant Gibbs, doing business as Gibbs-Wood Transport Company, and New Dixie Lines, Inc., filed a petition with the North Carolina Utilities Commission seeking Commission approval for the sale of Gibbs' franchise rights, his motor equipment, and certain real estate owned by him. A hearing was had on this petition

on 25 January 1952. The Commission gave its approval to the sale by order dated 29 January 1952. It recites in its order that Gibbs testified: ". . . he was familiar with the provisions of Section 22 of the North Carolina Truck Act wherein a Vendor must satisfy all debts and claims of which such seller has any knowledge or notice and to the effect that the list of debts and claims offered in evidence as Petitioner's Exhibit #2 was a true and accurate statement, such list being claims in the amount of $2,988.95 for Loss or Damage of goods transported or received for transportation, and that Vendor was in a position to furnish bond in double the aggregate of such debts and claims as required by Section 22 of the Act." The Commission, in approving the sale, said: "Upon full consideration of the petition, the contract, and representations made to the Commission and the bond filed with the Commission in amount double the aggregate of all the Loss or Damage Claims of which the Vendor has knowledge, the Commission finds no reason why the proposed sale and transfer should not be approved insofar as the Commission is authorized to do so under the provisions of General Statute 62-107."

On the date the Commission authorized Gibbs to sell to New Dixie, Fidelity and Gibbs executed the bond to the State of North Carolina in the sum of $6,000, conditioned in this language: "Whereas John M. Gibbs, the principal herein, applied to the Utilities Commission of the State of North Carolina for permission to sell or transfer to New Dixie Lines, Incorporated, of Richmond, Virginia, the franchise granted it by said Utilities Commission, and

"WHEREAS, There are still certain outstanding claims for loss and damage to property previously transported by the principal.

"NOW THEREFORE, if the said John Gibbs shall pay all sums as specified by Section 22 of the North Carolina Truck Act of 1947, then this obligation shall be null and void; otherwise to be and remain in full force and effect."

The court found: "From April 1951 to January 1952, the defendant Gibbs had various claims made against him by shippers or consignees for loss or damage to goods. Beginning in late February 1952, until January 20, 1953, the defendant Gibbs sent these various claims to the plaintiff for payment. Commencing on March 19, 1952, and ending on July 6, 1953, the plaintiff paid to the various shippers on account of the claims referred to in this paragraph a total of $2,958.93." He found as a fact that none of the losses for which payment was made by plaintiff were caused by the perils specifically enumerated in the policy but were made pursuant to the provisions of the endorsements as required by sec. 19 of the Truck Act of 1947 and by the Interstate Commerce Act.

Before considering plaintiff's claim against Fidelity, it is necessary to ascertain if there is error in the judgment as it relates to the defendant Gibbs.

The rights and obligations of Gibbs and plaintiff were fixed by contract. It is not suggested that this contract is contrary to public policy or contravenes any statute.

When we look at the contract to determine the rights of the parties, it is immediately apparent that it is divided into two separate and distinct parts: The first by express language "insures" Gibbs, i.e., "assures" him against loss resulting from the perils there expressly enumerated. That portion of the contract is a clear contract of insurance. G.S. 58-3; 44 C.J.S. 471; 29 Am. Jur. 433; Webster's 3rd Int. Dic. 1173.

The second portion of the agreement is not a contract insuring Gibbs. It does not purport to afford him protection. It agrees to pay shippers' or consignees' claims which they could assert against Gibbs by reason of his contract of carriage. Not only does plaintiff not obligate itself to save Gibbs from loss with respect to these claims, but Gibbs expressly agrees to reimburse plaintiff for any payments made by it pursuant to the endorsements, i.e., the second portion of the contract. Plaintiff became a surety on Gibbs' obligations arising from his contracts of carriage.

The insuring portion of the contract, by express language, required the "assured," Gibbs, to file proof of loss with the "company," plaintiff, within ninety days of the loss to impose any obligation on the company. This provision is valid. Gibbs could not recover for losses sustained as provided in the policy of insurance unless he complied with this provision. *Muncie v. Ins. Co.*, 253 N.C. 74, 116 S.E. 2d 474; *Boyd v. Ins. Co.*, 245 N.C. 503, 96 S.E. 2d 703; 29 A Am. Jur. 491.

Plaintiff alleged and defendant Gibbs admitted that in February 1952 he began to send claims to plaintiff for lost or damaged goods transported by him. These claims were forwarded without any information with respect to the cause of loss or damage and without any assertion that plaintiff was obligated to pay because of the insuring provisions of the contract. Plaintiff, in acknowledging receipt of the first batch of these claims which Gibbs requested it to pay, called attention to the provision of the endorsement obligating Gibbs to reimburse it for payments made pursuant to that portion of the contract. It expressly denied that any of the claims filed represented losses resulting from the perils enumerated in the insuring part of the contract. The letter concluded with the statement that plaintiff would "look to you for reimbursement of the full amount paid to claimants by virtue

of the common carrier endorsement, including all expenses incurred in so doing." Thereafter and without protest so far as the record discloses, Gibbs continued to send claims of shippers or consignees to plaintiff for payment.

The evidence is sufficient to sustain the court's findings that the claims paid for which plaintiff seeks reimbursement were not within the insuring portion of the contract and that no proof of loss had been filed as required by the insuring portion of the contract.

Was Plaintiff's right to recover from Gibbs the payments made at his request barred by the contractual provisions of the policy? If not, was it barred by the three-year statute of limitations? Each question must be answered in the negative. The contractual provision limiting to twelve months the time in which suits must be brought is by express language limited to "suits against Company." It applies only to insured losses, i.e., losses arising from the enumerated perils. It has no application to suits by plaintiff against Gibbs for payments made at his request, and which he promised to repay.

Defendants contend plaintiff stands in the shoes of the claimants it paid, and for that reason the lapse of time which would have barred claimants' right of action against Gibbs likewise bars plaintiff's claim against Gibbs.

Defendants misapprehend the law. A surety who, pursuant to his contractual obligation, pays the debt of his principal has a right of action to recover the sum so paid. The principal is not obligated to his surety until his surety has made a payment. The surety's right of action accrues at the time of payment, not before. Plaintiff's cause of action was not barred, because all payments were made by it within three years of the institution of this action. *Saieed v. Abeyounis*, 217 N.C. 644, 9 S.E. 2d 399; *Pritchard v. R.R.*, 166 N.C. 532, 82 S.E. 875; *Deaver v. Carter*, 34 N.C. 267; *Sherrod v. Woodard*, 15 N.C. 360; 54 C.J.S. 107.

The bond given by defendant Fidelity was conditioned on Gibbs' payment of "all sums as specified by section 22 of the North Carolina Truck Act of 1947." The statute referred to is now codified as G.S. 62-121.26. It requires as a condition precedent to Commission's approval of the sale of a motor carrier's franchise a bond from the seller conditioned for the payment of (1) taxes, (2) wages due employees of the seller, (3) unremitted C.O.D. collections due seller, (4) "for loss or damage of goods transported or received for transportation," (5) overcharge on property transported, and (6) for interline accounts to other carriers.

Plaintiff as surety was obligated to only one class of Gibbs' creditors —those having claims originating from a contract of carriage. Fidelity

as surety was obligated for six classes. The fourth class, for which Fidelity obligated itself, was the identical class for which plaintiff was obligated. Any claimant asserting a loss resulting from Gibbs' breach of his contract of carriage could have required plaintiff or Fidelity to pay the loss. Plaintiff and Fidelity were, as to such claimants, co-sureties.

Equity and law (G.S. 26-5) afford a right to one surety, who has paid a debt for which he and another are equally liable, to call on the other for contribution. *Adams v. Adams,* 212 N.C. 337, 193 S.E. 661; *Fowle v. McLean,* 168 N.C. 537, 84 S.E. 852; *Smith v. Carr,* 128 N.C. 150; *Peebles v. Gay,* 115 N.C. 38.

But plaintiff does not seek to hold Fidelity obligated to contribute its share of the monies expended by plaintiff in discharging obligations for which both were liable. What it seeks is in effect the right to make Fidelity pay the sums loaned or advanced for Gibbs to discharge his debts. Plaintiff's contention that when it paid claimants, it became an assignee of their rights which it could enforce is, for the reason given in denying defendant's plea of the statute of limitations, not well founded. Fidelity did not, by statutory requirement or the language of its bond, obligate itself to indemnify Gibbs or his other surety.

The case was not tried or argued on the theory that Fidelity was a cosurety and hence required to contribute. Plaintiff has failed to establish the asserted liability of Fidelity.

As to defendant Gibbs—Affirmed.

As to defendant Fidelity—Reversed.

LILLIE MARTIN GRAVES v. TERRY WHITE WELBORN, T/A WELBORN ELECTRIC COMPANY.

(Filed 19 December 1963.)

1. Death § 3—

An action for wrongful death is purely statutory and must be brought by the personal representative; if brought by a person who has not been appointed in this State the action must be dismissed; if the personal representative is permitted to become a party to an unauthorized action for wrongful death, the action is deemed to have been commenced only from the time he became a party. G.S. 28-173.

2. Parties § 2—

The court has no authority, over objection, to convert a pending action which cannot be maintained into a new and independent action by admitting a party who is solely interested as plaintiff.

3. Death § 4—

The amendment of G.S. 28-173 by G.S. 1-53(4) removed the time limitation on an action for wrongful death as a condition annexed to the cause of action and made it a two-year statute of limitations.

4. Executors and Administrators § 8—

Whether an action is brought by a person in his individual capacity or in his capacity as personal representative is to be determined from the allegations of the complaint and not the caption to the action.

5. Pleadings § 25—

Ordinarily the court may allow in its discretion an amendment to correct a misnomer or mistake in the name of a party where the amendment does not amount to a substitution or entire change of parties.

6. Same; Death § 4— Where action is instituted by person adjudged to be entitled to appointment, issuance of letters relates back to time of order.

The widow, prior to filing complaint in this action for wrongful death, had applied for appointment as administratrix, and order had been issued adjudging that she was entitled to appointment and she had signed the bond, but the surety had not signed and the letters did not actually issue until more than two years after intestate's death. The caption of the complaint was in the name of the widow individually, but the complaint alleged in good faith that she was the duly appointed and acting administratrix of decedent. *Held:* Upon the issuance of letters they related back to the time of the order, and the court should permit an amendment and should not dismiss the action on the ground that it was not instituted within the time limited.

APPEAL by plaintiff from *Shaw, J.*, September 2, 1963 Civil Term of GUILFORD.

Action for wrongful death. The events, material to this decision, occurred chronologically as follows:

Paul Junior Graves died intestate on August 30, 1957.

On August 7, 1958 his wife, Lillie Martin Graves, the plaintiff in this action, applied to the Clerk of the Superior Court of Guilford County for letters of administration upon his estate. The application specified no valuation for either his real or personal property. On the same day *an order for letters of administration* was signed by the Assistant Clerk of the Superior Court in which it was adjudged that plaintiff was entitled to the letters upon her qualification by taking the oath and giving an approved bond as required by law. The order did not ascertain the value of the decedent's property but provided that if the surety upon the bond should be an authorized surety company, the penalty of the bond would be one thousand dollars. The plaintiff thereupon signed the oath and, as principal, she also executed the bond in

the sum of one thousand dollars. The surety named in the bond, Southern Fidelity Mutual Insurance Company, did not then execute it.

On August 17, 1959 plaintiff instituted this action to recover damages from the defendant for the wrongful death of her intestate. The caption of the complaint indicated that she had brought the action as an individual. However, in the first paragraph plaintiff alleged that she "was duly appointed and is now acting as administratrix of the estate of said decedent."

On November 12, 1959 the defendant, having obtained an extension of time, by answer denied that plaintiff was the duly appointed administratrix of the estate.

On April 2, 1962 the surety executed the bond and, on that day, the Clerk of the Superior Court issued letters of administration to the plaintiff.

The defendant questioned plaintiff's right to maintain this action. On October 12, 1962 plaintiff and defendant, by written stipulation incorporating the course of events as above stated, agreed that the Judge of the Superior Court might ascertain as a matter of law whether or not plaintiff was entitled to maintain the suit.

Thereafter, Judge Shaw heard the matter upon the stipulations and argument of counsel. He concluded, as a matter of law, that the action was not instituted by the personal representative of Paul Junior Graves as required by G.S. 28-173; that the statute of limitation, G.S. 1-53(4), barred the action for wrongful death on August 30, 1959; and that, therefore, the court was without authority to permit plaintiff to amend the complaint by alleging her subsequent qualification as administratrix after the time limitation for bringing the action had expired. From his order dismissing the action, plaintiff appealed to this Court.

Elreta Melton Alexander for plaintiff appellant.

Hines & Boren and Jordan, Wright, Henson & Nichols for defendant appellee.

SHARP, J. The right of action for wrongful death is purely statutory. It may be brought only "by the executor, administrator, or collector of the decedent." G.S. 28-173. A widow, as such, has no right of action for the death of her husband. *Howell v. Comrs.*, 121 N.C. 362, 28 S.E. 362. If an action for wrongful death is instituted by one other than the personal representative of a decedent, duly appointed in this State, it should be dismissed, *Carr v. Lee,* 249 N.C. 712, 107 S.E. 2d 544; *Journigan v. Ice Co.*, 233 N.C. 180, 63 S.E. 2d 183; *Monfils v.*

Hazlewood, 218 N.C. 215, 10 S.E. 2d 673, and a separate and independent action instituted by such representative. *Hall v. R. R.,* 149 N.C. 108, 62 S.E. 899. The court has no authority, over objection, to convert a pending action which cannot be maintained into a new and independent action by admitting a party who is solely interested as plaintiff. *Exterminating Co. v. O'Hanlon,* 243 N.C. 457, 91 S.E. 2d 222. However, should the personal representative be permitted to become a party to an unauthorized action for wrongful death, the action is deemed to have been commenced only from the time he became a party. *Hall v. R. R., supra; Reynolds v. Cotton Mills,* 177 N.C. 412, 99 S.E. 240; *Insurance Co. v. Locker,* 214 N.C. 1, 197 S.E. 555.

Prior to the enactment of Chapter 246, Sess. Laws of 1951 (now codified as G.S. 1-53(4)) which amended G.S. 28-173, the institution of an action for wrongful death within one year after such death was a condition precedent to maintaining the action. All other requirements of the section were also strictly construed. See annotation to G.S. 28-173. The amendment removed the time limitation as a condition annexed to the cause of action and made it a two-year statute of limitations. *McCrater v. Engineering Corp.,* 248 N.C. 707, 104 S.E. 2d 858.

The majority rule is that an amendment which changes the capacity in which a plaintiff sues does not change the cause of action so as to let in the defense of the statute of limitations. Annot., 74 A.L.R. 1269; *Lopez v. United States,* 82 F. 2d 982, 987. That rule has not been followed in North Carolina. *Bennett v. R. R.,* 159 N.C. 345, 74 S.E. 883. However, plaintiff did not purport to institute the instant case in her individual capacity. In the first paragraph of the complaint she alleged that she was the duly appointed and acting administratrix of Graves. "An allegation by one describing himself as administrator of a designated estate is sufficient to show that he sues as such." 21 Am. Jur., *Executors and Administrators* § 947.

It is true that in the caption of the complaint and summons plaintiff did not designate herself as administratrix. When a suit is brought by a fiduciary he should indicate his representative capacity in the caption of the pleadings, but the character in which a party sues must be determined from the complaint and not from the caption. *Refining Co. v. Bottling Co.,* 259 N.C. 103, 130 S.E. 2d 33; 39 Am. Jur., *Parties* § 6.

Bennett v. R. R., supra, involved an action for wrongful death commenced by the widow of the decedent on July 4, 1910. An examination of the record of that case reveals (as the reported case does not) that she alleged in her complaint that she had been duly appointed as administratrix. The complaint itself had no caption but in the caption of

the summons the plaintiff's name appeared only as an individual. On March 11, 1912, the defendant moved to dismiss because plaintiff "failed to file a complaint in this action as required by statute." The plaintiff then moved to amend the summons by adding the word "administratrix" after her name. The judge allowed this motion. The Supreme Court reversed and dismissed the action saying that the effect of the amendment was "to change the entire character of the action and to convert that which was the individual action of Mary E. Bennett into one by her in her representative capacity as administratrix." The court held this could not be done more than a year after the death. *On the record* the Bennett case appears to have been wrongly decided.

Ordinarily an amendment of process and pleadings may be allowed in the discretion of the court to correct a misnomer or mistake in the name of a party where the amendment does not amount to a substitution or entire change of parties. *Bailey v. McPherson,* 233 N.C. 231, 63 S.E. 2d 559. In the instant case had plaintiff in fact been the duly appointed administratrix at the time the complaint was filed, there is no question but that the court would have had plenary power under G.S. 1-163 to permit the plaintiff to amend the caption in order to designate herself as administratrix in conformity with the allegation in the complaint.

However, the right to amend is not the primary question here. The difficulty in this case is that at the time plaintiff filed her complaint alleging that she was the duly appointed administratrix of Graves, that allegation was denied and it was not true. At that time the cause of action for wrongful death was not barred by the applicable two-year statute of limitations. When her letters were actually issued, however, her intestate had been dead more than five years. It is obvious, therefore, that unless the plaintiff's appointment as administratrix related back to the institution of this action, or to the time the order adjudicating her right to letters was signed, it cannot survive defendant's denial of the allegations in paragraph one of the complaint.

In order to protect property rights and to protect one who, prior to his appointment, has acted to preserve the estate, it is the universal rule that all previous acts of the personal representative prior to his appointment which were beneficial in nature to the estate and which would have been within the scope of his authority had he been duly qualified, are validated upon his appointment which relates back to the death of the intestate for this purpose. *Jones v. Jones,* 118 N.C. 440, 24 S.E. 774; 21 Am. Jur., *Executors and Administrators* § 211; see Annot., 26 A.L.R. 1359.

Although the appointment of an administrator relates back to the date of the death of decedent for many purposes, the courts are not

in accord as to whether it will relate back so as to validate an action brought prior to the appointment.

In *Gatfield agt. Hanson, et al*, 57 How. Pr. (N.Y.) 331, the heirs, not purporting to act for the estate, instituted the action to collect a mortgage which decedent owned at the time of her death. Thereafter one of them was appointed administrator. In dismissing the action, the court said: "As John H. Gatfield had no legal title or right to the mortgage when the action was commenced, his subsequent appointment cannot uphold the suit. The question is, what right had he when he instituted the suit? His subsequent appointment as administrator *de bonis non* cannot give validity to an action commenced before the appointment. . . ."

In *Pearson v. Anthony*, Iowa, 254 N.W. 10, decedent died November 20, 1931. On February 9, 1932, his wife, *alleging that she was the duly appointed administratrix*, instituted an action to recover damages for his wrongful death. The truth was that she expected to be appointed sometime in the future but, because of a lack of funds she had not secured her appointment. She was actually appointed on February 17, 1933 — after the statute of limitations had barred the action. The court said the question was whether the action of an individual *pretending* to act as administratrix were effective to commence the action and thereby avoid the bar of the statute of limitations. It answered the question in the negative and dismissed the suit.

In *Clinchfield Coal Corporation v. Osborne's Adm'r.*, 114 Va. 13, 75 S.E. 750, (1912) suit was brought *in the name of K as administrator* of the estate of O to recover damages for the wrongful death of O from the defendant Coal Corporation. No question of the statute of limitations was involved. *After verdict* it was discovered that by some mistake or inadvertence no order had been entered appointing K administrator. The order of appointment was then signed and judgment entered upon the verdict. Upon appeal, the case was sent back for a new trial on other grounds, but the court held that the appointment after verdict was valid and related back to the institution of the action. Among other authorities, it relied upon *Doolittle v. Lewis*, 7 Johns. Ch. (N.Y.) 49, 11 Am. Dec. 389, in which Chancellor Kent was quoted as follows: "If a party sues as executor or administrator, without probate or taking out letters of administration, the taking them out at any time before the hearing will cure the defect and relate back so as to make the bill good from the beginning. In a light so merely formal is that omission viewed."

In *Griffin v. Workman*, Fla., 73 So. 2d 844, G died on November 28, 1950. On November 26, 1952 plaintiff, the father of the decedent, in-

stituted an action for his wrongful death as *administrator of his estate.* At that time the father was not the administrator. Two days later he petitioned for appointment and an order was entered reciting that upon taking the oath and filing the specified bond, letters would be granted. Letters were actually issued on January 31, 1953. On January 9, 1953 defendant moved to dismiss the action and the trial court allowed the motion. In reversing the dismissal, the Supreme Court reasoned: The death action was the only asset of the estate; the suit was brought by the person entitled to administer; no fraud or inequity was involved and no new cause of action was presented by allowing the father to prosecute the action to a conclusion. "We think, therefore," said the court, "that the issue is ruled by the ancient doctrine 'that whenever letters of administration or testamentary are granted they relate back to the intestate's or testator's death. . . .' " No plea of the statute of limitation was there involved, but the court said that such a plea would not necessarily have changed its conclusions.

In *Anderson v. Union Pac. R. Co.,* Utah, 289 P. 146, plaintiff, *alleging that he was the administrator of G's estate,* instituted an action to recover for the wrongful death of his intestate. Although the district court had entered an order for plaintiff's appointment and he had filed his bond as directed in the order, on the trial it was discovered that he had failed to take the oath of office. Consequently, his letters had not been issued. During the trial plaintiff took the oath and letters were issued. The court held that the letters *related back to the time of the order* validating the institution of the action which was for the benefit of the estate.

It is a long established rule in the Federal courts that a lack of letters of administration may be cured, and an objection to want of capacity to sue, may be avoided by amendment or by substitution of the proper party at any time before hearing. Later appointments of this nature will relate back and validate the proceedings from the beginning regardless of the statute of limitations. *Lopez v. United States, supra; Deupree v. Levinson,* 186 F. 2d 297 and cases therein cited.

A case on all fours with the instant case is *Douglas v. Daniels Bros. Coal Co.,* 135 Ohio St. 641, 22 N.E. 2d 195, 123 A.L.R. 761. There, decedent died October 28, 1935. His wife, as administratrix, instituted an action for his wrongful death on October 27, 1937—one day before the statute of limitations would have barred the action. Prior to that date, after having presented herself to the probate court asking to be appointed, she had received forms from the court which she erroneously believed to be letters of administration. Thereafter she informed her counsel that she had been appointed, and the error was not discovered

until preparations were being made for the trial. She was actually appointed on November 27, 1937, more than two years after the date of death. Thereafter she filed an amended complaint in which she alleged the above facts and attempted to ratify her act in commencing the action. *Inter alia,* defendant interposed these defenses: (1) Plaintiff did not have legal capacity to sue at the time she instituted the action, and (2) at the time of filing the amended petition the action was barred by the two year statute of limitations for wrongful death actions. The trial court sustained these defenses and directed a verdict for the defendant. The Court of Appeals reversed, quoting from the earlier case of *Archdeacon v. Cincinnati Gas & Electric Co.,* 76 Ohio St. 97, 81 N.E. 152 as follows:

> ". . . . (T)he motion to dismiss, was based upon a mere technicality. The plaintiff having fully qualified as administrator, before the case was reached for trial, every right of the defendants upon the merits of the case was fully preserved, and in no possible aspect could the delay in perfecting the bond and receiving the letters of administration prejudice the defense of the defendants upon the real meritorious question involved in the controversy, which was whether or not the defendants' negligence was the cause of the death." *Douglas v. Daniels,* 62 Ohio App. 1, 22 N.E. 2d 1003.

On appeal, the Supreme Court of Ohio sustained the Court of Appeals, saying:

> "The amendment corrects the allegations of the petition with respect to plaintiff's capacity to sue and relates to the right of action as contradistinguished from the cause of action. A right of action is remedial, while a cause of action is substantive, and an amendment of the former does not affect the substance of the latter. See 1 Bouv. Law Dict., Rawles Third Revision, page 295; Pomeroy's Code Remedies, 5th Ed., 526 *et seq.,* Section 346 *et seq.;* 1 Cyc., 642. An amendment which does not substantially change the cause of action may be made even after the statute of limitations has run.
>
> ". . . .
>
> "We hold that where a widow institutes an action as administratrix, for damages for the wrongful death of her husband, under the mistaken belief that she had been duly appointed and had qualified as such, thereafter discovers her error and amends her petition so as to show that she was appointed administratrix after

the expiration of the statute of limitation applicable to such action, the amended petition will relate back to the date of the filing of the petition, and the action will be deemed commenced within the time limited by statute."

This case was the subject of an annotation in 123 A.L.R. 768 (1939) in which the commentator stated that no other case had been found which involved the question of an amendment to a complaint after limitation had run, so as to allege the subsequent valid appointment of a plaintiff who *had professed to bring the action initially in his representative capacity as executor or administrator.*

The Ohio Court has since made it clear that the doctrine of relation back validates only those actions of a personal representative which are for the benefit of the estate. Where it was discovered that letters of administration had been applied for but not issued to the *defendant administrator* until after the expiration of the statute of limitations as to a tort action against the estate, the court held there was no relation back. *Wrinkle v. Trabert,* 174 Ohio St. 233, 188 N.E. 2d 587.

We think that the reasoning of the Ohio Court in *Douglas v. Daniels Bros. Coal Co., supra,* is sound and applicable to the facts of the instant case. Unlike *Pearson v. Anthony, supra,* our case was not instituted by one *pretending* to be the administrator. Plaintiff, in good faith, and with some reason, albeit mistakenly, believed herself to be the duly appointed administratrix of the estate of Paul Junior Graves at the time she instituted the suit. Prior to the filing of the complaint plaintiff had applied for appointment; the Clerk had entered an order adjudging that she was entitled to letters of administration upon taking the oath and giving the bond. She had taken the oath, signed the bond as principal, and left it with the Clerk pending the signature of the surety. The bond recites that it was signed, sealed, and delivered in the presence of Madge C. Parker, Assistant Clerk of the Superior Court of Guilford County on August 7, 1958. The signature of the surety was the only remaining requirement for the issuance of letters. It is noted that the claim for wrongful death was the only asset of the estate and at that stage of the proceedings a nominal bond would have sufficed.

The basis of defendant's motion to dismiss the action is wholly technical. He has in nowise been prejudiced by the course of events. We therefore hold that, when issued, plaintiff's letters related back to the commencement of the action which was brought for the benefit of the estate prior to the bar of the statute of limitations, and that the complaint may properly be amended to allege the true facts. However, we must not be understood as holding that one who has never applied for letters or who, having applied, had no reasonable grounds for be-

lieving that he had been duly appointed, can institute an action for wrongful death, or any other cause, upon a false allegation of appointment and thereafter validate that allegation by a subsequent appointment. We think that the Iowa Court correctly dealt with a pretender.

For the reasons stated, the order of the court below dismissing the action is

Reversed.

J. T. INGRAM, EXECUTOR OF THE ESTATE OF EDITH K. MINISH v. W. A. JOHNSON, STATE COMMISSIONER OF REVENUE.

(Filed 19 December 1963.)

1. Taxation § 23—

Where the language of a taxing statute is plain and unambiguous, the courts must give its language its obvious meaning; but when the language leaves reasonable doubt, the courts will give it the meaning intended by the legislature as ascertained with reference to the particular factual situation, the legislative history. judicial interpretation of prior statutes dealing with the situation, and the changes, if any, made following a particular interpretation.

2. Taxation § 27—

Step grandchildren of testatrix who are the daughters of testatrix' stepchildren who predeceased testatrix, fall within Class A as defined by G.S. 105-4, and not class C as defined by G.S. 105-6, for the purpose of determining the rate of tax to be paid on properties bequeathed them.

APPEAL by plaintiff from *Campbell, J.*, March 25, 1963 Civil Session of CALDWELL.

Plaintiff seeks to recover the sum of $2,428.76 assessed as inheritance taxes owing in addition to the sum reported and paid by plaintiff. The sum assessed was paid under protest.

Plaintiff, as the basis for his demand, alleges these facts. Edith K. Minish, a resident of Caldwell County, died testate in October 1961. The pertinent part of her will reads: "All the rest and residue of my property, which I may die seized and possessed of, which includes all moneys, stocks and bonds of every kind and nature, I give to my step grandchildren, Mrs. Betty Sutton Nelson, Mrs. Nancy Sutton Young, Mrs. Ann Ingram Whisnant and Miss Sarah Ingram, they to share and share alike in the same." Mrs. Nelson and Mrs. Young are children of Maude Minish Sutton, a stepdaughter of testatrix. Mrs. Whisnant

and Miss Ingram are children of Pearl Minish Ingram, a stepdaughter of testatrix. Mrs. Sutton and Mrs. Ingram, stepchildren of Mrs. Minish, died prior to October 1961. Plaintiff, executor, filed his inheritance tax return and paid $338.24, the proper amount on the properties received by the named legatees if they are class A beneficiaries as plaintiff contends.

Defendant, by answer, admitted the facts alleged but asserted the facts stated placed the named legatees in class C. Hence the assessment was properly made.

Defendant moved for judgment on the pleadings. The motion was allowed. Judgment was entered dismissing the action.

Dickson Whisnant for plaintiff appellant.

Attorney General Bruton and Assistant Attorney General Barham for defendant appellee.

RODMAN, J. The only question presented by the appeal is this: In which class, A or C, do the named legatees fall for the purpose of determining the rate of tax to be paid on the properties they received under Mrs. Minish's will?

The answer is to be found by an interpretation and application of the appropriate statutes, G.S. 105-2, 3, 4, 5, and 6 to the admitted facts.

G.S. 105-4, so far as here pertinent, reads: "(a) Where the person . . . entitled to any beneficial interest in such property shall be the lineal issue, or lineal ancestor, or husband or wife of the person who died possessed of such property aforesaid, or stepchild of the person who died possessed of such property aforesaid, or child adopted by the decedent . . . at the following rates of tax . . . (Then follows a tabulated rate based on values.) (b) The persons mentioned in this class shall be entitled to the following exemptions: Widows, ten thousand dollars ($10,000.00), each child under twenty-one years of age, five thousand dollars ($5,000.00); all other beneficiaries mentioned in this section, two thousand dollars ($2,000.00) each: Provided, a grandchild or grandchildren shall be allowed the single exemption or pro rata part of the exemption of the parent, when the parent of any one grandchild or group of grandchildren is deceased or when the parent is living and does not share in the estate: Provided, that any part of the exemption not applied to the share of the parent may be applied to the share of a grandchild or group of grandchildren of such parent. The same rule shall apply to the taking under a will, and also in case of a specific legacy or devise . . ."

G.S. 105-5, captioned "Rate of tax—Class B," provides: "Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister or descendant of the brother or sister, or shall be the uncle or aunt by blood of a person who died possessed aforesaid, at the following rates of tax . . ."

G.S. 105-6, entitled "Rate of tax—Class C," provides: "Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of relationship or collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the person who died possessed as aforesaid, or shall be a body politic or corporate, at the following rates of tax . . ."

Legislative intent is the test to be applied where a statute classifies persons for the purpose of measuring their tax liability. *Sale v. Johnson, Commissioner of Revenue,* 258 N.C. 749, 129 S.E. 2d 465; *Canteen Service v. Johnson, Comr. of Revenue,* 256 N.C. 155, 123 S.E. 2d 582; *Shue v. Scheidt, Comr. of Motor Vehicles,* 252 N.C. 561, 114 S.E. 2d 237; *Watson Industries v. Shaw, Comr. of Revenue,* 235 N.C. 203, 69 S.E. 2d 505.

Interpretation is of course unnecessary where the words used are so plain and unambiguous that no doubt can exist as to legislative intent and the proper application of the statutory language to a particular factual situation; but when the words used leave reasonable doubt as to what the Legislature intended with respect to a particular factual situation, it is proper to look to legislative history, judicial interpretation of prior statutes dealing with the question, and the changes, if any, made following a particular interpretation. *Insurance Co. v. Johnson, Comr. of Revenue,* 257 N.C. 367, 126 S.E. 2d 92; *Cab Co. v. Charlotte,* 234 N.C. 572, 68 S.E. 2d 433.

By clear and express language, if the property had been given to Mrs. Sutton or Mrs. Ingram, parents of the legatees, their tax liability would be computed at the rate charged to class A beneficiaries. Does this classification extend to their children? Plaintiff says the answer should be yes. Defendant says it should be no.

Defendant would deny A classification to anyone other than those named in subsec. (a), G.S. 105-4, thereby confining the classification to lineal issue or stepchild or adopted child. He would ignore the provisions of subsec. (b).

That subsection grants exemptions to "the persons mentioned in this class." What class? Manifestly the language refers to class A beneficiaries. No exemptions are allowed to class B or class C beneficiaries. The exemptions allowed class A beneficiaries are "each child under twenty-one years of age, five thousand dollars ($5,000.00); all other

beneficiaries mentioned in this section, two thousand dollars ($2,-000.00) each . . ." If defendant's reasoning is correct, the Legislature intended to prevent a testator from conferring equal benefits on stepchildren and natural children. The natural, if under twenty-one, would get a $5,000 exemption; but the stepchild, if of like age, could not get that exemption. He would be limited to $2,000. We do not believe the Legislature intended to force the testator to draw a distinction between his children, whether they are stepchildren or natural children. Especially is this so when, by subsec. (a), it has expressly authorized him to accord them equality.

The first proviso in subsec. (b) permitting grandchildren to take the exemption a parent would have taken is of course limited to the children of a natural child, because a stepchild does not, under our statutes of descent and distribution, succeed to the estate of his stepparent. A stepchild can take only by will. To protect the stepchildren as well as the natural children who may take, not by descent but by will of the person last seized, the Legislature said: "The same rule shall apply to the taking under a will, and also in case of a specific legacy or devise." Does not this language mean that a stepparent, instead of giving to a stepchild who would be entitled to an exemption, might give to the child of a stepchild without depriving the legatee of the exemption his parent could claim? Certainly this is a reasonable interpretation of the language used.

If a husband died, leaving a widow and a stepchild, child of the widow, and devised all, or substantially all, of his property to his widow, would she be limited to a $10,000 exemption or could she claim an exemption of $15,000—$10,000 for herself and $5,000 for her minor child? The last proviso of subsec. (b) would, we think, entitle the widow to claim an exemption of $15,000; but defendant's interpretation would limit her exemption to $10,000.

Our present inheritance statute had its origin in c. 9, P.L. 1901. That Act gave all who acquired property as the result of the death of another an exemption of $2,000. It fixed five classes of beneficiaries, each to be taxed at a different rate. The first class, now class A, was composed of "lineal issue or lineal ancestor, brother or sister." Property passing to a wife or husband or for religious, charitable, or educational purposes was exempt from taxation.

The next session of the Legislature enlarged the first class of beneficiaries so as to include those who "stood in the relation of child to the person who died possessed . . ." c. 247, P.L. 1903.

The language of these acts carried forward in subsequent revenue acts was interpreted in *S. v. Bridgers*, 161 N.C. 246, 76 S.E. 827, de-

cided in December 1912. It was there held by a divided Court that the $2,000 exemption applied to all beneficiaries. Chief Justice Clark and Justice Walker dissented from this conclusion, but the Court was unanimous in its holding that daughters-in-law were within the language, "stood in the relation of child to the person who died seized."

The Revenue Act of 1913, ratified in March, c. 201, P.L. 1913, added to those included in the first class "husband or wife." It further said: "The persons mentioned in this class, except as is hereinafter otherwise provided, shall be entitled to an exemption of two thousand dollars ($2,000) each: *Provided,* grandchildren shall be allowed only the single exemption of the child they represent: *Provided,* a widow shall be entitled to an exemption of ten thousand dollars and each child under twenty-one years of age to an exemption of five thousand dollars."

Brothers and sisters were stricken from the first class and put in the second class. Only those in the first class were allowed an exemption.

The Revenue Act of 1915, c. 285, P.L. 1915, struck from the list of first class beneficiaries those who "stood in the relation of child to the person last possessed," and inserted in lieu thereof the words "adopted child." It reduced the classes from five to three, the present number. These changes were apparently made in response to the decision of this Court, *In re Inheritance Tax,* 168 N.C. 352, 84 S.E. 360.

In 1921, c. 34, the Legislature enlarged the first class beneficiaries so as to include "son-in-law or daughter-in-law or stepchild of the person who died possessed of such property aforesaid, or any person to whom the decedent stood in the mutually acknowledged relation of a parent, and who began such relationship at or before such person's fifteenth birthday, and whose relationship was continuous from such age until the date of the decedent's death."

The Legislature, by the Revenue Act of 1925, c. 101, P.L. 1925, added to the proviso giving a grandchild the exemption his parent would have taken this phrase: "and the same rule shall apply to the taking under a will and also in case of specific legacy or devise."

This amendment would appear to be superfluous if limited to natural grandchildren—they had been provided for in the previous provision—but essential to permit stepgrandchildren to take the exemption.

The Revenue Act of 1927, c. 80, rewrote subsec. (a) to read as now appears in G.S. 105-4. It added the last proviso to subsec. (b). There has, as affecting the decision in this case, been no material amendment since 1927.

We think a reading of the entire inheritance tax statute shows that the Legislature did not use the word "grandchildren" in a technical or

restricted sense, *Owens v. Munden,* 168 N.C. 266, 84 S.E. 257, but intended to place his children, natural, step, or adopted, in the same category. Our interpretation of the language used as it appears in the present statute is strengthened and fortified by an examination of preceding statutes imposing inheritance taxes. *In Re Bousman's Estate,* 44 P. 2d 1038.

Reversed.

DOLLIE M. WADSWORTH (WIDOW) v. WALTER B. WADSWORTH, JR. (MINOR), AND L. AUSTIN STEVENS, GUARDIAN AD LITEM FOR WALTER B. WADSWORTH, JR. (MINOR).

(Filed 19 December 1963.)

1. Judicial Sales § 1—

There must be an order for a judicial sale entered by a court having jurisdiction of the subject matter and the parties as prerequisites of a valid judicial sale.

2. Judicial Sales § 4—

Confirmation cannot validate a void judicial sale.

3. Judicial Sales § 2—

The court has discretionary power to order either a public or private sale of an interest in land owned by a minor who is represented by a guardian *ad litem.* G.S. Ch. 1, Art. 29A.

4. Judicial Sales § 3—

Every private sale of real property under order of the court is subject to upset bids, G.S. 1-339.36(a) and upon the filing of an upset bid G.S. 1-339.27(a) applies, and to all intents and purposes the sale thereafter becomes a public sale and is subject to the statutory requirements of resale.

5. Same— Reports of intermediate bids as sales by commissioner authorized to sell to highest bidder at private sale is irregularity.

Where order for a private sale is entered by the court having jurisdiction of the parties and the subject matter, and the order directs the sale to be for cash to the highest bidder, and the commissioner receives a series of bids from two interested parties, and reports each bid to the court as a "sale," but no order for resale is made or any order for sale to any intermediate bidder with provision for such sale to stand for confirmation in default of an upset bid, the confirmation of the last and highest bid received constitutes but a single private sale in accordance with the order of the court, and the report of the commissioner of each bid as a "sale" is but an irregularity.

6. Judicial Sales § 7—

The purchaser at a judicial sale may not avoid his obligation to comply with his bid after confirmation for mere irregularities which do not prejudice him, there being no mistake, fraud, or collusion.

APPEAL by plaintiff and defendant from *Braswell, J.*, April 1963 Session of JOHNSTON.

Proceedings for sale of standing timber.

The petition, filed 8 May 1962, alleges in substance the following facts: Walter B. Wadsworth, Sr., died intestate in January 1956 seized of certain real estate, including two tracts of land in Bentonville Township, Johnston County, aggregating approximately 725 acres. Plaintiff, widow of intestate, has an unallotted dower interest in these tracts, and defendant, 16-year old son and only heir of intestate, owns said tracts in fee subject to plaintiff's dower. The 725 acres are woodlands, having a considerable growth of timber, mainly hardwood, which has reached maturity. Because the timber is mature, some of it is beginning to deteriorate in quality and decrease in value. It would be for the best interests of plaintiff and defendant that the timber be sold and from the proceeds plaintiff be paid the present cash value of her dower interest and the remainder be invested for the benefit of the minor defendant. The best price can be obtained by a private sale since the acreage is large and it will require considerable time for prospective buyers to "cruise" and estimate the timber.

A guardian *ad litem* was duly appointed for defendant and he filed answer, verified 30 May 1962, admitting all the allegations of the petition and averring that the timber is mature and ready for cutting and, due to the hazards of fire, decay and disease, it would be for the best interest of the minor defendant that it be sold.

The clerk of superior court found as facts the matters, in detail, alleged in the petition and answer, and ordered, adjudged and decreed "that the sale of the timber . . . is necessary for the best interest of the preservation of the estate of said minor defendant," that E. V. Wilkins is appointed commissioner of the court and is "authorized, empowered and directed to sell said timber at a private sale for cash to the highest bidder, said private sale to be conducted according to the law regulating said private sales," and "that the highest bidder be required to make a deposit of ten (10) per cent of his bid as evidence of good faith and that said commissioner shall report said sale to the court for confirmation." The cause was retained for further orders.

Ward Lumber Company (hereinafter Ward) and Stimson Lumber Company (Stimson) were interested in purchasing the timber. They alternately offered bids as detailed in the following table:

Date	*Bidder*	*Amt. of Raise*	*Bid*
Oct. 29, 1962	Ward		$15,000.00
Nov. 8	Stimson	$ 800.00	15,800.00
Nov. 12	Ward	840.00	16,640.00
Nov. 23	Stimson	882.00	17,522.00
Nov. 30	Ward	926.10	18,448.10
Dec. 10	Stimson	972.40	19,420.50
Dec. 20	Ward	1,021.00	20,441.50
Dec. 31	Stimson	1,072.08	21,513.58
Jan. 10, 1963	Ward	1,125.68	22,639.26
Jan. 21	Stimson	1,181.96	23,821.22

The bids were for all merchantable timber, 14 inches in diameter, 10 inches above the ground, with a period of 5 years from the date of the deed for removal of the timber. The commissioner required the bidders to raise the previous bid in the minimum amount fixed by statute for raises in judicial sales. G.S. 1-339.25. Bids remained open for 10 days. The commissioner reported to the court each bid he received, and in each report stated that he verily believed the price offered was fair and as much or more than the timber would bring at public auction, and recommended that "the matter be allowed to remain open for ten days as by law required and that if no advance bid is filed with the court that the sale hereby reported be confirmed." There were no orders of resale after bids were raised.

On 5 February 1963 the clerk signed an order confirming the sale of the timber to Stimson for the price of $23,821.22. The order was approved by MacRae, J. It recited in detail the bids which had been offered and reported, the terms of sale, and that no advance bid had been offered within 10 days after the last report. The order decreed that a sale of the timber to Stimson on the terms and for the price stated ($23,821.22) "is hereby directed and in all respects confirmed." The commissioner was directed, upon receipt of the purchase money, to execute and deliver to Stimson "a good and sufficient timber deed."

Upon tender of the deed to Stimson, it refused to accept the deed and pay the purchase money. Plaintiff, defendant and the commissioner petitioned for an order requiring Stimson to show cause why it should not comply. The petitioners expressly ratified the sale and attached to the petition affidavits of third persons to the effect that the price last offered by Stimson was fair and adequate and "as much, if not more, than anyone would give for same *(sic)* at either public or private sale."

The clerk made an order requiring Stimson to appear 22 March 1963 and show cause why it should not be compelled to honor its bid. Stim-

son answered the petition and asserted that the sale was void for failure of compliance with certain provisions of G.S., Ch. 1, Art. 29A, especially G.S. 1-339.1 to G.S. 1-339.40, in that there were no orders of resale. Stimson requested that its deposit of $1,181.96 be refunded.

There was a hearing pursuant to the show cause order, and the clerk ordered Stimson to honor its bid. Stimson appealed to superior court.

Judge Braswell found, among other things, the following pertinent facts:

> "4. That on June 6, 1962, the Clerk of the Superior Court of Johnston County entered an order appointing E. V. Wilkins commissioner to sell said timber as described in the Petition at private sale according to the laws regulating private sales.
>
> "5. That, pursuant to said order, the Commissioner obtained a private bid in the amount of $15,000.00; that within 10 days, Stimson Lumber Company, Inc. raised the bid on said timber in the amount required by law; that thereafter, on different dates, E. V. Wilkins, purporting to act as Commissioner, received private bids through January 1, 1962 *(sic)*.
>
> "6. That the last private bid was in the amount of $23,821.22 received from Stimson Lumber Company, Inc., and that a deposit of $1,181.96 was made with the said E. V. Wilkins.
>
> "7. That no order of sale was signed, issued or entered authorizing or directing E. V. Wilkins, Commissioner, to receive any bids other than the original order which was entered on June 6, 1962; that on February 5, 1963, an order of confirmation was entered by the Clerk of the Superior Court, which was approved by his Honor James MacRae, Judge of the Superior Court, as appears of record.
>
> "8. That immediately after the confirmation order was signed E. V. Wilkins notified Stimson Lumber Company, Inc., that he was ready to deliver to said Stimson Lumber Company, Inc. a deed upon payment of the purchase price.
>
> "9. That the said Stimson Lumber Company, Inc. declined to accept the deed for said timber for that said E. V. Wilkins could not convey a good and marketable title to said timber on account of the irregularities in the proceeding and the lack of authority of said E. V. Wilkins to receive bids or to offer said timber for sale;
>
> . . . . .
>
> "11. That there was no order authorizing or directing a public sale at auction, after the raised bid made subsequent to the first

private sale bid and that all subsequent purported private sales and raised bids at private sales and the last bid, as made and tendered by the prospective high bidder, Stimson Lumber Company, Inc., is a nullity.

"12. That the requirements as to procedure relating to Judicial Sales under the Statute when a raise of bid is made, are mandatory.

"13. That Stimson Lumber Company, Inc. is entitled to have refunded to it by E. V. Wilkins, acting as Commissioner, the deposit which it made in the amount of $1,181.96."

Upon the foregoing findings the court decreed that the sale was a nullity and ordered that Stimson's deposit be refunded. Plaintiff, defendant and the Commissioner appeal.

L. Austin Stevens, Guardian Ad Litem for Walter B. Wadsworth, Jr.
E. V. Wilkins for appellants.
Albert A. Corbett for appellee, Stimson Lumber Company, Inc.

MOORE, J. Appellee contends, and the court below concluded, that the purported sale of the timber to appellee at the price of $23,821.22 is void for failure of the clerk to make orders of resale vesting the commissioner with authority therefor.

There are certain absolute prerequisites of a valid judicial sale. ". . . (I)t is necessary, in order that a judicial sale may be validly made, that the court by which it was ordered shall have the general power to decree a sale, and that in a particular case the jurisdiction of the court over the subject matter and parties shall have been acquired in a proper manner." 50 C. J. S., Judicial Sales, s. 2, p. 579. "There can be no valid judicial sale without an order or decree directing it . . . ." *ibid*, s. 8, p. 582. Accord: *Cherry v. Woolard*, 244 N.C. 603, 94 S.E. 2d 562; *Powell v. Turpin*, 224 N.C. 67, 29 S.E. 2d 26; *Park, Inc. v. Brinn*, 223 N.C. 502, 27 S.E. 2d 548.

"Confirmation cannot supply the lack of original authority to make the sale, as where . . . the officer selling acted without authority, for a sale without authority is a mere nullity and cannot be given legal validity by the recognition and ratification which confirmation supplies." 30A Am. Jur., Judicial Sales, s. 143, p. 985.

The clerk of superior court, without question, has general jurisdiction of special proceedings, and in the instant case had jurisdiction of the subject matter and parties, and made an order, initially, decreeing a sale of the timber, appointing a commissioner to make the sale, and

authorizing and directing a *private* sale thereof. The narrow question presented is whether under the circumstances of this case an order of resale, or orders of resale, was or were mandatory.

As a general proposition, in appropriate circumstances "an order of resale is always proper and generally necessary in order to charge a defaulting purchaser." 50 C.J.S., Judicial Sales, s. 70, p. 695.

Under our former statute, the court having jurisdiction might, in the exercise of its discretion, order a sale of land where minors were interested and represented by guardian *ad litem*, either at public or private sale. *Ryder v. Oates,* 173 N.C. 569, 92 S.E. 508. The court likewise has this discretion under the 1949 act, G.S., Ch. 1, Art. 29A. This act does not specify the conditions under which a private sale may be ordered and it is therefore a discretionary matter for the court in a particular case. The number of persons interested in the purchase of large bodies of standing timber is much more limited than in the purchase of such real estate as farms, homes and small parcels of land. In the sale of such timber a commissioner, if permitted to sell privately, has freedom to canvass prospective buyers, give time for viewing and estimating the timber, and negotiate directly with prospects, without being restricted by the formal requirements of a public sale.

Every private sale of real property is subject to an upset bid. G.S. 1-339.36(a). Such upset bid shall be submitted to the court within 10 days after the filing of the report of sale, and shall be in an amount specified by statute. G.S. 1-339.25. "When an upset bid is made for property sold at private sale, subsequent procedure with respect thereto shall be the same as for the public sale of real property for which an upset bid has been submitted . . . ." G.S. 1-339.36(b). Thus, when an upset bid is submitted in a private sale, G.S. 1-339.27 applies and to all intents and purposes the sale thereafter becomes a public sale. When the upset bid is submitted to the court, a resale shall be ordered, a notice of the resale shall be posted at the courthouse door for 15 days immediately preceding the sale and published in a newspaper once a week for two successive weeks. G.S. 1-339.27.

The order of sale entered by the clerk on 6 June 1962 authorized the commissioner to sell the timber "at a private sale for cash to the *highest bidder,* said private sale to be conducted according to the law regulating said private sales," and ordered the commissioner to "report said sale to the court for confirmation." It will be observed that the court did not order a sale to Ward for $15,000, such sale to stand for confirmation in default of an upset bid. The order was to sell "to the highest bidder." That is, to the bidder who offered the highest price. There is nothing in the statute which restricts the court in laying down guide

lines and giving directions for the making of a private sale in the first instance. Indeed, it is the duty of the court to give directions to the commissioner. "Except to the extent that they are not controlled by statute, the terms of a judicial sale are within the discretion of the court." 50 C.J.S., Judicial Sales, s. 13, p. 596.

There were ten bids, but in our opinion only one sale, and that *to the highest bidder* as the court had ordered. It is true that the commissioner reported the bids as if they were sales, and followed the provisions of G.S. 1-339.25 in the acceptance of bids. Even if he proceeded under a misapprehension of his duty and a misunderstanding of the order under which he acted, the substance of what he did was a sale at the highest bid received by him. That he kept the court advised of his progress, bid by bid, by making what purported to be reports of sales, does not alter the fact that the sale to the highest bidder was in compliance with, and within the terms of, the order of sale. If he had only reported the last bid received by him, appellee's contention would never have arisen. The excessive reports are mere irregularities. The presumption is in favor of the validity of judicial proceedings. *Johnson v. Sink,* 217 N.C. 702, 9 S.E. 2d 371. There was only one sale and no necessity for an order of resale.

One who seeks relief by reason of irregularities in the proceedings must show that he has been prejudiced thereby. *Franklin County v. Jones,* 245 N.C. 272, 95 S.E. 2d 863; *Harris v. Brown,* 123 N.C. 419, 31 S.E. 877; *Stancill v. Gay,* 92 N.C. 455; *Hervey & Co. v. Edmunds,* 68 N.C. 243; 50 C.J.S., Judicial Sales, s. 62, p. 685. A decree of confirmation entered by a court of competent jurisdiction may not be set aside as to the purchaser, when the proceedings are merely irregular except for mistake, fraud or collusion. *Franklin County v. Jones, supra.* There is nothing in the record which indicates that the purchaser, Stimson, has been prejudiced by the irregularities indicated. So far as the record discloses it was dealing at arm's length, it made an offer of $23,821.22, the offer was accepted and it is bound by its contract.

Proceedings outlined by statute for the holding of judicial sales (exclusive of the absolute prerequisites referred to in the outset of this opinion) and giving notice thereof are "merely methods of administration and disposition of property by fiduciary officers, their purpose being that the price received shall be greater, and not that the title given shall be better." 50 C.J.S., Judicial Sales, s. 16, p. 601; *Putnam v. Connor,* 80 S. 265.

The judgment below is

Reversed.

ERTLE OXENDINE, BY HIS NEXT FRIEND, PEARL OXENDINE v. BRONFORD LOWRY.

(Filed 19 December 1963.)

1. Trial § 21—

On motion to nonsuit, plaintiff's evidence will be considered in the light most favorable to him, giving him the benefit of every reasonable inference to be drawn therefrom, and so much of defendant's evidence as is favorable to plaintiff may also be considered.

2. Automobiles § 41s—

Evidence favorable to plaintiff which tends to show that plaintiff was riding his bicycle on the right side of the highway, that the bicycle was equipped with a reflector on the rear as required by G.S. 20-129(e), and that plaintiff was struck from the rear by the automobile driven by defendant, who had drunk some beer and was traveling at excessive speed and rammed the bicycle without slackening speed or sounding his horn, etc., *is held* sufficient to be submitted to the jury on the issue of defendant's negligence.

3. Negligence § 7—

Only negligence which constitutes a proximate cause of injury is of legal import, either on the issue of negligence or the issue of contributory negligence.

4. Evidence § 3—

The courts will take judicial notice of the fact that in this State 8:15 p.m. on June 4 is more than a half hour after sunset.

5. Automobiles § 11—

The statutory provisions prescribing lighting devices to be used at night on vehicles, including bicycles, were enacted in the interest of public safety, and the violation of the statutory provisions is negligence *per se.* G.S. 20-129(e), G.S. 20-38(ff).

6. Negligence § 7—

Ordinarily, the question of proximate cause is for the determination of the jury and it is only when the facts are all admitted and only one inference may be drawn from them that the court may declare whether an act was a proximate cause of an injury or not.

7. Automobiles § 42m— Absence of front bicycle lamp held not proximate cause or contributing cause to collision from the rear.

Where plaintiff's evidence fails to show that his bicycle was equipped with a lighted lamp on the front thereof as required by statute, but does show that he had a reflecting mirror on its rear as required by the statute, G.S. 20-129(e), and that plaintiff's bicycle was hit from the rear by a car operated by defendant, and there is no evidence in the record that if the bicycle had been equipped with a front lamp the lamp would have been visible to a person approaching in an automobile from the rear of the bicycle, *held* the only legitimate inference is that the absence of a lighted

lamp on the front of the bicycle was not a proximate cause or a contributing proximate cause of the collision, and the court may properly charge the jury to this effect.

APPEAL by defendant Bronford Lowry from *McKinnon, J.*, February-March 1963 Civil Session of ROBESON.

Civil action to recover damages for personal injuries sustained by a sixteen-year-old boy, when the bicycle he was riding on a highway at night was struck from the rear by an automobile owned by and registered in the name of Hazel Lowry Cribb, and driven by her brother Bronford Lowry.

Plaintiff's evidence considered in the light most favorable to him shows the following facts: At the scene of the tragedy hereinafter set forth Rural Paved Road #1513 is a level, straight paved road for a mile or more with pavement about 18 feet wide and with dirt shoulders on each side of the pavement. It runs in a generally northwest to southeast direction, and is known as the Buie-Lumberton public highway. About 8:15 p.m. on 4 June 1961, five boys were riding bicycles on the dirt shoulder or pavement of this road in a southeasterly direction toward Lumberton as follows: Ronson Lowry, eight years old and a son of Bronford Lowry, was riding in front on the right dirt shoulder; behind him on the right dirt shoulder was his brother Kenneth Lowry, thirteen years old; behind him on the right dirt shoulder was Bob Allen Wilkins, fifteen years old; behind him on the right-hand edge of the pavement about six inches from the dirt shoulder was the plaintiff; and about five yards behind him to his left and closer to the center line of the road was Scotty Jones, fourteen years old and a son of Hazel Lowry Cribb. All five of the bicycles had red reflectors on them. Plaintiff's bicycle had a red reflector about two inches wide on the rear fender visible under normal atmospheric conditions from a distance of more than two hundred feet to the rear of the bicycle, when used at night. His grandmother Pearl Oxendine testified: "He would ride the bicycle ahead of the car on the way back (from a church revival), and I could see the reflector for about 500 yards * * *." His bicycle also had on it "spinners with reflector on the front." It did not have a lighted lamp on the front as required by G.S. 20-129(e).

Some distance ahead of these boys was a truck in the opposite lane of the highway, standing in front of a house, with its bright lights burning. Approaching these boys from behind and overtaking them was an automobile owned by and registered in the name of Hazel Lowry Cribb, and driven by her brother Bronford Lowry at a speed of 60 to 65 miles an hour. Without slacking speed this automobile struck

Scotty Jones and his bicycle and plaintiff and his bicycle. After hitting these two boys Bronford Lowry "slammed" on his brakes, stopped, and came back to the scene of the collision. In the collision Scotty Jones was killed, and plaintiff was grievously injured. One of the struck bicycles or both hit Bob Allen Wilkins and the two Lowry boys and knocked them in a ditch. E. J. Cummings, an eye witness, testified "the automobile did not give any kind of signal" before it struck the boys. When Bronford Lowry returned to the scene, he said "he couldn't see the boys, the lights were blinding him"—the lights of the parked truck.

Plaintiff did not know what had hit him. He testified: "Before I was hit in the back I didn't hear any car horn or warning from behind me, observed no flash of lights or blinking of lights or anything of that sort."

Appellant's evidence favorable to plaintiff is as follows: Tracy Bullard, a State patrolman and a witness for appellant, went to the scene and talked with Bronford Lowry, that Lowry appeared to be drinking and told him he drank two or three or four beers that day, and the last beer he drank was around 3:30 p.m. Appellant testified he does not wear glasses, that he cannot see out of his right eye as good as out of his left eye, and that the vision of his right eye is 25/100 and of his left eye 20/20.

Defendant's evidence in substance is as follows: The scene of the tragedy was open country. He was traveling 35 or 40 miles an hour on the right-hand side of the road. That none of the five bicycles was equipped with a lamp or reflector as required by G.S. 20-129(e). The patrolman carefully examined the bicycles at the scene and saw no evidence of reflectors or lamps on any of the bicycles. When he saw the bright lights of the truck ahead of him, he began slowing down. He saw nothing in front of him on the road. He was blinded for a minute when this truck was about 100 yards from him, and when so blinded he heard something hit his car. He stopped, turned around, and came back. He was not under the influence of the beer he had drunk earlier in the day.

The jury found by its verdict that plaintiff was injured by the negligence of Bronford Lowry as alleged in the complaint, that plaintiff did not contribute to his injuries as alleged in the answer, and awarded him damages in the amount of $5,000.

From a judgment that plaintiff recover $5,000, with his costs, from Bronford Lowry, he appeals.

Ellis E. Page for defendant appellant.
McLean & Stacy for plaintiff appellee.

PARKER, J. Defendant offered evidence. Considering plaintiff's evidence in the light most favorable to him and giving him the benefit of every reasonable inference to be drawn therefrom, and considering so much of defendant's evidence as is favorable to him, the court properly submitted the case to the jury, and defendant's assignment of error to the court's denial of his motion for judgment of compulsory nonsuit made at the close of all the evidence is overruled. G.S. 1-183; *Rosser v. Smith, ante,* 647, 133 S.E. 2d 499.

Defendant in his answer alleged a conditional plea of contributory negligence on plaintiff's part to bar recovery. Among the various acts of alleged negligence by plaintiff, which defendant avers contributed proximately to his injuries, is the allegation that plaintiff was negligent in operating his bicycle in the nighttime and more than a half hour after sunset on Rural Paved Road #1513 without having his bicycle equipped with a lighted lamp on the front thereof, visible under normal atmospheric conditions from a distance of at least three hundred feet in front of his bicycle, and without having his bicycle equipped with a reflex mirror or lamp on the rear, exhibiting a red light visible under like conditions from a distance of at least two hundred feet to the rear of such bicycle, in violation of G.S. 20-129(e).

Plaintiff's evidence shows that on this occasion his bicycle was not equipped with a lighted lamp on the front thereof when he was struck.

The court in its charge in respect to the second issue of contributory negligence of plaintiff stated *ipsissimis verbis* G.S. 20-129(e), and immediately thereafter charged the jury as follows, which appellant assigns as error:

> "And so that statute requires that a bicycle when used or operated at night, shall have a lighted light on the front, visible under normal atmospheric conditions, from a distance of at least 300 feet in front of the bicycle. With respect to that portion, gentlemen, and I understand it is admitted by plaintiff in his testimony that he had no lighted lamp upon the front of his bicycle, and I instruct you that the provision respecting a front lamp on a bicycle, is designed for the benefit of those approaching a bicycle from the front, for the protection of the cyclist from such. It does not require a light of such intensity as to render objects visible along the highway in front of a bicycle, and the violation of the statute in respect to failing to have a headlight as required by the law, I instruct as a matter of law would not be a proximate cause of a collision resulting from plaintiff being struck in the rear, as alleged in this action."

It is a fundamental principle that the only negligence of legal importance is negligence which proximately causes or contributes to the injury under judicial investigation. *McNair v. Richardson,* 244 N.C. 65, 92 S.E. 2d 459; *Cox v. Freight Lines* and *Matthews v. Freight Lines,* 236 N.C. 72, 72 S.E. 2d 25; *Smith v. Whitley,* 223 N.C. 534, 27 S.E. 2d 442; *Byrd v. Express Co.,* 139 N.C. 273, 51 S.E. 851.

We take judicial notice of the fact that in North Carolina about 8:15 p.m. on 4 June 1961 was within the period of time from a half hour after sunset to a half hour before sunrise. *Weavil v. Myers,* 243 N.C. 386, 90 S.E. 2d 733; 31 C.J.S., Evidence, p. 700.

Under G.S. 20-38(ff) of our Motor Vehicles Act, bicycles are "deemed vehicles, and every rider of a bicycle upon a highway shall be subject to the provisions of this article applicable to the driver of a vehicle except those which by their nature can have no application." *Tarrant v. Bottling Co.,* 221 N.C. 390, 20 S.E. 2d 565; *Van Dyke v. Atlantic Greyhound Corp.,* 218 N.C. 283, 10 S.E. 2d 727.

"The statutes prescribing lighting devices to be used by motor vehicles operating at night (G.S. 20-129 and 129.1) were enacted in the interest of public safety. *S. v. Norris,* 242 N.C. 47, 86 S.E. 2d 916. A violation of these statutes constitutes negligence as a matter of law." *Scarborough v. Ingram,* 256 N.C. 87, 122 S.E. 2d 798.

What is the proximate cause of an injury is ordinarily a question to be determined by the jury as a fact in view of the attendant circumstances. *Ervin v. Mills Co.,* 233 N.C. 415, 64 S.E. 2d 431; *Hoke v. Atlantic Greyhound Corp.,* 226 N.C. 692, 40 S.E. 2d 345. When more than one legitimate inference can be drawn from the evidence, the question of proximate cause is to be determined by the jury. *Lincoln v. R.R.,* 207 N.C. 787, 178 S.E. 601. "It is only when the facts are all admitted and only one inference may be drawn from them that the court will declare whether an act was the proximate cause of an injury or not. But that is rarely the case." *Conley v. Pearce-Young-Angel Co.,* 224 N.C. 211, 29 S.E. 2d 740.

It would seem that the trial judge in giving the challenged part of the charge quoted above followed *Spence v. Rasmussen,* 190 Ore. 662, 226 P. 2d 819. This was an action to recover damages for death of a bicyclist when an overtaking truck collided with his bicycle. The collision occurred 26 January 1948 about the hour of 6:10 a.m. in Jackson County, Oregon, on U. S. Highway 99. The sun rose at 7:20 a.m. that day. The weather was clear and the pavement was dry. There was evidence the bicycle was equipped with an ordinary bicycle front lamp (electric) and with a red reflector on the rear, but that the front lamp on the bicycle was not burning. Section 115-368, O. C. L. A., as amend-

ed by ch. 16, Oregon Laws 1947, provided: "(b) * * * Every bicycle shall be equipped with a lamp on the front exhibiting a white light visible from a distance of at least 500 feet to the front of such bicycle, and with a red reflector on the rear, and of such size or characteristics and so mounted as to be visible at night from all distances within 300 feet to 50 feet from the rear of such bicycle. A red light visible from a distance of 500 feet to the rear may be used in addition to the rear reflector." The Court said:

> "This provision respecting a front lamp on a bicycle is designed for the benefit of those approaching a bicycle *from the front* and for the protection of the bicyclist from such. It in no way requires a light of such intensity as to render objects visible along the highway in front of the bicycle. The red reflector is designed to protect the bicyclist from vehicles approaching *from the rear* and to give notice to such vehicles of the presence of the bicycle ahead. The installation of a red *light* on the rear of a bicycle is permissive and not mandatory. The statute contemplates that the red reflector on the rear of the bicycle will show up in the rays of light from the front lamps on the motor vehicle approaching from the rear in time to prevent mishap.
>
> "The requirements of the statute respecting front lamps on *motor vehicles* have entirely different purposes than the statute respecting bicycle lamps. The front lights on motor vehicles are designed to render visible not only the road ahead and each side thereof, but also persons and objects thereon in the path of the vehicle.
>
> * * *
>
> "There is no evidence in this record that if the front lamp on this bicycle had been burning it could have been better seen by one operating a motor vehicle from the rear, nor is there any evidence from which such inference might reasonably be drawn. * * *
>
> "Ordinarily, the question of proximate cause must be submitted to the jury for determination, but where, as here, the facts respecting the front lamp on the bicycle are not disputed, we may, and do, hold as a matter of law that the violation of the statute in question by decedent was not a proximate cause nor contributing proximate cause of the accident in question."

In the case of *Flynn v. Kumamoto,* 22 Cal. App. 2d 607, 72 P. 2d 248, 249, the California Court of Appeals construed a statute of that

State respecting front lamps on bicycles of almost identical language to that found in the statute of North Carolina. In that case plaintiff, a minor age about fourteen years, was riding his bicycle on the highway when it was dark, and tied to his bicycle was another bicycle ridden by his brother, a minor fifteen years old. The two bicycles were separated by a distance of about five feet. Both bicycles were equipped with red reflectors, although neither had headlights. Plaintiff was struck from the rear by defendants' sedan automobile and injured. Defendants contend plaintiff was guilty of contributory negligence as a matter of law in riding an unlighted bicycle upon a public highway at night. Respecting this contention, the California Court, after quoting the statute above referred to, said:

> "Inasmuch as the bicycles were equipped with red reflectors, which was not disputed, and were visible at a distance of 200 feet when directly in front of a motor vehicle as was established by evidence, it is immaterial in this case that such bicycles were not equipped with a headlight, as the absence of that light did not proximately contribute to the cause of the accident, the absence of such a light not in any manner contributing to the accident. *Greeneich v. Knoll,* 73 Cal. App. 1, 238 P. 163."

Plaintiff's evidence, in fact all the evidence, is that plaintiff was riding his bicycle on the highway at night without a lamp of any kind on the front thereof. This was a violation of G.S. 20-129(e), and was negligence *per se.*

G.S. 20-129 (e) requires that "every bicycle shall be equipped with a lighted lamp on the front thereof, visible under normal atmospheric conditions from a distance of at least three hundred feet in front of such bicycle, * * * when used at night." This is entirely different from the requirement for motor vehicles, when used at night as set forth in G.S. 20-131 (a): "The head lamps of motor vehicles shall be so constructed, arranged, and adjusted that, except as provided in subsection (c) of this section, they will at all times mentioned in § 20-129, and under normal atmospheric conditions and on a level road, produce a driving light sufficient to render clearly discernible a person two hundred feet ahead * * *."

Plaintiff's evidence tends to show that he had a reflex mirror on the rear of his bicycle in conformity with the requirements of G.S. 20-129 (e). There is no evidence in the record that if plaintiff's bicycle had been equipped with "a lighted lamp on the front thereof," as required by G.S. 20-129 (e), it would have been visible at all to a person approaching the bicycle with an automobile from the rear. "In the abs-

ence of some probable causal connection, bald negligence *per se* can raise no presumption of proximate cause: it may be wholly innocent." *Tendoy v. West,* 51 Idaho 679, 9 P. 2d 1026. "Proximate cause is an inference of fact, to be drawn from other facts and circumstances. If the evidence be so slight as not reasonably to warrant the inference, the court will not leave the matter to the speculation of the jury." *Conley v. Pearce-Young-Angel Co., supra; Brown v. Kinsey,* 81 N.C. 245. In our opinion, and we so hold, the admitted fact that plaintiff's bicycle had no lighted light on the front thereof, considered in connection with the fact that there is no evidence in the record that if the bicycle had been equipped with a lighted lamp in accord with the statutory requirement, it would have been visible at all to a person approaching the bicycle with an automobile from the rear, permits only one legitimate inference to be drawn, and that is that the absence of a lighted lamp on plaintiff's bicycle was not a proximate cause or a contributing proximate cause of plaintiff's injuries. To hold otherwise "would unloose a jury to wander aimlessly in the fields of speculation." *Poovey v. Sugar Co.,* 191 N.C. 722, 133 S.E. 12. Under the facts disclosed by the record in the instant case, the assignment of error to the challenged part of the charge quoted above is overruled.

The jury, under the application of well-settled principles of law, resolved the issues of fact against the defendant. A careful examination of all the other assignments of error discloses no new question or feature requiring extended discussion.

This appears in the charge of the court:

> "The parties have agreed that the question of responsibility of Hazel Cribb, owner of the automobile driven by the defendant, Bronford Lowry, should not be submitted to you, her responsibility, if any, being derivative or rising out of the relation or connection, if any, between her and Bronford Lowry and you are not concerned with separate responsibility of Hazel Cribb at this time."

The record does not disclose what judicial determination, if any, has been made in respect to the responsibility of Hazel Cribb. Neither reversible nor prejudicial error has been made to appear. The verdict and judgment against Bronford Lowry will be upheld.

No error.

ATLANTIC COAST LINE RAILROAD COMPANY v. J. B. HUNT & SONS, INC., AND RICHARD H. DRISCOLL, AND INSTO-GAS CORPORATION.

(*Filed* 19 December 1963.)

1. Process §§ 12, 13—

G.S. 55-143 applies to service of process on a foreign corporation only in those instances in which the corporation has domesticated here, regardless of whether or not the cause of action arose in this State and regardless of whether the action relates to business transacted in this State, and the statute has no application to a foreign corporation which has not domesticated here.

2. Process § 13—

G.S. 55-144 applies only when the cause of action against a foreign corporation arises out of business conducted by it in this State, and therefore when a transitory cause of action arises in another State, G.S. 55-144 can have no application.

3. Same—

There is no statutory authority in this State for service of process on a foreign corporation by service on the Secretary of State when the cause of action arises in another state and the corporation has not domesticated here.

4. Same—

In a suit by an employer to recover indemnity for amounts paid the estate of an employee fatally injured by the explosion of a gas heater, motion of the nonresident manufacturer to quash the service of summons upon it by service upon the Secretary of State is properly allowed when the manufacturer has not domesticated here and the sale of the heater to the distributor was consumated in another state.

APPEAL by plaintiff from *Fountain, J.*, at Chambers in Tarboro, N. C., February 5, 1963. From NASH.

Plaintiff, a railroad corporation engaged in interstate commerce and doing business in North Carolina, brings this action against J. B. Hunt & Sons, Inc., a domestic corporation (hereinafter called Hunt); Richard H. Driscoll, a resident of North Carolina and salesman for Hunt; and Insto-Gas Corporation, a Michigan corporation (hereafter called Insto-Gas) which has never designated a process agent in this State and is not authorized to do business in North Carolina. Plaintiff seeks indemnity from defendants for the amount it paid the estate of a deceased employee, John T. Parrish, in settlement of a claim under the Federal Employers' Liability Act for his wrongful death. Parrish received fatal injuries on March 17, 1960 at plaintiff's Collier Yard near Portsmouth, Virginia when a gas heater, manufactured by Insto-Gas Corporation and furnished to the plaintiff by Hunt through its agent, Driscoll, exploded in a refrigerator car.

The complaint alleges that the heater was inherently dangerous when used for the purpose furnished and that the defendants' negligent failure to warn plaintiff of such danger proximately caused the death of Parrish.

The action was originally instituted only against Driscoll and Hunt. In their answer they deny any liability to the plaintiff. Thereafter Insto-Gas was made a party defendant and summons, reciting issuance pursuant to G.S. 55-144, was served upon the Secretary of State on August 7, 1962. Insto-Gas, appearing specially, moved to "quash the purported service of summons" and to dismiss the action as to it for lack of jurisdiction. Judge Fountain heard the matter upon evidence offered by both plaintiff and Insto-Gas.

These facts appeared to be undisputed: Insto-Gas manufactures torches, furnaces, and heaters which are handled in North Carolina by about fifty independent wholesale distributors including Hunt. The orders of these dealers are accepted in Michigan. Title to the equipment sold passes to the distributors when the items ordered are delivered to common carriers there. Hunt is engaged in the business of selling industrial equipment in North Carolina. The sale of the three small items manufactured by Insto-Gas constitutes a minute part of its business. Prior to January 7, 1960, Driscoll had attempted to interest plaintiff in the purchase of blower-type heaters manufactured by Insto-Gas. Arrangements were finally made to demonstrate the heaters at Collier Yard in Virginia.

Insto-Gas has never employed an agent in North Carolina. Donald B. Edwards, a resident of Georgia, is its regional representative in six states, including North Carolina. He calls upon each distributor in his territory three or four times a year. On these calls he checks the inventories but is not authorized to take orders. Occasionally, however, he will forward an order to Michigan as an accomodation to a distributor. Edwards neither trains nor educates his customers in the use of Insto-Gas equipment, nor does he handle any independent advertising.

At Driscoll's request, Edwards attended the demonstration at Collier Yard and this is the only contact he ever had with the plaintiff. After the demonstration, Driscoll left two heaters with the plaintiff so that it could continue to test them. Edwards and Insto-Gas were not a party to this arrangement or any negotiations between plaintiff and Driscoll. Plaintiff and the defendants disagree as to the length of time Driscoll authorized the plaintiff to use the heaters. Plaintiff contends that its authority had not expired at the time of the explosion; the defendants contend that the license had terminated. In any event, the heaters were not sold to the plaintiff; title remained in Hunt.

The judge concluded that Insto-Gas had not transacted any business in the State of North Carolina; that its contacts with the State had been too insubstantial to subject it to suit in North Carolina. He quashed the service of summons upon the Secretary of State and dismissed the action as to Insto-Gas. From this ruling, the plaintiff appealed.

Spruill, Trotter, Biggs & Lane for plaintiff appellant.
Battle, Winslow, Merrell, Scott & Wiley for Insto-Gas Corporation defendant appellee.

SHARP, J. The plaintiff states in its brief that "unless defendant Insto-Gas Corporation was doing business in the State of North Carolina the service of process upon the Secretary of State is invalid and this Court has no jurisdiction of the defendant." It then argues that if the defendant were transacting business in the State prior to the institution of the action, substituting service upon the Secretary of State in the manner provided by G.S. 55-146 meets the requirements of due process. However, in our view of this case, it is immaterial whether defendant was or was not transacting business in the State of North Carolina. It is, therefore, unnecessary to consider plaintiff's assignments of error relating to the facts found by his Honor or those pertaining to his failure to find other facts tending to establish that Insto-Gas was doing business in North Carolina. The decision in this case turns upon the undisputed facts.

Here the plaintiff is suing a foreign corporation not authorized to transact business in this State to recover damages for an alleged tort which occurred outside of North Carolina. Even if we concede the evidence to establish that Insto-Gas was transacting business in this State, no statute in North Carolina authorizes service upon the Secretary of State in an action against an *undomesticated* foreign corporation doing business in this State for a tort *committed outside this State.*

G.S. 55-143 sanctions a suit here against a foreign corporation *authorized to transact business in this State* by service on the registered agent or on the Secretary of State if there is no such agent, whether or not the cause of action arose in this State and whether or not it relates to business transacted in this State. Since Insto-Gas was not domesticated, this statute obviously has no application to the instant case.

In the summons plaintiff indicated that it was proceeding under G.S. 55-144 which is as follows:

> "Whenever a foreign corporation *shall transact business in this State without first procuring a certificate of authority so to do*

from the Secretary of State or after its certificate of authority shall have been withdrawn, suspended, or revoked, then the Secretary of State shall be an agent of such corporation upon whom any process, notice, or demand in any suit upon a cause of action *arising out of such business* may be served." (Italics ours).

G.S. 55-144 expressly limits substituted service upon the Secretary of State where the foreign corporation has not domesticated to suits upon a cause of action arising out of business transacted in this State. It provides no jurisdiction here for foreign transitory causes of action. Therefore, even if Insto-Gas were transacting business in this State, it could not be brought into court in North Carolina under this section by service of process upon the Secretary of State in an action based on a tort occurring in Virginia.

The consequence of the statutory limitations particularized above is that a foreign corporation which has complied with Article 10 of Chapter 55 of the General Statutes, and has been duly authorized to do business in North Carolina, may be sued here by substituted service on the Secretary of State on a cause of action arising either inside or outside the State, whereas a foreign corporation which has done business in the State without complying with the law may not be thus brought into court on a transitory foreign action. An action based upon such service may be maintained against an undomesticated foreign corporation only on causes arising within the State. This may seem to be an anomalous situation, but it was no oversight. In Latty, Powers & Breckenridge, The Proposed North Carolina Business Corporation Act, 33 N.C.L. Rev. 26, 53, the draftsmen of the Act themselves state:

"Section 143 contains a provision, which goes considerably beyond the present law, for suits against domesticated foreign corporations. The policy is to treat the foreign corporation which is authorized to transact business in this state just as a domestic corporation is treated, insofar as suability is concerned. If such a corporation fails to appoint or maintain a registered agent in North Carolina, or whenever such agent cannot be found, then the Secretary of State becomes an agent upon whom process may be served. The substituted service provided is not limited to causes of action arising in this state. See Section 143(c) . . . . Express consent to such substituted service is required at the time the foreign corporation domesticates, and such express consent has been held to cure the constitutional difficulty presented by transitory causes of action.

"The present rule as to substituted service on foreign corporations which transact business here without domesticating is pre-

served by Section 144. This provision limits such substituted service to causes of action arising out of business transacted in this state, so that it will not be available for transitory foreign causes of action. The explanation for the paradox that a foreign corporation which fails to comply with the law is treated more generously than the foreign corporation which does domesticate is that the former will have filed no express consent to such substituted service and constitutional problems might be presented in the absence of this limitation."

The statute governing jurisdiction over foreign corporations not transacting business in this State is G.S. 55-145 which, in pertinent part, provides:

"(a) Every foreign corporation shall be subject to suit in this State, by a resident of this State or by a person having a usual place of business in this State, whether or not such foreign corporation is transacting or has transacted business in this State and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows:

"(1) Out of any contract made in this State or to be performed in this State; or

"(2) Out of any business solicited in this State by mail or otherwise if the corporation has repeatedly so solicited business, whether the orders or offers relating thereto were accepted within or without the State; or

"(3) Out of the production, manufacture, or distribution of goods by such corporation with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed, regardless of how or where the goods were produced, manufactured, marketed, or sold or whether or not through the medium of independent contractors or dealers; or

"(4) *Out of tortious conduct in this State,* whether arising out of repeated activity or single acts, and whether arising out of misfeasance or nonfeasance." (Italics ours).

The plaintiff attempts to bottom its case on subsection (2) above. Incidentally, it is noted that Insto-Gas did not solicit the business which resulted in the death of Parrish; it was solicited by Hunt, through its agent Driscoll. However, the jurisdiction created by G.S. 55-145 pertains only to *local actions.* It has no application to any cause of action arising outside the State. The draftsmen have expressed the purpose of this section as follows:

> "Foreign corporations are by Section 145 made subject to local suits by residents of North Carolina in some situations where they have engaged in specified activity giving rise to a cause of action locally, even though they are not so 'transacting business' as to be required to obtain a certificate of authority." Latty, Powers & Breckenridge, *op. cit. supra* at 54.

Situations such as the instant case which involve substituted service upon the Secretary of State must be distinguished from those coming within G.S. 1-97. In the latter case, a suit on a cause of action arising out of the State may be maintained here against an undomesticated foreign corporation *if* personal service can be had within the State upon an *actual agent* of the corporation as defined by the statute. Such was the situation in *Dumas v. R.R.*, 253 N.C. 501, 117 S.E. 2d 426.

The instant case is controlled by *Babb v. Cordell Industries,* 242 N.C. 286, 87 S.E. 2d 513. In *Babb*, plaintiff, a resident of Georgia, brought suit in North Carolina upon a cause of action which arose outside this State against the defendant, a New York corporation which was neither domesticated nor represented by a designated process agent in North Carolina but was doing business here. Summons was served upon the Secretary of State. The court held that the service of process, having been made upon a statutory agent instead of upon an actual agent as required by G.S. 1-97, was a nullity.

Speaking for the Court, *Higgins, J.*, said:

> "The question presented, therefore, is whether a suit by a nonresident against a foreign corporation on a cause of action arising outside this State can be maintained in North Carolina, and the defendant brought into court by a service of process on the Secretary of State. That a nonresident has access to the courts of this State is not debatable. That he can sue a foreign corporation is also beyond dispute. But to bring the foreign corporation into court the service of process must be made upon an officer or agent as defined in G.S. 1-97, and in the following cases only: (1) Where it has property in this State; or (2) where the cause of action arose in this State; or (3) where the service can be made personally upon some officer designated in G.S. 1-97."

G.S. 55-145 (then G.S. 55-38.1) became effective on May 20, 1955. The opinion in *Babb* was filed on May 25, 1955 and it is entirely consistent with G.S. 55-144 and G.S. 55-145(a).

It is noted, however, that G.S. 55-143(c) changed the rule laid down in *Motor Lines v. Transportation Co.,* 225 N.C. 733, 36 S.E. 2d 271,

162 A.L.R. 1419; *Hamilton v. Greyhound Corp.*, 220 N.C. 815, 18 S.E. 2d 367; and *King v. Motor Lines*, 219 N.C. 223, 13 S.E. 2d 233.

For the reasons stated in this opinion, the order quashing the service of summons upon the Secretary of State and dismissing the action as to Insto-Gas Corporation is

Affirmed.

JAMES LESTER WOODRUFF v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY.

(Filed 19 December 1963.)

1. Insurance § 54—

The North Carolina Motor Vehicle Safety and Financial Responsibility Act does not require an owner's assigned risk policy to cover any vehicle except the one described in the policy, G.S. 20-279.21(b) (2), and an assigned risk policy covering in addition the use by insured of other automobiles is an additional coverage not required by the Act, and as to such additional coverage the provisions of the Act are not applicable. G.S. 20-279.21(g).

2. Insurance § 60—

The failure of insured under an assigned risk policy to give notice of an accident occurring while he was driving an automobile other than the one named in the policy precludes recovery by the insured or by the injured third person against insurer, even though the policy contains additional coverage if insured is driving another vehicle, since such additional coverage is not required by the Motor Vehicle Safety and Financial Responsibility Act and therefore the provisions of the Act are not applicable thereto.

3. Pleadings §§ 12, 30—

Where motion for judgment on the pleadings is allowed, not on the basis of the admitted facts but on the basis that the facts alleged in the complaint are insufficient to state a cause of action, the allowance of the motion is tantamount to the sustaining of a demurrer, and the action should not be dismissed, since plaintiff is entitled to amend, if so advised.

APPEAL by plaintiff from *Johnston, J.*, 4 March 1963 Session of FORSYTH.

The plaintiff received serious personal injuries in an automobile collision in Winston-Salem, North Carolina, on 10 July 1959, when the 1951 Oldsmobile he was operating was struck at a street intersection by a 1950 Oldsmobile operated by Sonny Tabor Holbrook (Holbrook).

In a previous action the plaintiff filed suit against Holbrook, the operator of the 1950 Oldsmobile, and Thomas Jefferson Billings, Carl Dean Cothren, and Winford Stanley Spicer, alleged owners of the 1950 Oldsmobile. Holbrook filed no answer, and judgment by default and inquiry was entered against him. Later, upon the inquiry, judgment was rendered in favor of the plaintiff in the sum of $22,500. The other defendants filed answer in which they denied ownership of the 1950 Oldsmobile. The cause came on for trial, and a judgment of nonsuit was rendered against the plaintiff as to defendants Billings, Cothren and Spicer. On appeal, this Court affirmed the nonsuit. See *Woodruff v. Holbrook,* 255 N.C. 740, 122 S.E. 2d 707.

The present action is against Holbrook's liability insurance carrier. Plaintiff alleges and defendant admits that on or about 20 February 1959, defendant executed and delivered a policy of insurance "under the assigned risk statute of North Carolina," in which defendant obligated itself to pay any liability Holbrook should become liable to pay by reason of the operation of the Ford automobile described in the policy, up to the limit of $5,000.

The plaintiff alleges that at the time of the accident, Holbrook was operating a 1950 two-door grey Oldsmobile, 1959 License No. NX713, Motor No. B-722034. Plaintiff further alleges upon information and belief that said automobile was not owned by Holbrook and was not provided for regular use of Holbrook or any member of his household. It is alleged that the policy issued by the defendant, "specifically the so-called 'use of other automobiles' provision," makes the defendant liable to the plaintiff for the amount of the assigned risk.

The defendant in its amended answer alleges and the plaintiff in its reply admits that the vehicle operated by Holbrook was not the 1950 Ford Coupe described in the policy.

The defendant alleges further that the policy required by the compulsory liability insurance laws and the assigned risk laws of the State of North Carolina does not require the defendant to protect any liability of Holbrook except as to the specific 1950 Ford Coupe, Serial No. BODA163549, described in the policy, and the compulsory provisions of the North Carolina Financial Responsibility Act did not apply to any automobile except the 1950 Ford. Defendant specifically pleads the exclusion appearing in Part V (d) of the policy which excludes from coverage "any automobile owned by or furnished for regular use to either the named insured or a member of the same household other than a private chauffeur or domestic servant of such named insured or spouse."

The amended answer pleads as its second further defense: "If the court should find that the automobile driven by Holbrook which col-

lided with the plaintiff's automobile came within the provisions of the policy issued by this company, * * * to Holbrook, which the defendant denies, then Holbrook failed to comply with the terms of the policy in that he failed to notify the defendant of the collision with plaintiff's automobile; in that he failed to notify the defendant of the institution of the action by plaintiff against him; in that he failed to forward to the defendant summons, complaint or other process received by him; in that he failed to file answer in said action and permitted judgment by default to be taken against him; in that he has failed to cooperate with the defendant to any extent whatever in the defense of the action against him and also in the defense of the present action."

In its further amendment to answer, the defendant alleges that it "has been greatly prejudiced and handicapped by the failure of Sonny Tabor Holbrook to notify it of the accident, and of the action against him, and in his failure to cooperate with the defendant in the defense of either action, in the following respects: The defendant had no opportunity to investigate the accident to learn the true facts and whether the claimant, James Lester Woodruff, was negligent in the operation of his own car; to learn the identity and ownership of the automobile driven by Holbrook; to learn the source of the body of that car, the source of the motor of that car, and the source of the license tag on that car; to learn to what extent Holbrook had previously driven the car; and to learn whether there was liability insurance on it as to which any insurance policy issued to Sonny Tabor Holbrook, even if applicable to that car, was excess insurance."

The defendant moved for judgment on the pleadings on the ground that, under the terms of the policy, Holbrook was obligated to provide defendant with notice and to assist and cooperate with defendant in the defense of plaintiff's action against him; that "the complaint and the amendment thereto do not allege such notice or cooperation," and the complaint and the amended complaint allege that Holbrook was driving an automobile other than the one described in the policy issued by the defendant; that, therefore, the compulsory provisions of the Financial Responsibility Act of 1957 do not apply to the facts in this case.

When this cause came on for hearing on the above motion, it was allowed and the action dismissed "for the reason that the complaint fails to state that the said Holbrook gave notice of the accident and failed to give notice of the suit against him, which accident and suit constitutes the basis of plaintiff's claim against the defendant herein."

From the judgment dismissing the action, plaintiff appeals, assigning error.

Elledge & Mast; Clyde C. Randolph, Jr., for plaintiff appellant.
Deal, Hutchins & Minor for defendant appellee.

DENNY, C.J. The appellant's sole assignment of error is to the ruling of the court below dismissing plaintiff's action for the reason that the complaint fails to state that the insured "gave notice of the accident and failed to give notice of the suit against him, which accident and suit constitutes the basis of plaintiff's claim against the defendant herein," and the entry of judgment in accord with said ruling.

The provisions of our Motor Vehicle Safety and Financial Responsibility Act, Article 9A, Chapter 20, of our General Statutes, provide for motor vehicle insurance carriers to issue two types of motor vehicle liability policies. "One is an owner's policy, which insures the holder against legal liability for injuries to others arising out of the ownership, use or operation of a motor vehicle owned by him; and the other is an operator's policy, which insures the holder against legal liability for injuries to others arising out of the use by him of a motor vehicle not owned by him." *Howell v. Indemnity Co.*, 237 N.C. 227, 74 S.E. 2d 610; G.S. 20-279.21 (a) (b) and (c).

The policy involved herein is an owner's policy. It was issued to Holbrook pursuant to the assigned risk statute of North Carolina, in which the defendant insurer obligated itself to pay any liability Holbrook should become liable to pay by reason of the operation of the Ford automobile described in the policy, up to the limit of $5,000. G.S. 20-279.21 (b) (2).

No violation of the provisions of an owner's policy as an assigned risk, will void the policy where the liability thereunder has been incurred by reason of the insured's operation of the automobile described in the policy. G.S. 20-279.21 (f) (1); *Swain v. Insurance Co.*, 253 N.C. 120, 116 S.E. 2d 482.

G.S. 20-279.21 (g) reads as follows: "Any policy which grants the coverage required for a motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy and such excess or additional coverage shall not be subject to the provisions of this article. With respect to a policy which grants such excess or additional coverage the term 'motor vehicle liability policy' shall apply only to that part of the coverage which is required by this section."

Our Financial Responsibility Act does not require an owner's assigned risk policy to cover any liability except that growing out of the operation of the motor vehicle described in the policy. Consequently, the coverage in the policy issued by the defendant to Holbrook with

respect to the use of other automobiles, was in addition to the coverage required by our Motor Vehicle Safety and Financial Responsibility Act. Therefore, with respect to such coverage, the policy makes the giving of notice a condition precedent to insurer's liability. "Prior and subsequent to the decision in the *MacClure* case (229 N.C. 305, 49 S.E. 2d 742), this Court has consistently held that plaintiff has the burden of showing that he has complied with those conditions precedent to his right to maintain his action." *Muncie v. Insurance Co.*, 253 N.C. 74, 116 S.E. 2d 474.

The plaintiff in this action has no greater right against the defendant insurer than Holbrook, the insured, would have. Any failure of Holbrook to give notice defeating his right to indemnity under the provision with respect to the use of other automobiles, would likewise prevent plaintiff from asserting any rights under this provision of the policy. *Muncie v. Insurance Co., supra.*

We hold that the motion interposed and allowed in the court below, was tantamount to a demurrer on the ground that the complaint did not state a cause of action against the defendant. Even so, under our decisions, we hold that it was error to dismiss the action. The plaintiff is entitled to amend his complaint, if so advised. *Leggett v. Smith-Douglass Co.*, 257 N.C. 646, 127 S.E. 2d 222, and cited cases.

Except as modified herein, the judgment entered below is affirmed.

Modified & affirmed.

MITTIE MAE COPPLE v. DUNCAN TALMADGE WARNER, JR. AND JERRY WAYNE WEST.

(Filed 19 December 1963.)

1. Pleadings § 2—

A cause of action consists of the facts alleged in the complaint. G.S. 1-122(2).

2. Pleadings § 12—

A demurrer admits the facts alleged in the pleading but not the pleader's legal conclusions.

3. Automobiles §§ 35, 43— Author of negligence causing first collision not resulting in injury is not jointly liable with author of negligence independently causing second collision.

Plaintiff passenger's complaint alleged that while she was sitting in a stationary car on her right side of the highway after it had collided with

another car which had approached the intersection from plaintiff's right, and after the driver of the car in which she was riding had gotten out to disengage the cars, a third car, approaching from the opposite direction at excessive speed, was driven to its left of the center of the highway and collided with the stationary cars, resulting in personal injuries to plaintiff. *Held:* There being no allegation that plaintiff suffered any injury from the first collision, and no allegation that either of the stationary cars blocked to any extent the lane of travel of the third vehicle, the position of the stationary cars on the highway was a mere circumstance and not a proximate cause of the second collision, and the complaint fails to state a cause of action against the driver of the other car involved in the first collision.

4. Pleadings § 18—

Where the complaint fails to state a cause of action against one of two defendants and such defendant's demurrer on this ground is sustained, the question raised by demurrer for misjoinder of parties and causes of action is eliminated.

5. Pleadings § 21.1—

Where the record indicates that a demurrer was sustained on incorrect grounds, the cause will be remanded for order sustaining the demurrer for the correct reason.

6. Automobiles § 35—

Complaint alleging that a driver approaching from the opposite direction drove to his left of the center line of the highway and collided with two stationary cars, inflicting injuries to plaintiff, who was sitting in one of them, *held* to state a cause of action against such driver.

APPEAL by plaintiff from *Latham, Special Judge,* July 1963 Regular Session of ALAMANCE.

Plaintiff's action is to recover damages from defendants, jointly and severally, for personal injuries she alleges she sustained on account of their joint and concurrent negligence. The hearing below was on defendants' (separate) demurrers to the complaint.

Plaintiff's factual allegations, summarized except when quoted, are as follows:

On March 17, 1963, about 9:00 p.m., Charles A. Copple, plaintiff's husband, was operating his Studebaker automobile in a general *easterly* direction along N. C. Highway No. 62, a two-lane highway, approaching its intersection with Rural Paved Road No. 1129. Plaintiff was a guest passenger in her husband's car.

On the said occasion, defendant Warner was operating his Ford automobile in a general *northerly* direction on Rural Paved Road No. 1129 approaching its intersection with N. C. Highway No. 62. Warner did not stop in obedience to a stop sign facing him but drove upon No. 62 and collided with the Copple Studebaker.

The collision between the Copple and Warner cars "occurred in the east bound lane of N. C. Hwy. No. 62." The "right front fender" of the Copple car "collided with the left rear fender" of the Warner car. Plaintiff's husband "got out of his car and attempted to pull his automobile's fender loose from that of defendant Warner's automobile." Plaintiff remained "seated in the right front seat of her husband's car."

"(A)lmost immediately following" the said collision between the Copple and Warner cars, defendant West, operating his Ford in a general *westerly* direction on N. C. Highway No. 62, approached said intersection "at a high, dangerous and unlawful rate of speed" and "negligently, carelessly and wrongfully drove his automobile across the center line of said Hwy. No. 62 and collided with defendant Warner's 1950 Ford and with the automobile in which plaintiff was seated as aforesaid, causing plaintiff's head to be propelled into and through the windshield of said 1959 Studebaker automobile and inflicting upon her the severe and permanent injuries hereinafter set forth."

Plaintiff alleges the respects in which Warner was negligent, alleges the respects in which West was negligent, and alleges the negligent acts of the defendants, "acting jointly, concurrently and successively," proximately caused plaintiff's injuries.

Plaintiff's allegations as to the negligent acts of West include the following: He "failed and neglected to drive his automobile upon the right half of the highway, in that (he) drove his automobile across the center line of said Hwy. No. 62 and into the lane of travel in which the automobile in which plaintiff was riding was situated . . ." He "failed and neglected to yield at least one half of the main travelled portion of the highway to the automobile in which plaintiff was riding, by driving his automobile across the center line of Hwy. No. 62 into plaintiff's husband's lane of travel . . ."

Warner demurred on two grounds, namely: 1. That the complaint does not allege facts sufficient to constitute a cause of action against him in that (a) plaintiff does not allege she was injured as a result of the first collision, and (b) the *facts* alleged disclose the negligence of West was the sole proximate cause of the second collision and of plaintiff's injuries. 2. That there is a misjoinder of parties and causes of action.

West demurred on two grounds, namely: 1. That the complaint does not state facts sufficient to constitute a cause of action against him in that it appears upon the face of the complaint that the negligence of Warner "was the sole proximate cause of the collision and the resulting damages." 2. That "there is a misjoinder of causes of actions."

In separate orders, the court sustained the demurrer of each defendant and dismissed the action as to him. Plaintiff excepted to each of these orders and appealed.

Harold T. Dodge for plaintiff appellant.
Sanders & Holt for defendant appellee Warner.
Thomas D. Cooper for defendant appellee West.

BOBBITT, J. We consider first the demurrer of Warner.

Plaintiff alleges her injuries were proximately caused by the second collision, that is, when the West car collided with the Copple and Warner cars. Whether there is a misjoinder of parties and causes of action depends upon legal principles stated in *Batts v. Faggart, ante,* 641, and cases cited. If, as defendant Warner asserts, the complaint does not allege facts sufficient to constitute a cause of action against him, there is no misjoinder of parties and causes of action.

A cause of action consists of the *facts* alleged in the complaint. G.S. 1-122(2); *Lassiter v. R.R.,* 136 N.C. 89, 48 S.E. 642; *Stamey v. Membership Corp.,* 249 N.C. 90, 94, 105 S.E. 2d 282. The *facts* alleged, but not the pleader's legal conclusions, are deemed admitted where the sufficiency of a complaint is tested by demurrer. *Skipper v. Cheatham,* 249 N.C. 706, 710, 107 S.E. 2d 625.

The crucial question is whether, upon the *facts* alleged, the alleged negligence of Warner, conceding Warner's negligence proximately caused the first collision, may be considered a (concurring) proximate cause of the second collision.

While plaintiff alleged the second collision occurred "almost immediately following" the first collision, there was sufficient time between the first and second collisions according to plaintiff's allegations for Copple to get out of his car and engage in an attempt to pull loose the fenders of the Copple and Warner cars. The only reasonable inference to be drawn from plaintiff's allegations is that the Copple and Warner cars had collided and were at a standstill before West was in close proximity to said intersection.

Plaintiff does not allege the (right) lane for westbound travel on No. 62 was in any manner or to any extent blocked by the Copple car, the Warner car or otherwise. She alleges West traveling west on No. 62 did not yield at least one-half of the main traveled portion of the highway but negligently and wrongfully drove his car across the center line of No. 62 and there collided with the Copple and Warner cars.

In our view, plaintiff's factual allegations are insufficient to show

that negligence on the part of Warner in proximately causing the first collision was a (concurring) proximate cause of the second collision. The presence of the Copple and Warner cars in the (right) lane for *eastbound* travel on No. 62 must be regarded as a circumstance of the accident and not its proximate cause. *Lee v. Upholstery Co.,* 227 N.C. 88, 90, 40 S.E. 2d 688, and cases cited; *Henderson v. Henderson,* 239 N.C. 487, 492, 80 S.E. 2d 383. Warner's demurrer should have been sustained on the ground the complaint as to Warner did not allege facts sufficient to constitute a cause of action, thereby eliminating the question as to the misjoinder of parties and causes of action.

The court's order does not indicate the ground on which Warner's demurrer was sustained. Presumably, since the order dismisses the action, the demurrer was sustained on the ground of misjoinder of parties and causes of action. As indicated, such ruling was erroneous. In these circumstances, the order relating to Warner's demurrer is vacated and the cause is remanded for the entry of an order sustaining Warner's demurrer on the specific ground that, as to Warner, the complaint does not allege facts sufficient to constitute a cause of action.

As to the demurrer of defendant West: Obviously, the complaint alleges facts sufficient to constitute a cause of action against West for the injuries plaintiff alleges she sustained, namely, injuries proximately caused by said second collision. Moreover, since plaintiff has not alleged facts sufficient to constitute a cause of action as to Warner, there is no misjoinder of causes of action. The court erred in sustaining West's demurrer and in dismissing the action as to West. Hence, the order relating to West's demurrer is vacated and the cause remanded for the entry of an order overruling West's demurrer in its entirety.

Error and remanded.

CHARLES A. COPPLE v. DUNCAN TALMADGE WARNER, JR. AND JERRY WAYNE WEST.

(Filed 19 December 1963.)

APPEAL by plaintiff from *Latham, Special Judge,* July 1963 Regular Session of Alamance.

In plaintiff's action to recover damages from defendants, jointly and severally, for personal injuries and property damage he allegedly sustained on account of their joint and concurrent negligence, the court, in separate orders, sustained the separate demurrer of each defendant

to the complaint and as to such defendant dismissed the action. Plaintiff excepted to each order and appealed.

Harold T. Dodge for plaintiff appellant.
Sanders & Holt for defendant appellee Warner.
Thomas D. Cooper for defendant appellee West.

PER CURIAM. Reference is made to the opinion filed simultaneously herewith in the separate action by Mittie Mae Copple, wife of the present plaintiff, against the same defendants, *ante,* 727.

The allegations on which plaintiff seeks to recover herein and those on which his wife seeks to recover in her said separate action are identical. Too, the demurrers filed and the orders entered in each of the two actions are identical. Hence, the orders herein sustaining the demurrers and dismissing the action are vacated; and the cause is remanded for the entry of orders as directed in our opinion in the *Mittie Mae Copple* case.

As we construe his complaint, plaintiff seeks to recover solely for personal injuries *and* damage to his car proximately caused by the second collision. Plaintiff alleges West drove his car across the center line and collided with the Copple and Warner cars, "injuring the plaintiff and damaging his automobile as hereinafter set forth." Whether plaintiff has a separate cause of action against Warner for damages, if any, proximately caused by the first collision, is not presented.

Error and remanded.

AMERICAN FLOOR MACHINE CO., A CORPORATION v. JOSEPH T. DIXON, T/A DIXON FLOORING COMPANY.

(Filed 19 December 1963.)

1. Appeal and Error § 12; Courts § 7—

After appeal and the termination of the term, the trial court is *functus officio* except, after notice and on a proper showing, he may adjudge that the appeal has been abandoned, and has authority, provided countercase or exceptions to appellant's statement of the case on appeal is filed within the time allowed, to settle the case on appeal.

2. Courts § 7—

Under Article 35, Chapter 7, of the General Statutes, the judge of a county civil court has the discretionary power to enlarge beyond the statutory 30 day period the time within which appellant must serve statement of

case on appeal, but after allowing such extension at the time of the appeal he is *functus officio* and has no authority thereafter to enter any order enlarging the time beyond that allowed in his original order.

3. Same; Appeal and Error § 28—

When no statement of case on appeal is served within the time allowed by valid order, there is no proper statement of case on appeal, and the appellate court is confined to a review of the record proper for error appearing on its face.

APPEAL by plaintiff from *Latham, S.J.*, June, 1963, Civil Session, DURHAM Superior Court.

The plaintiff instituted this civil action in the Durham County Civil Court to recover the sum of $296.92 and interest due for goods sold and delivered. The defendant, by answer, admitted the sale, but set up a counterclaim for damages allegedly resulting from a breach of the implied warranty of the goods. A jury trial resulted in a judgment in favor of the defendant for the sum of $437.08. The plaintiff gave notice of appeal. The County Court Judge, by order dated November 9, 1962, allowed the plaintiff 60 days "to make up and serve case on appeal."

On January 3, 1963, the County Court Judge entered an order extending the time for an additional 30 days. The defendant excepted to the order. On February 6, 1963, the County Court Judge entered another order extending the time to "file" statement of case on appeal to February 21, 1963. The defendant again excepted and gave notice of appeal to the Superior Court.

According to the certificate of the Clerk of the Durham County Civil Court, the plaintiff on February 22, 1963, served the case on appeal on defendant's counsel. On February 25, 1963, the defendant filed a motion in the Superior Court setting forth the facts above recited and moved that the appeal be dismissed. The plaintiff filed a reply to the motion, giving excuses for the request for the delays, but did not controvert the facts recited in the motion.

Judge Carr heard the motion in Superior Court and upon the admitted facts entered this order:

"IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED that the plaintiff has failed to perfect its appeal to the Superior Court in that it has failed to serve the Statement of Case on Appeal upon the defendant's counsel in apt time so that said Statement of Case on Appeal could constitute a valid Statement of Case on Appeal; AND IT IS THEREFORE ORDERED that the Clerk of the Durham County Civil Court transfer to the

Durham County Superior Court the record proper in this action to the end that this Court may review said record and determine if errors appear upon the face thereof.

"This the 30th day of April, 1963."

The plaintiff excepted to the order. The Clerk of the Durham County Civil Court certified the record proper to the Superior Court. At the June, 1963, Civil Session, Durham Superior Court Judge Latham, after hearing and inspection of the record proper, adjudged that no errors appeared upon the face of the record, affirmed the judgment of the Durham County Civil Court, and dismissed plaintiff's appeal. The plaintiff appealed here.

Wade H. Penny, Jr., Henry Bane for plaintiff appellant.
C. Horton Poe, Jr., for defendant appellee.

HIGGINS, J. The plaintiff presents two assignments of error:

"1. The Superior Court of Durham County was not the lawful and proper forum in which to determine whether the plaintiff appellant failed to perfect in due time its appeal to the Superior Court as provided in the Orders of the Durham County Civil Court.

"2. If it is assumed that the Superior Court of Durham County could properly determine the issue in regard to plaintiff appellant's perfecting its appeal, then, based on the record proper and those facts found by the Court, the order entered by the Court holding that the plaintiff appellant failed to perfect in due time its appeal to the Superior Court was in error."

The Durham County Civil Court appears to have been established under Article 35, Chapter 7, General Statutes. Its jurisdiction—civil only—is concurrent (1) with that of justices of the peace, (2) with the Superior Court in all cases wherein the amount demanded, exclusive of interest, does not exceed $1,500.00. The court shall be open for business whenever matters before the court require attention, "except for the trial of issues of fact requiring a jury and the trial of contested causes wherein the county civil court is exercising jurisdiction concurrent with the Superior Court, which shall be heard in term." The judge is authorized to fix terms after consulting with the clerk and members of the county bar. The record does not disclose what has been done with respect to terms. "Appeals may be taken from the county civil court within ten days . . . . to the superior court . . . for errors

assigned in matters of law or legal inference, in the same manner as is provided for appeals from the superior court to the Supreme Court, except (1) The appellant shall cause a copy of the statement of case on appeal to be served on the respondent within *thirty days* from the entry of the appeal taken, and the respondent, within *fifteen days* after such service, shall return the copy with his approval or specific amendments endorsed or attached; if the case be approved by the respondent, it shall be filed with the clerk as a part of the record; if not returned with objections within the time prescribed, it shall be deemed approved: Provided, that the judge trying the case shall have the power, in the exercise of his discretion, to enlarge the time in which to serve statement of case on appeal and exceptions thereto or counter statement of case." (Emphasis added).

The plaintiff invoked the jurisdiction of the Durham County Civil Court to force collection of a claim of $296.90. At the time summons was issued it applied for and was granted time to file its complaint. After jury trial it was determined that it was indebted to the defendant in the sum of $437.08. At the time it gave notice of appeal to the Superior Court it induced the judge of the county civil court to exercise his discretion in doubling the time fixed by the statute for serving the case on appeal. Thereafter, on the plaintiff's motion, the court granted two additional extensions. To each of these extensions the defendant excepted. Finally the case on appeal was served on defendant's counsel on the day after the last extension expired.

The rules governing appeals from the county civil to the Superior Court conform as near as may be to those governing appeals from the Superior to the Supreme Court. It seems, therefore, the judge of the county court had authority, in his discretion, to extend the time to serve the case on appeal in the first instance. The extension could only be for a reasonable time. We do not say in doubling the statutory period he exceeded his discretionary authority. But in passing on the question and fixing the time at 60 days within which the appeal should be served, he was thereafter without authority to do more than to settle the case on appeal in the event a countercase was served or exceptions were filed.

As a general rule, an appeal takes a case out of the jurisdiction of the trial court. Thereafter, pending the appeal, the judge is *functus officio*. ". . . (A) motion in the cause can only be entertained by the court where the cause is." Exceptions to the general rule are: (1) notwithstanding notice of appeal a cause remains *in fieri* during the term in which the judgment was rendered, (2) the trial judge, after notice and on proper showing, may adjudge the appeal has been abandoned,

(3) the settlement of the case on appeal. *Hoke v. Greyhound Corp.,* 227 N.C. 374, 42 S.E. 2d 407.

The authority of the trial judge to settle the case on appeal may be invoked only by the service of a countercase or by filing exceptions to the appellant's statement of case. Otherwise the appellant's statement becomes the case on appeal. G.S. 1-282, 283; *Wiggins v. Tripp,* 253 N.C. 171, 116 S.E. 2d 355. "The right of appeal is not an absolute right, but is only given upon compliance with the requirements of the statute. . . . rules requiring service to be made of case on appeal within the allotted time are mandatory, not directive." *Little v. Sheets,* 239 N.C. 430, 80 S.E. 2d 44.

When the judge of the county civil court entered his order fixing 60 days as the time for the service of the case on appeal, he exhausted his authority over the case and was thereafter *functus officio,* except to fulfill his statutory obligation to see that a proper record is sent up for review and the obligation to settle the cases devolves only in the event the appellee serves a countercase or files exceptions. In the absence of a case on appeal served within the time fixed by the statute, or by valid enlargement, the appellate court will review only the record proper and determine whether errors of law are disclosed on the face thereof. *Roberts v. Bus Co.,* 198 N.C. 779, 153 S.E. 398. The appeal removed the case to the Superior Court for all purposes except the certification of a correct record. Any further extensions of time within which the record was due in the Superior Court could only come from the Superior Court. *Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 126.

"It appears, without contradiction, that appellant's statement of case on appeal was not served within the time allowed by agreement of counsel, hence the judge was without authority to settle the case. *Lindsey v. Knights of Honor,* 172 N.C. 818, 90 S.E. 1013. And his attempted settlement of the case, without finding that service within the stipulated time had been waived, did not cure the defect." *Smith v. Smith,* 199 N.C. 463, 154 S.E. 737.

Both Judge Carr, in holding the plaintiff had not perfected its appeal and by ordering the record proper sent up, and Judge Latham, in finding that no error existed on the face of that record, were acting as appellate judges. They appear to have followed the established rules.

The judgment of the Superior Court of Durham County is

Affirmed.

IN THE MATTER OF BEECHER P. CHAPPELL, GUARDIAN OF BESSIE CHAPPELL, INCOMPETENT v. BEECHER P. CHAPPELL, INDIVIDUALLY; OSCAR CHAPPELL; EVA CHAPPELL STOUT; ESTELLE CHAPPELL COLLIER; NOVELLA CHAPPELL WARD; BURRUS CHAPPELL, JR., MINOR; ERAS CHAPPELL; URCELL CHAPPELL; MARGARET CHAPPELL WARD AND THEOTIS P. LOWRY AND GLADYS CHAPPELL WARREN.

(Filed 19 December 1963.)

1. Wills § 31—

The word "loan" when used in the dispositive provisions of a will is to be construed as "give" or "devise" unless it is manifest that the testator intended otherwise.

2. Wills § 32—

Where the language attracts the Rule in *Shelley's* Case the Rule applies as a rule of property without regard to the intent of testator.

3. Same—

The words "nearest heirs" means simply "heirs" and the words do not take the case out of the Rule in *Shelley's* Case.

4. Same—

Provisions of a will that "I loan" to testator's son "his lifetime and then to his widow her lifetime or during her widowhood and then to the nearest heirs," devise the son a life estate in possession with a fee simple in expectancy under the Rule in *Shelley's* Case, and upon the death of the son, the heirs of the son own the land in fee subject to the life estate of the son's widow.

APPEAL by petitioner Beecher P. Chappell and the respondents Eras Chappell, Urcell Chappell, Margaret Chappell Ward, and Gladys Chappell Warren, from *Morris, J.*, September Session 1963 of CHOWAN.

This is a proceeding instituted by petitioner Beecher P. Chappell, guardian of Bessie Chappell, incompetent, to obtain an order for the sale of a tract of land allegedly owned by his ward in fee simple.

The pertinent facts found by the court below, in summary, are as follows:

That, John S. Chappell died leaving a last will and testament dated 24 January 1910, and the same was duly and properly admitted to probate in the office of the Clerk of the Superior Court of Chowan County on 15 April 1912. Item Three of the said testator's will reads as follows:

"I loan to John S. Chappell, Jr., my homeplace where I now live containing 91 acres more or less to him his lifetime and then to his widow her lifetime or during her widowhood then to the nearest heirs,

with the privilege of cutting and using any timber necessary for his own use on the farm, and buildings, and not to sell any except the dead timber. I give him all the farming implements and remainder of the Household & Kitchen Furniture, and what corn & other feed & meat that may be on hand at the time of my death and Two Hundred Dollars ($200) in cash";

That, Bessie Chappell, incompetent, is the surviving widow of the said John S. Chappell, Jr., and is the widow referred to within the meaning of Item Three of the aforementioned will;

That, title to the tract of land described in the petition, and being the same tract of land devised under Item Three of the will of John S. Chappell, said will being offered in evidence by petitioner and being attached to the petition and by reference made a part thereof, is dependent upon the construction of Item Three of said will; and

That, all persons whose interest may be affected by this proceeding have been made parties hereto, have been duly served, and the court has jurisdiction over said parties and over the subject matter of this proceeding.

John S. Chappell, testator of the aforesaid will, died leaving three children surviving him, namely, John S. Chappell, Jr., Charlie Clifton Chappell and Sarah L. Chappell Lowry. The other children of John S. Chappell, testator, predeceased him and left no surviving issue. The three children who survived said testator have been dead for many years.

Bessie Chappell, who is 71 years of age, has been adjudged incompetent from want of understanding to manage her affairs by reason of mental and physical weakness on account of old age and disease, and Beecher P. Chappell has been appointed guardian of said incompetent.

The children of said John S. Chappell, Jr., and Bessie Chappell, and the descendant of the deceased child, are as follows: Beecher P. Chappell (guardian for Bessie Chappell, incompetent), Oscar Chappell, Eva Chappell Stout, Estelle Chappell Collier, Novella Chappell Ward, and Burrus Chappell who is dead and left surviving him one child, Burrus Chappell, Jr. who is now 13 years of age and is represented in this proceeding by a guardian ad litem; Charlie Clifton Chappell who died leaving four children surviving him, as follows: Eras Chappell, Urcell Chappell, Margaret Chappell Ward, and Gladys Chappell Warren; and the said Sarah L. Chappell Lowry who died leaving one child, namely, Theotis F. Lowry.

A trial by jury was expressly waived and at the close of the hearing and after the judgment was signed it was agreed and stipulated that "each and every finding of fact appearing in the * * * judgment of

Morris, J., is fully supported by competent evidence offered and admitted during the trial of this cause * * *."

There is no suggestion on the part of the petitioner, appellant, that Bessie Chappell is entitled to take any interest in the lands involved herein pursuant to the provisions of Chapter 879 of the 1959 Session Laws, codified as G.S. 29-1, et seq.

In construing Item Three of the last will and testament of John S. Chappell, the court below held that, "(1) * * * the words, 'The nearest heirs,' appearing in Item Third of said will, were intended by the testator to mean the nearest heirs of John S. Chappell, Jr., and therefore the rule in *Shelley's* case applies so as to give the said John S. Chappell, Jr. fee simple title to said tract of land, subject only to the intervening estate of his widow, Bessie Chappell, for her lifetime or widowhood. (2) Bessie Chappell, incompetent, does not have fee simple title to said tract of land."

Judgment was entered accordingly, and the petitioner and the respondents, except the surviving heirs of John S. Chappell, Jr., appeal, assigning error.

Aydlett & White for petitioner appellant.
LeRoy, Wells & Shaw for respondent appellants.
W. J. P. Earnhardt, Jr., guardian ad litem for Burrus Chappell, Jr.
Philip P. Godwin for respondent appellees.

DENNY, C.J. The question posed for decision is whether or not the words "to the nearest heirs" as they appear in Item Three of the will of John S. Chappell bring this devise within the rule in *Shelley's* case.

In the case of *Allen v. Hewitt,* 212 N.C. 367, 193 S.E. 275, this Court said: "The terms 'loan' and 'lend' when used in a will are given the interpretation of the words 'give' and 'devise' unless it is manifest that the testator intended otherwise. *Sessoms v. Sessoms,* 144 N.C. 121 (56 S.E. 687), citing *Cox v. Marks,* 27 N.C. 361; *King v. Utley,* 85 N.C. 59; *Robeson v. Moore,* 168 N.C. 388 (84 S.E. 351, L.R.A. 1915D 496); *Waller v. Brown,* 197 N.C. 508 (149 S.E. 687). * * *

"It is established by repeated decisions of this Court that the rule in *Shelley's* case is still recognized in this jurisdiction, and where the same obtains it does so as a rule of property without regard to the intent of the grantor or devisor. (Citations omitted.)" See *Hammer v. Brantley,* 244 N.C. 71, 92 S.E. 2d 424, and Strong's North Carolina Index, Volume 4, Section 32, page 513.

Likewise, in *Crisp v. Biggs,* 176 N.C. 1, 96 S.E. 662, Jesse Mizelle devised the tract of land in question to his son, Hardy Mizelle, "to have

and to hold in fee simple all the days of his life, then it shall descend to his nearest heirs." The question to be determined was whether the devise to Hardy Mizelle was in fee simple under the rule in *Shelley's* case. Clark, C.J., speaking for the Court, said: "The rule in *Shelley's* case was first stated, 1 Coke, 104, in 1581, and is as follows: "When an ancestor, by any gift or conveyance, taketh an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, the word *heirs* is a word of *limitation of the estate, and not a word of purchase.*' * * *

"The words, 'nearest heirs,' mean simply 'heirs,' and do not take this case out of the rule." *Cox v. Heath*, 198 N.C. 503, 152 S.E. 388.

Also, in the case of *Ratley v. Oliver*, 229 N.C. 120, 47 S.E. 2d 703, the devise was to W. A. Ratley "for his natural life, and at his death to his nearest heirs." The Court said: "And the principle seems to have been established by the adjudications of this Court that the words 'nearest heirs,' standing alone, should be understood in their technical sense as denoting an indefinite succession of lineal descendants who are to take by inheritance * * *, and that the rule in *Shelley's* case applies as a rule of law and of property, vesting fee simple title in the first taker."

In *Rose v. Rose*, 219 N.C. 20, 12 S.E. 2d 688, the devise was as follows: "I give and bequeath to my son, W. W. Rose, the Pierce place where he now lives * * * his lifetime, then to his wife, Sarah, her lifetime or widowhood but in case said W. W. Rose have any heirs said land go to said heirs." Stacy, C.J., speaking for the Court, said: "Reduced to its simplest terms, the devise in question is one to W. W. Rose for life, remainder to his wife Sarah for life, remainder to his heirs. *Rowland v. Building & Loan Assn.*, 211 N.C. 456, 190 S.E. 719. This under the rule in *Shelley's* case gives to W. W. Rose an estate for life in possession, with a fee simple in expectancy. *Hileman v. Bouslaugh*, 13 Pa. St. 344. He may deal with the property as full owner and convey it, subject only to the intervening life estate and its incidents. *Welch v. Gibson, supra* (193 N.C. 684, 138 S.E. 25); *Smith v. Smith*, 173 N.C. 124, 91 S.E. 721; *Cotten v. Moseley*, 159 N.C. 1, 74 S.E. 454. As the intervening life estate is at an end, he may convey it absolutely and in fee simple."

In *Smith v. Smith*, 173 N.C. 124, 91 S.E. 721, the devise was to testator's son, "to have during his life, at his death to his bodily heirs and to his wife her lifetime or widowhood." The Court held in this case that the son took a fee simple title to the devised land subject only to the life estate of his wife, or until she remarried, and that the precedent life estate in her did not affect the operation of the rule in *Shelley's* case insofar as the heirs were concerned.

In light of our decisions, we hold that the heirs of John S. Chappell, Jr., are the owners in fee simple of the tract of land devised in Item Three of the will of John S. Chappell, subject to the life estate of Bessie Chappell.

The judgment of the court below is, in all respects,

Affirmed.

WILLIAM RAY BARRIER, HELEN C. BARRIER, R. MARET WHEELER, AND ELIZABETH H. WHEELER v. E. O. RANDOLPH, MARY I. RANDOLPH AND ALICE E. RANDOLPH.

(Filed 19 December 1963.)

1. Appeal and Error § 3—

The denial of a motion for judgment on the pleadings is not appealable and an attempted appeal therefrom is subject to dismissal as being premature, the proper procedure being to except to the denial of the motion and to bring the exception forward on an appeal from a final judgment.

2. Appeal and Error § 2—

Even though an appeal is subject to dismissal as premature, the Supreme Court, in the exercise of its discretionary power, may decide a question relating to real property sought to be presented by the appeal.

3. Deeds § 11—

A deed will be construed to ascertain the intent of grantor as expressed in the entire instrument, giving effect to every part thereof, unless the deed contains conflicting provisions which are irreconcilable or contains a provision which is contrary to public policy or runs counter to some rule of law.

4. Deeds § 19—

Restrictive covenants constituting a part of the consideration for the grant are binding on the grantee upon his acceptance of the deed, even though he does not sign same.

5. Same; Deeds § 11—

Reservations and restrictions contained in a deed between the description and the habendum are not void for repugnancy even though the granting, habendum, and warranty clauses are sufficient to convey a fee simple, since reservations and restrictions are not in conflict with the conveyance of the fee simple.

APPEAL by plaintiffs from *McLaughlin, J.*, April 22, 1963 Session of MECKLENBURG.

The hearing below was on plaintiffs' motion for judgment on the pleadings, which consist of the complaint, a copy of the deed attached thereto as Exhibit A and by reference made a part thereof, and the answer.

The facts alleged by plaintiffs and admitted by defendants, summarized except when quoted, are as follows:

The deed of which Exhibit A is a copy, referred to in the opinion as the Randolph-Austin deed, is dated March 24, 1950, and recorded in Book 1432, Page 93, Mecklenburg Registry. By the terms thereof, the present defendants and others conveyed to David Blair Austin and wife, Marian Robinson Austin, a tract of land in Sharon Township, Mecklenburg County, North Carolina, described by metes and bounds, containing 7.51 acres. The granting, habendum and warranty clauses are in terms of a conveyance in fee simple.

After the description, but before the habendum and warranty clauses, this provision is set forth: "And this Deed is made subject to the following conditions, reservations, and restrictions which constitute covenants running with the land and binding upon the parties hereto, their heirs and assigns, to wit": The conditions, reservations and restrictions are then set forth *in extenso* in eleven separate (numbered) paragraphs. They include, *inter alia*, restrictions that the property shall be used only for residential purposes, restrictions as to the size of lots in the event of subdivision, restrictions as to the location, cost and composition of any residence constructed thereon, etc. Too, they include reservations of rights of way for the installation of power and telephone lines.

Thereafter, through mesne conveyances, the 7.51-acre tract was conveyed to plaintiffs herein.

Plaintiffs allege that defendants claim an interest or estate adverse to plaintiffs in the said 7.51-acre tract based on the restrictions and easements set forth in Exhibit A, but that said restrictions and easements purport to limit the estate of plaintiffs "contrary to the granting clause and the habendum and the warranties" in Exhibit A and therefore are invalid and of no effect. Plaintiffs prayed that they be adjudged the owners in fee simple of the said 7.51-acre tract free and clear of any right or claim of defendants on account of the restrictions and easements set forth in Exhibit A.

Defendants denied the legal conclusions alleged by plaintiffs and asserted the restrictive covenants set forth in Exhibit A were and are valid and presently enforceable. Defendants prayed that plaintiffs' action be dismissed and that they recover their costs.

After hearing, the court, by order dated April 25, 1963, denied plaintiffs' motion for judgment on the pleadings. Plaintiffs excepted and appealed.

John D. Shaw for plaintiff appellants.
McDougle, Ervin, Horack & Snepp and J. W. Kiser for defendant appellees.

BOBBITT, J. There has been no adjudication of the rights of the parties. The court did not enter final judgment but simply denied plaintiffs' motion for judgment on the pleadings. It is well established that an appeal does not lie from a denial of a motion for judgment on the pleadings. The proper practice was for plaintiffs to except to the court's denial of their said motion and bring forward this exception in the event of their appeal from an adverse final judgment. *Howland v. Stitzer,* 240 N.C. 689, 692, 84 S.E. 2d 167; *Garrett v. Rose,* 236 N.C. 299, 304, 72 S.E. 2d 843; *Erickson v. Starling,* 235 N.C. 643, 658, 71 S.E. 2d 384, and cases cited; *Gilliam v. Jones,* 191 N.C. 621, 132 S.E. 566, and cases cited.

Plaintiffs' appeal must be dismissed as fragmentary and premature. Even so, in the exercise of our discretionary power (*Cowart v. Honeycutt,* 257 N.C. 136, 140, 125 S.E. 2d 382; *GMC Trucks v. Smith,* 249 N.C. 764, 768, 107 S.E. 2d 746) we deem it appropriate to express an opinion upon one, but only one, of the questions plaintiffs have attempted to raise by their fragmentary and premature appeal.

The one question we consider is that raised by plaintiffs' contention that *all* the "conditions, reservations and restrictions" set forth in the Randolph-Austin deed are repugnant to the granting, habendum and warranty clauses of said deed and therefore are surplusage and void *ab initio.* Plaintiffs base this contention upon *Oxendine v. Lewis,* 252 N.C. 669, 114 S.E. 2d 706, asserting in their brief that "the *Oxendine* Case is determinative of the controversy herein."

The rule applied in *Oxendine v. Lewis, supra,* and in decisions cited therein, is stated by *Parker, J.,* as follows: "We have 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."

"In the interpretation of a deed, the intention of the grantor or grantors must be gathered from the whole instrument and every part

thereof given effect, unless it contains conflicting provisions which are irreconcilable or a provision which is contrary to public policy or runs counter to some rule of law." *Lackey v. Board of Education,* 258 N.C. 460, 462, 128 S.E. 2d 806, and cases cited; *Rouse v. Strickland,* 260 N.C. 491, 495, 133 S.E. 2d 151, and cases cited.

The sufficiency of the Randolph-Austin deed as a conveyance in fee simple of said 7.51-acre tract is not controverted. There is no contention it conveyed a life estate or other estate less than a fee simple.

In express terms, the Randolph-Austin deed provides that it is made subject to the conditions, reservations and restrictions therein set forth and that such conditions, reservations and restrictions constitute covenants. Indeed, the portion of the deed in which these conditions, reservations and restrictions are set forth constitutes the greater part of the entire (including description) deed. The intention of the grantors that such conveyance is made subject to such conditions, reservations and restrictions is manifest. Moreover, "(i)t is a settled principle of law that a grantee who accepts a deed poll containing covenants or conditions to be performed by him as the consideration of the grant, becomes bound for their performance, although he does not execute the deed as a party." *Maynard v. Moore,* 76 N.C. 158, 165; *Herring v. Lumber Co.,* 163 N.C. 481, 485, 79 S.E. 876; *Williams v. Joines,* 228 N.C. 141, 143, 44 S.E. 2d 738.

In *Lackey v. Board of Education, supra,* this Court, in opinion by *Denny, C.J.,* while recognizing and restating the rule applied in *Oxendine v. Lewis, supra,* held it did not apply to the deed then under consideration. The granting clause of that deed was in terms of a fee simple conveyance. Immediately after the description, this paragraph appeared: "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 read 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." The validity of the quoted reversion clause was upheld by this Court and was the basis of decision.

In *Guilford v. Porter,* 167 N.C. 366, 83 S.E. 564, the purpose of the action (treated as an action for declaratory judgment) was, in the language of Brown, J., "to get rid of these restrictions upon the use of the property . . ." The deed(s) under consideration, sufficient as

conveyances in fee simple, contained this clause: *"Provided, however,* and it is understood and agreed, that the said lot herein conveyed shall be used by the said parties of the second part as a public square and be forever kept open for that purpose, and should any building or structure of any character inconsistent with said purpose be erected thereon, the said party of the first part, his heirs or assigns, may enter upon the land herein conveyed and abate and remove any and all buildings or parts of buildings inconsistent with its use as aforesaid." The quoted provision in said deed(s) was between the habendum and warranty clauses. The validity of this provision as a restrictive covenant was upheld. The contention that it was repugnant to the estate in fee simple already granted and therefore should be rejected and treated as surplusage was made, expressly considered by this Court and rejected. See also *Church v. Bragaw,* 144 N.C. 126, 56 S.E. 688.

The foregoing impels us to express the view that *Oxendine v. Lewis, supra,* does not control decision and that the conditions, reservations and restrictions set forth in the Randolph-Austin deed are not void *ab initio* on the ground they are repugnant to the granting, habendum and warranty clauses of said deed. We express no opinion as to whether these conditions, reservations and restrictions or any of them are void on *other grounds.* Neither do we express any opinion as to whether these conditions, reservations and restrictions, or any of them, are presently enforceable by defendants herein or other persons. These matters are for determination in the first instance in the superior court. Upon further hearing, all factual matters relevant to a proper decision should be brought to the attention of the court.

Appeal dismissed.

VONNIE MAE GRADY v. J. C. PENNEY COMPANY.

(Filed 19 December 1963.)

1. Negligence § 37b—

The proprietor of a store owes his customers the duty to exercise ordinary care to keep the premises in reasonably safe condition and to give warning of hidden perils and unsafe conditions insofar as they can be ascertained by reasonable inspection and supervision.

2. Negligence § 37g—

Evidence tending to show that plaintiff customer, after having been directed to a dressing room, opened the curtain to an adjacent stair landing,

took two steps and lost her balance and fell down the stairs, without evidence of defective lighting or any inherent danger in the plan of construction, with testimony by plaintiff herself that there was nothing to prevent her from seeing the steps if she had looked, *is held* to warrant judgment as of nonsuit.

APPEAL by plaintiff from *Clark, S.J.*, August 1963 "A" Civil Session of LENOIR.

Lamar Jones for plaintiff appellant.
White & Aycock for defendant appellee.

MOORE, J. Plaintiff seeks to recover damages for personal injuries suffered by her when she fell down a flight of stairs in defendant's department store. She appeals from judgment of involuntary nonsuit. Defendant offered no evidence.

The fall occurred about 4:45 P.M., 24 January 1961. Plaintiff was shopping at defendant's store. She went to the dress department on the second floor and selected two house dresses, then proceeded to the dressing room area at the direction of a saleslady who told her that she (the saleslady) would join her in a few minutes. Plaintiff pushed aside a curtain to what she thought was the entrance to a dressing room. In fact it was an entrance to a landing at the head of a stairway. She stepped inside, lost her balance and fell down a flight of twelve steps.

Plaintiff offered in evidence a "Partial second floor plan" of defendant's store. It was stipulated that the drawing is a true and accurate representation of the portion of the store involved. A short aisle leads from the dress department eastwardly between the clerks' desk and the mirror compartment to a sort of alcove or hallway on which the dressing rooms or booths are located. The hallway runs north and south, at right angles to the above-mentioned aisle. The hallway dead-ends at the south wall of the store building. At the south end of the hallway on the west side is a dressing room, and from this dressing room northward to the aisle is a partition wall which separates a part of the dress department from the hallway. On the east side of the hallway are five dressing rooms or booths which open into the hallway and are situate between the hallway and the east wall of the store building. These dressing rooms are about 4 feet by 4½ feet, floor dimensions; the entrances to these rooms are openings about 22 inches wide, covered with curtains hung by eyelets on a rod. Immediately to the north of this row of dressing rooms is the entrance to the stair landing; this opening is a little wider than the dressing room entrances,

and has a curtain in all respects similar to those at the dressing room entrances; this entrance is set back about a foot farther east than the fronts to the dressing rooms. Extending north from the stair-landing entrance is a partition wall encasing the stairwell. The stairway is about 3 feet wide and has a guard or handrail along the west side; the stairway is not maintained for the use of customers; it leads to the office on the mezzanine between the first and second floors. The landing at the head of the stair is approximately 2½ feet by 3 feet. The entrance to the landing is 25 inches wide, and the landing extends 3 to 4 inches farther to the north than the entrance itself. In proceeding eastwardly along the aisle toward the dressing-room hallway, the entrance to the stairway is nearly in line with the aisle, just a little to the south. To reach the dressing rooms, one must turn right, almost at right angles, from the aisle into the hallway.

The following is a summary of plaintiff's version of the accident: A saleslady at the clerks' desk told plaintiff to pick out what house dresses she wanted. Plaintiff selected two and told the saleslady she would like to try them on. The saleslady told plaintiff to go back to the hall "and turn to the right and she (the saleslady) would be there in a little while." Plaintiff proceeded to go back to the dressing-room hallway, saw Mrs. Hawkins, a seamstress, to the left of the stairway entrance, and spoke to her, and went to the first entrance she saw, which was the stairway entrance — plaintiff thought it was a dressing room. She pulled the curtain aside, "peeled it open," with her right hand while holding the dresses in her left hand. She stepped through the opening, but does not recall with which foot. When she stepped in she got off balance and fell down the stair. She had not seen the stairsteps before she stepped in and became overbalanced. She stepped in as she pulled the curtain back. She had shopped at Penney's a number of years. She had been on the second floor and tried on dresses a number of times, but on those occasions there was someone with her. Her eyesight is normal and she "could walk perfectly all right" up to the time of the accident. On cross-examination she testified: "I reckon I couldn't have gotten by that post and stepped down in that hole . . . without taking another step after I got inside. . . . I reckon there wasn't anything to prevent me from seeing the steps if I had looked. There wasn't anything on the floor to cause me to fall. I did not slip on anything."

The proprietor of a store owes his customers the duty to exercise ordinary care to keep the premises in reasonably safe condition and to give warning of hidden perils and unsafe conditions insofar as can be ascertained by reasonable inspection and supervision. *Case v. Cato's, Inc.*, 252 N.C. 224, 113 S.E. 2d 320.

Plaintiff alleges that defendant was negligent in that: (1) The stairway and landing were without proper lighting; (2) there was no guard rail at the landing or on the stair; (3) the stairwell was "constructed peculiarly and inherently unsafe to persons on or about the premises"; (4) there was no warning sign that the entrance in question was to a stairway; and (5) the saleslady directed plaintiff to the dressing-room area without warning her of the stairway.

The evidence does not support plaintiff's allegation that the stairway and landing were without proper lighting. A witness, who was not in the store at the time of the occurrence and who had seen the lighting on a prior occasion, testified: "It was lighted fair. The light inside the stairway was not equal with that in the sales section of the store." Eight flourescent light tubes, attached to the ceiling about 4 feet north of the position of the landing, extended over the stairway about one-third the width of the stairway; the other ends of the tubes extended into the dressing-room hallway. There is a window in the outside wall of the building at the landing. Plaintiff did not testify that her vision was obscured by poor lighting.

There is a guard rail along the stair. There is no evidence whatever that the stair is "peculiar" in construction, defective in any way, or inherently dangerous. There was not any foreign matter on the floor to cause plaintiff to trip; she did not slip.

There was no sign posted at the entrance indicating a stairway. There had been an "exit" sign over the entrance but the inspector from the fire department had required its removal because the stairway led to the mezzanine office and might prove to be a trap in case of fire. The saleslady did not mention the stairway, but did direct plaintiff to turn to the right at the hallway. Plaintiff did not follow her instruction. It is true that plaintiff was not expecting to find a stairway when she pushed the curtain aside, but the stair was in plain view and she was entering the landing at floor level. The landing was wider than the entrance. Plaintiff admits that she took at least two steps after opening the curtain and there was nothing to prevent her seeing the stair if she had looked. Her eyesight was normal and she had no physical handicap. "Where a condition of the premises is obvious to an ordinarily intelligent person, generally there is no duty of the owner of the premises to warn of that condition." *Reese v. Piedmont, Inc.*, 240 N.C. 391, 395, 82 S.E. 2d 365; *Coleman v. Colonial Stores, Inc.*, 259 N.C. 241, 130 S.E. 2d 338.

Plaintiff relies on *Walker v. Randolph County*, 251 N.C. 805, 112 S.E. 2d 551. There the principle of diverted attention applies, but that principle is inapplicable upon the facts here presented. The instant

case is controlled by *Benton v. Building Co.*, 223 N.C. 809, 28 S.E. 2d 491; *Porter v. Niven,* 221 N.C. 220, 19 S.E. 2d 864. Plaintiff has failed to show any negligence on the part of the defendant which could be a proximate cause of her injuries.

Affirmed.

STATE v. LARRY M. McINTOSH.

(Filed 19 December 1963.)

1. **Criminal Law § 26—**

A valid plea of former jeopardy must be based upon a prior prosecution for an offense which is the same both in fact and in law, and it is not sufficient that the two offenses grow out of the same transaction.

2. **Criminal Law §§ 10, 11—**

The crime of accessory before the fact and that of accessory after the fact are distinct; the crime of accessory after the fact must have its beginning after the prior offense has been committed, and is a separate substantive crime and not a lesser degree of the principal crime. G.S. 14-5, G.S. 14-7.

3. **Criminal Law § 26; Robbery § 1—**

An acquittal of a charge of accessory after the fact of armed robbery will not support a plea of former jeopardy in a subsequent prosecution of the same defendant for armed robbery, since the two offenses are different in law and in fact. G.S. 14-87, G.S. 14-7.

APPEAL by defendant Larry M. McIntosh from *Shaw, J.*, regular August 8, 1963 Session, GUILFORD Superior Court, Greensboro Division.

The appellant and John J. Pollart were charged in the following bill of indictment:

"*INDICTMENT* — Armed Robbery
"STATE OF NORTH CAROLINA
Guilford County

SUPERIOR COURT
November 30, Criminal
Term, A.D. 1959

"THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That John J. Pollart and Larry M. McIntosh, late of

the County of Guilford, on the 18th day of July, in the year of our Lord one thousand nine hundred and fifty-eight, with force and arms, at and in the County aforesaid, unlawfully, wilfully and feloniously, having in possession and with the use and threatened use of certain firearms or other dangerous weapon, implement or means, to-wit: a certain pistol, the life of W. A. Strickler was endangered and threatened, did unlawfully take personal property, to-wit: $1,795.00 in good and lawful money of the United States of America, of the value of $1,795.00, from W. A. Strickler, at Guilford County, North Carolina, where the said W. A. Strickler was in attendance, against the form of the statute in such case made and provided and against the peace and dignity of the State.

/S/ HORACE R. KORNEGAY, Solicitor."

The defendant John J. Pollart was arraigned at the December Term, 1959, and entered a plea of guilty to the charge in the foregoing indictment. When the defendant Larry M. McIntosh (appellant herein) was arraigned at the August 28, Session, 1963, on the same bill and before pleading to the merits, he filed a written plea of former jeopardy to which he attached a copy of a bill of indictment upon which he had been tried:

"*INDICTMENT* — ACCESSORY AFTER THE FACT OF ARMED ROBBERY
STATE OF NORTH CAROLINA
GUILFORD COUNTY

SUPERIOR COURT
September 14, Criminal Term,
A.D., 1959

"THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Larry M. McIntosh, late of the County of Guilford, on the 18th day of July, A.D., 1958, with force and arms, at and in the County aforesaid, unlawfully, willfully and feloniously, well knowing one John J. Pollart to have done and committed, on the day and date aforesaid, a felonious robbery with a dangerous implement, by having in possession and with the use and threatened use of certain firearms, to-wit: a pistol whereby the life of W. A. Strickler was endangered and threatened, and by unlawfully taking $1,795.00 in good and lawful money of the United States from the said W. A. Strickler, in Guilford County, North

Carolina, where the said W. A. Strickler was in attendance, afterwards and with full knowledge and well knowing that the said John J. Pollart had done and committed the aforesaid robbery with a dangerous implement, did him the said John J. Pollart, then and there receive, harbor, maintain, comfort, assist, shield, and transport from the scene of the aforesaid felony and otherwise assist and aid him, the said John J. Pollart, to escape arrest and punishment for the commission of the aforesaid felony, against the form of the statute in such case made and provided and against the peace and dignity of the State.

/S/ HORACE R. KORNEGAY, Solicitor."

Appellant offered minutes of the Superior Court session of July 16, 1963, showing that he was tried and acquitted as accessory after the fact as charged in the foregoing indictment. After a full hearing on the plea of former jeopardy, Judge Shaw entered the following order:

"NORTH CAROLINA
GUILFORD COUNTY
Case No. 9742
STATE OF NORTH CAROLINA
v.
LARRY M. McINTOSH

IN THE SUPERIOR COURT
JULY 8, 1963, CRIMINAL TERM
GREENSBORO DIVISION

O R D E R

"The above case having been called for trial and the defendant having been requested to enter his plea to the Bill of Indictment returned at the November 30, 1959, Criminal Term of the Court charging him with armed robbery on the 18th day of July, 1958;

"In response to said request the defendant in apt time through counsel filed with the Court, in writing, his duly verified plea of former jeopardy, plea of res adjudicata, plea of former acquittal, motion to dismiss, plea in bar and in abatement;

"And the Court having read and considered the defendant's consolidated pleas and motions and the Court having heard argument of counsel for the defendant and of the Solicitor for the State and having read and considered the authorities cited;

"IT IS CONSIDERED AND ADJUDGED that all and singular the pleas so submitted be, and the same are hereby DENIED, and the defendant's motion to dismiss is hereby OVERRULED. The defendant EXCEPTS. (EXCEPTION #1).

"This the 9th day of July, 1963.

"Eugene G. Shaw, Judge Presiding."

After his plea had been overruled, appellant entered a plea of not guilty to the charge of armed robbery. At the conclusion of the State's evidence, defendant's motion for a directed verdict of not guilty was denied. He did not offer evidence. The jury returned a verdict of "guilty as charged." From the judgment of imprisonment of not less than five nor more than ten years, the defendant appealed, assigning numerous errors.

T. W. Bruton, Attorney General, Harry W. McGalliard Asst. Attorney General for the State.
Robert S. Cahoon for defendant appellant.

HIGGINS, J. The defendant contends his trial and acquittal on the charge that he assisted Pollart in escaping detection, arrest and punishment, knowing Pollart had committed the robbery, was in effect an acquittal of the charge that he was a participant in that robbery. Admittedly, the plea of former jeopardy should have been sustained if the appellant had already been tried for the robbery.

The cases are numerous in which this Court has considered pleas of former jeopardy. Uniformly the plea has been held good if the first trial was upon a bill of indictment which embraced the offense charged in the second trial. This is the crucial question: Has the defendant been put in jeopardy for the same offense? In *State v. Birckhead,* 256 N.C. 494, 124 S.E. 2d 838; *State v. Barefoot,* 241 N.C. 650, 86 S.E. 2d 424; *State v. Hicks,* 233 N.C. 511, 64 S.E. 2d 871; *State v. Bell,* 205 N.C. 225, 171 S.E. 50; *State v. Malpass,* 189 N.C. 349, 127 S.E. 248, and many others this Court has considered the problem. "To support a plea of former acquittal it is not sufficient that the two prosecutions should grow out of the same transaction, but they must be the same offense—*the same both in fact and law.* . . . This test applied in the *Barefoot* case is indubitably the correct test for determining, upon a plea of former jeopardy, whether offenses are the same in fact and in law. Our Court has consistently applied this test in a long line of opinions. The number of cases is too great to justify a complete listing here, but the following are typical." (citing many cases) *State v. Birckhead, supra.*

Unquestionably armed robbery under G.S. 14-87 differs in fact and in law from accessory after the fact under G.S. 14-7. Otherwise a principal might be guilty of robbery and then be guilty of aiding and abetting himself or some other participant in escaping detection, arrest and prosecution. On a charge for robbery the State must show active participation or accessory *before the fact.* On a charge of accessory after the fact the State must show (1) robbery, (2) the accused knew of it and (3) possessing that knowledge he assisted the robber in escaping detection, arrest and punishment. *State v. Williams,* 229 N.C. 348, 49 S.E. 2d 617. A participant in a felony may no more be an accessory after the fact than one who commits larceny may be guilty of receiving the goods which he himself had stolen. The crime of accessory after the fact has its beginning after the principal offense has been committed. How may an accessory after the fact render assistance to the principal felon if he himself is the principal felon? A comparison of G.S. 14-5, defining accessory before the fact, and G.S. 14-7, accessory after the fact, clearly indicates the necessity of holding the latter is a substantive crime—not a lesser degree of the principal crime. *State v. Jones,* 254 N.C. 450, 119 S.E. 2d 213.

The defendant's trial and acquittal on the charge of accessory after the fact did not bar the State from trying him for the armed robbery. Judge Shaw correctly overruled the plea of former jeopardy. *State v. Hooker,* 145 N.C. 581, 59 S.E. 866.

We have examined the numerous assignments of error based on objections to the evidence and to the charge and find them without merit.

No error.

STATE v. WILLIAM ED GAMMONS.

(Filed 19 December 1963.)

1. Rape § 17—

In order to be guilty of assault with intent to commit rape, defendant must have the intent at least at some time during the assault to gratify his passion on the person of the woman at all events, notwithstanding any resistance on her part.

2. Criminal Law § 2—

Intent is an attitude or emotion of the mind and is usually susceptible of proof only by circumstantial evidence.

3. Rape § 18—

Evidence that defendant assaulted prosecutrix and attempted to have sexual intercourse with her under the pretense that the act was a re-

ligious rite necessary to her cure, but that the defendant immediately desisted when she threatened to scream, *is held* insufficient to show that defendant had at any time during the assault intended to have intercourse with her at all events, notwithstanding any resistance on her part, and nonsuit of the charge of the felony should have been allowed.

4. Rape § 6—

In a prosecution of a defendant for assault with intent to commit rape, nonsuit of the felony does not entitle the defendant to his discharge, but the State may put defendant on trial under the same indictment for assault on a female, defendant being a male over the age of 18. G.S. 14-33, G.S. 15-169.

APPEAL by defendant from *Shaw, J.*, April 29, 1963, Regular Criminal Session (second week) of SURRY.

This is a criminal action.

Indictment: Assault with intent to commit rape. Plea: Not guilty. Verdict: Guilty as charged. Judgment: Imprisonment.

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

Blalock & Swanson and C. Orville Light for defendant.

MOORE, J. At the close of the State's evidence and again at the conclusion of all the evidence, defendant moved for judgment of nonsuit as to the felony charged and that the case be submitted to the jury only as to the offense of assault on a female.

There was a prior appeal in this case at the Fall Term 1962. *State v. Gammons,* 258 N.C. 522, 128 S.E. 2d 860. At the trial from which that appeal arose, defendant failed to renew his motion for nonsuit at the close of all the evidence, and the appeal did not present the question of nonsuit. We now consider it for the first time.

Prosecutrix, a married woman and mother of two small children, is 25 years of age; defendant is 46. At the time of the alleged crime, 18 July 1961, they both resided at Bannertown in Surry County. Defendant was a minister of the Gospel and pastor of the "Faith and Gospel" Holiness Church. Prosecutrix had been attending this church for nine years.

The only account of the alleged occurrence is from prosecutrix. She testified: ". . . (T)he defendant . . . and his wife came to my home. . . . (I)t was . . . around 6 o'clock . . . P.M. . . . I talked to his wife. I talked with them in the car; they didn't get out . . . I was on the side that she was on. She did talk to me in the presence of the defendant. When she talked to me he did not make any statement . . . He heard everything she was saying. She said that the Lord had show-

ed Bill (defendant) that I had to come out to their house that night; that he had to pray for me and that it was real important. She wanted to know if I would come, and I told her yes . . . . I did go . . . . I drove my car. My two children went with me. . . . I think I arrived at his home somewhere around 8:00. . . . When I was there in the house with William Ed Gammons and his wife, they asked the children if they wanted to go to the store to get ice cream and they did, so they left . . . their two children and my two, and they had been gone a little bit and so Bill (defendant) said that we would have prayer while they were gone and so he told me which room to go in. He told me this bedroom to go in. . . . (Y)ou have to go down a flight of steps. . . . I went to this bedroom downstairs. I did not go with him, I went by myself. . . . (H)e came in the room and he shut the door, but I didn't think anything about it, and just as quick as he shut the door, he laid his hands on my head and started praying, and he prayed a few words and then he had both hands on my head and he just give a push and pushed me down on the bed and came right down on top of me, as quick as he done that, he said that the Lord had told him that he had to have sexual relations with me and said that I would be healed that way, and I said, 'No, I don't believe in no such mess as that.' Well, he already had his hand up my dress and was trying to get my underclothes down and I started crying and I said, 'No, I don't believe no such mess as that,' and he said, 'Well, you know that I wouldn't do that if the Lord hadn't told me to.' . . . (H)e got my underclothes down a little ways and then I felt his body touch mine, and I told him when he did that, I said, 'If you don't leave me alone, I'm going to scream,' and he said, 'You hush crying,' said, 'My wife will hear you,' and I said, 'I'm going to scream if you don't leave me alone,' and when I said that, he got up and left me alone. . . . I got up off the bed and I straightened my clothes up . . . I reached over for the door to try to get out, but the door was locked (thumblatched) and I was so nervous I never could get it unlocked and he turned around and unlocked it, but before he unlocked the door he said, 'If you tell anybody about this,' said, 'You know you will die.' Said, 'You know what a disobedient person gets'."

To convict a defendant on the charge of an assault with intent to commit rape the State must prove not only an assault but that defendant intended to gratify his passion on the person of the woman, and that he intended to do so, at all events, notwithstanding any resistance on her part. *State v. Burnette,* 242 N.C. 164, 172, 87 S.E. 2d 191. It is not necessary to complete the offense that the defendant retain the intent throughout the assault, but if he, at any time during

the assault, have an intent to gratify his passion upon the woman, notwithstanding any resistance on her part, the defendant would be guilty of the offense. *State v. Petry,* 226 N.C. 78, 81, 36 S.E. 2d 653. Intent is an attitude or emotion of the mind and is seldom, if ever, susceptible of proof by direct evidence, it must ordinarily be proven by circumstantial evidence, i.e., by facts and circumstances from which it may be inferred. *State v. Petry, supra; State v. Adams,* 214 N.C. 501, 199 S.E. 716.

Assuming the truth of prosecutrix's testimony, as we must on the motion to nonsuit, defendant assaulted prosecutrix and intended to gratify his passion upon her person, but the evidence fails to show, circumstantially or otherwise, that he intended at any time during the assault to have carnal knowledge of her, at all events, notwithstanding any resistance on her part. Defendant was in his own home and his wife was in another room within earshot of any outcry. He did not threaten to do her violence if she refused to yield. When she threatened to scream he immediately desisted. It is true that he thumblatched the door, but this seems more consistent with the intent to avoid interruption in case he engaged in the act than any intent to imprison or restrain prosecutrix. He, himself, released the lock. He attempted to persuade her to yield by pretention that the sex act was a religious rite necessary to her cure. But his conduct did not show any intention to overcome her resistance by force and have the intercourse at all events.

With respect to nonsuit for insufficiency of the evidence of the felonious intent, compare the instant case factually with the following: *State v. Moore,* 227 N.C. 326, 42 S.E. 2d 84; *State v. Gay,* 224 N.C. 141, 29 S.E. 2d 458; *State v. Hill,* 181 N.C. 558, 107 S.E. 140; *State v. Smith,* 136 N.C. 684, 49 S.E. 336; *State v. Jeffreys,* 117 N.C. 743, 23 S.E. 175; *State v. Massey,* 86 N.C. 658.

The court erred in denying defendant's motion to nonsuit the felony. However, the defendant is not entitled to discharge. The State may put him on trial on the charge of assault on a female, he being a male person over 18 years of age. G.S. 14-33. A new indictment is not necessary; he may be tried on this misdemeanor charge under the present bill. G.S. 15-169; *State v. Beam,* 255 N.C. 347, 121 S.E. 2d 558; *State v. Jones,* 222 N.C. 37, 21 S.E. 2d 812; *State v. Hill, supra.*

Defendant makes 42 assignments of error. Since they may not recur upon a retrial we do not discuss here the questions involved. We note that the Attorney General confesses error in the charge on alibi, and states "there are other assignments of error which appear to have merit." As to the law pertaining to alibi we call attention to *State v.*

Walston, 259 N.C. 385, 130 S.E. 2d 636; *State v. Allison*, 256 N.C. 240, 123 S.E. 2d 465.

New trial.

MAUDE JOYCE v. TOM JOYCE AND FLOYD H. (JACK) JOYCE, CO-EXECUTORS OF THE ESTATE OF FLOYD P. JOYCE, TOM JOYCE, FLOYD H. (JACK) JOYCE, CLEO STONE, NINA BILLINGS AND ESTELLE ARRINGTON.

(Filed 19 December 1963.)

Wills § 60—

Adjudication that the fact that the widow had qualified as executrix did not estop her from resigning and filing a dissent to the will within six months of probate upheld, it being made to appear that at the time of qualifying she was in a state of mental and physical exhaustion and that she was an elderly woman of limited education and experience in business matters. G.S. 30-1.

APPEAL by defendants from *Gwyn, J.*, at Chambers in Danbury, North Carolina, 12 August 1963. From STOKES.

This is an action instituted under the provisions of the Uniform Declaratory Judgment Act of North Carolina, G.S. 1-253, et. seq., to determine whether the plaintiff in this action, Maude Joyce, the widow of the late Floyd P. Joyce, was estopped as a matter of law from dissenting within the statutory period of six months after probate, from her deceased husband's will, by her act of qualifying and serving for a brief time as co-executrix of said will.

This cause was heard on stipulated facts, and it was further agreed that the hearing might be out of session before the Resident Judge of the Seventeenth Judicial District.

It appears from the stipulated facts that Floyd P. Joyce died testate on 7 June 1962, that his will was probated in the office of the Clerk of the Superior Court of Stokes County, North Carolina, on 3 July 1962. That the testator named Tom Joyce and Floyd H. (Jack) Joyce, his sons, as executors, and Maude Joyce, his wife, as executrix, and when the will was probated the Clerk of the Superior Court named all of said parties as executors and executrix, respectively, to execute the said will.

On 20 December 1962, Maude Joyce, the plaintiff herein, filed a dissent to the will of Floyd P. Joyce and resigned as executrix of said will and her resignation was accepted by the court.

Other pertinent stipulations are as follows:

"The widow is entitled to a greater share in the estate by dissenting from the will than she would be entitled to if she accepted that which the will of Floyd P. Joyce provides for her.

"At the time of his death, Floyd P. Joyce was seventy-eight (78) years of age. He had been seriously ill for at least three (3) years next preceding the date of his death, and for several weeks prior to his death he was critically ill. Throughout the illness of Floyd P. Joyce, he was faithfully and constantly cared for and attended by Maude Joyce, the plaintiff. At the time of the death of Floyd P. Joyce, the plaintiff was seventy-five (75) years old, and the care and attention given by her to her husband, together with the anxiety she experienced, was an arduous ordeal for any elderly woman. The plaintiff also performed the household chores and tasks during this period of time. The nervous tension, strain and heartache incident to the illness, death and burial of her husband, Floyd P. Joyce, caused the plaintiff to be physically and mentally depleted and exhausted. The plaintiff was suffering from extreme mental and physical exhaustion on July 3, 1962, when she was sworn in as one of the Executors of the Will of her husband, and for a period of time thereafter. She had no conscious thought or recognition of the legal significance of any act which she did with reference to the estate on July 3, 1962, or in the time which followed.

"That the plaintiff has very limited education. She is inexperienced, unlearned, uninformed and was unadvised concerning business matters or legal matters at the time of the probate of the Will of Floyd P. Joyce, and of her appointment as one of the Executors of his Will. That she did not know the nature and extent of the property of her husband's estate, nor did she know or understand the terms and conditions of his will. She did not seek or receive the advice of an attorney concerning the will, or her rights and obligations under the will.

"That the plaintiff has not accepted any benefits under the terms of the Will of Floyd P. Joyce, or done or performed any act which would indicate that she desired to take under the terms of the will."

Based upon the court's findings of fact from the stipulated facts, the court concluded as a matter of law that, the act of qualifying as executrix under the circumstances disclosed did not estop the plaintiff from subsequently dissenting from the will of the late Floyd P. Joyce within six months after the probate, and the plaintiff is thereby entitled to a share in the estate of her late husband in the same manner and to the same extent as though he had died intestate. Judgment was entered accordingly.

Defendants appeal, assigning error.

Hayes & Hayes for plaintiff appellee.
Leonard H. Van Noppen for defendant appellants.

DENNY, C.J., The defendants assign as error the action of the court below in signing judgment to the effect that the act of qualifying as executrix under the circumstances involved did not estop the plaintiff from subsequently dissenting from her husband's will within six months after probate, and that she is entitled to take a share in the estate of her late husband in the same manner and to the same extent as though he had died intestate.

Ordinarily, where a widow offers a will for probate and qualifies as executrix thereunder, and enters upon the duties of her office, or knowingly takes property thereunder, she may not afterwards be allowed to resign and dissent from said will. *In re Meadows,* 185 N.C. 99, 116 S.E. 257.

It is otherwise when it appears that such widow "was at the time mentally and physically disqualified from attending to the business in hand or having any intelligent concept of what she was about." *In re Meadows, supra; In re Shuford's Will,* 164 N.C. 133, 80 S.E. 420, and cited cases; 166 A.L.R. Anno.—Wills—Election by Beneficiary, at page 323.

In the last cited case this Court said: "The widow having qualified as executrix, relying upon the advice of her son and son-in-law, the latter a member of the bar in active practice, and upon an assurance of the other executors by which she was led to believe that adequate provision would be made for her, which indeed the living children have endeavored to do, we think she was entitled to enter her dissent, notwithstanding her qualification, which she has done within the six months prescribed by the statute, upon finding that the assent of the living children would not be a protection to the executors in paying out the additional provision."

The statute G.S. 30-1 allows a widow six months from the probate of the will of her husband within which to dissent. "Clearly that time is allowed by the law to enable the widow to make an examination into the value of the estate, the debts and liabilities, and for her to come to an intelligent conclusion as to the course she should pursue under all the circumstances that surround her." *Richardson v. Justice,* 125 N.C. 409, 34 S.E. 441.

The stipulations in this case make it clear that the plaintiff was at no time between the death of her husband on 7 June 1962 and 3 July 1962, the date she qualified as executrix, mentally and physically capable of making an adequate examination of the value of her husband's estate or her rights with respect thereto.

It further appears from the stipulated facts, that in addition to plaintiff's mental and physical condition, she is an elderly woman of limited education and inexperienced in business matters; that she was uninformed and unadvised as to her legal rights. Therefore, she was in no position to make an intelligent decision with respect to the course she should pursue under the circumstances that surrounded her.

The judgment entered below is

Affirmed.

OTIS ALDINE KIGER, FATHER; SADIE KRITS KIGER, MOTHER; HILDA KATHRIN KIGER, SISTER; EDMUND I. ADAMS, NEXT FRIEND OF DEBORAH LYNN KIGER AND DONNA GWYNN KIGER, MINOR CHILDREN OF OTIS ALDINE KIGER, JR., DECEASED EMPLOYEE v. BAHNSON SERVICE COMPANY, EMPLOYER; MARYLAND CASUALTY COMPANY, INSURER.

(Filed 19 December 1963.)

Master and Servant § 60—

Where the employee is directed by his superiors to report for duty at successive municipalities for work as a necessary incident to the employment, and is paid for his travel and travel time and permitted to travel by bus or his private car, a fatal accident to the employee while driving his car to the city designated arises out of the employment.

APPEAL by defendants from *Johnston, J.,* July 15, 1963 Session, FORSYTH Superior Court.

This proceeding originated before the North Carolina Industrial Commission upon a claim for benefits resulting from the death of Otis Aldine Kiger in an industrial accident. All jurisdictional and material facts necessary to establish recovery were stipulated, except this one question: Did the death of the employee arise out of and in the course of his employment? The hearing Commissioner, the full Commission, and the Superior Court Judge in review answered the question in the affirmative and awarded death benefits. The employer and its insurance carrier excepted and appealed.

Hayes & Hayes by James M. Hayes, Jr., for plaintiff appellees.

Deal, Hutchins and Minor by John M. Minor for defendant appellants.

HIGGINS, J. The Industrial Commission has found that Otis Aldine Kiger, age 20 years, was fatally injured by accident arising out of and

in the course of his employment by Bahnson Service Company. All other material facts necessary to the award of compensation were stipulated. The appeal, therefore, presents the question whether there is any substantial evidence in the record that death arose out of the employment.

Prior to Friday, August 12, 1960, the deceased worked for Bahnson Service Company as a mechanic's assistant in one of its field units at Saxapahaw. On that day he completed his work. His foreman, Mr. Smith, knowing the deceased lived near Winston-Salem, instructed him to report to the main office there for assignment to another job. He followed the instructions and on Monday, August 15, reported to Mr. Blackwelder, installation superintendent in charge of the Winston-Salem office. The superintendent handed him a memorandum introducing him to the foreman in charge of the employer's field unit at Laurinburg and instructed him to report there the following morning at seven o'clock. While on his way as ordered, driving his own vehicle as his employment permitted, he had an accident and was killed.

Here we quote in part testimony of Mr. Blackwelder: "I gave him the time to be at the job . . . at 7:00 a.m. on Tuesday morning. I directed him to report to Morgan Mills in Laurinburg. As far as travel pay is concerned . . . he would have been paid bus fare from Saxapahaw . . . and his travel time would have been approximately two hours at his base pay. Neither I nor the company specified any particular route that he was to travel to Laurinburg. . . . For his continued employment it was necessary that he contact me for assignment which he did. Employees do have a choice of selecting their own private vehicles or a bus . . . If the employee owns a car and wants to use it, . . . that is his privilege. . . . The bus fare of which I speak is limited to bus fare from the last job to the next. . . . The deceased lived with his parents at Rural Hall except when he was out in the field working. *Mr. Smith* (foreman at Saxapahaw) *asked him* (deceased) *since he lived nearby, . . . to contact me over the weekend.*"

Claimants introduced evidence that Mr. Blackwelder's memorandum directing deceased to report to Laurinburg allowed three hours travel time for which he would be paid. According to Mr. Blackwelder's recollection the memorandum allowed two hours travel time.

Mr. Blackwelder testified: "For his continued employment it was necessary that he contact me." It was deceased's duty to follow Mr. Smith's instruction to contact Mr. Blackwelder. Likewise it was necessary for him to follow Mr. Blackwelder's instructions to report to the main office, and having done so and received the written orders to report to Laurinburg, is it not a permissible inference from these facts

that Saxapahaw is no longer of material consideration in the case? Mr. Smith could and did send deceased to Winston-Salem. Mr. Blackwelder could and did order him to Laurinburg. While obeying these orders the fatal accident occurred.

The facts distinguish this case from those holding that off-premises injuries during travel to and from work are not compensable. *Bray v. Weatherly & Co.*, 203 N.C. 160, 165 S.E. 332; *Hunt v. State,* 201 N.C. 707, 161 S.E. 203. On the contrary, "Employees whose work entails travel away from the employer's premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown." (citing many cases) *Brewer v. Trucking Co.,* 256 N.C. 175, 123 S.E. 2d 608.

Surely in this case the fatal accident is fairly traceable to the employment as a contributing cause. *Hardy v. Small,* 246 N.C. 581, 99 S.E. 2d 862. The deceased was being paid during travel in the manner approved by the employer. "Where any reasonable relationship to employment exists, or employment is a contributory cause, the court is justified in upholding the award as 'arising out of employment'." *Allred v. Allred-Gardner, Inc.,* 253 N.C. 554, 117 S.E. 2d 476.

Under the liberal construction rule which is a part of workmen's compensation law, we hold the evidence was sufficient to support the finding and the conclusion that the fatal accident arose out of and in the course of employment.

The judgment is
Affirmed.

STATE OF NORTH CAROLINA, ON THE RELATION OF THE UTILITIES COMMISSION v. CENTRAL TRANSPORT, INC.

(Filed 19 December 1963.)

Carriers § 2—

The evidence before the Utilities Commission in regard to a manufacturer's need to work in close cooperation with its carrier in having trucks and personnel available at all times near its plant for loading shipments day or night as orders were received, etc., *held* sufficient to sustain the Commission's findings and conclusion thereon that a contract carrier is better qualified than a common carrier to meet the manufacturer's needs, and order of the Commission granting the contract carrier's application for such authority is affirmed.

APPEAL by Central Transport, Inc., from *Latham, S.J.,* March 18, 1963 Civil Session, RANDOLPH Superior Court.

This proceeding originated before the North Carolina Utilities Commission on application filed by O'Boyle Tank Lines, Inc., Arlington, Virginia, for contract carrier authority to transport by motor vehicle for Lone Star Cement Company dry cement in bulk and in bags from the shipper's plant in Winston-Salem, North Carolina, to all points and places in North Carolina. A written contract between the shipper and the applicant is made a part of the application.

Central Transport, Inc., High Point, North Carolina, and Maybelle Transport Company, of Lexington, North Carolina, filed protests alleging that they were authorized and fully equipped as common carriers to transport dry cement in bulk and in bags throughout North Carolina; that contract authority to O'Boyle Tank Line would be an unnecessary duplication not in the public interest and likely to jeopardize protestants' financial standing; and would add an unnecessary traffic hazard to the North Carolina public highways. The protestants were permitted to intervene and to be heard.

After hearing, the Utilities Commission, among other findings, made the following: Upon the completion of the Lone Star Cement Company's plant at Winston-Salem (by January 1, 1963) its transportation service will require that trucks be located at or near its distribution site; that a shuttle tractor with available operating personnel be kept on or near the yard at all times, both day and night. "The proposed operation conforms with the definition of a contract carrier, will not unreasonably impair the efficient public service of carriers operating under certificates and/or rail carriers nor unreasonably impair the use of the highways by the general public and will be consistant with the public interest and the transportation policy declared by the Truck Act. O'Boyle is fit, willing and able to perform the service proposed as a contract carrier."

The Commission concluded: "Careful consideration of all the facts and circumstances involved in this matter leads to the conclusion that the transportation needs of shipper more nearly conform to those required of a contract carrier rather than common carrier, and authority will, therefore, be granted."

The Commission ordered contract authority issue as requested upon the filing of schedules of rates and compliance with the requirements of the Commission, including a showing of insurance coverage.

Central Transport, Inc., one of the protestants, filed exceptions to the findings of fact and conclusions of the Commission, and appealed to the Superior Court. On the appeal Judge Latham overruled all excep-

tions and assignments of error and affirmed the Commission's order granting the contract authority as requested. The protestant appealed.

Martin, Whitley and Washington by Robert M. Martin for Central Transport, Inc., protestant appellant.

Bailey, Dixon and Wooten by J. Ruffin Bailey for O'Boyle Tank Lines, Inc., appellee.

HIGGINS, J. The O'Boyle Tank Lines, Inc., offered substantial evidence of its ability and equipment to perform the contract carrier service for which it requested authority.

The Lone Star Cement Company has distribution facilities in a number of eastern states. O'Boyle Tank Lines performs contract carrier service for that company in Virginia. Lone Star's Transportation Manager testified: "In order to render the service that is required by Lone Star Cement Corporation, whatever motor carrier we employ must, to all intents and purposes, become an integral part of that organization . . . He must have his equipment available to us for loading at any time of the night or day which we require. We load trucks sometimes at night for orders which we have on hand . . . and we also load trucks, . . . anticipating orders, . . . we do that in order that we can take advantage of some lull in the packhouse crews operation . . . (when) the packhouse crews are idle. We can then call on these trucks which are outside the packhouse door and finish out an eight-hour day for those men . . . We also have to work in agreement with this motor carrier to have direct wires to his office . . . a copy comes over a wire simultaneously to our packhouse so they will know what is to be loaded; . . . In all of our operation we prefer a contract carrier, . . . we have obtained the services of a contract carrier with one exception. . . . Our opinion is that the service which will be rendered by O'Boyle will be the type service we require. Our company is very much desirous of seeking the approval of the permit that is sought by this application."

From the testimony of Lone Star's Traffic Manager (sketchily quoted herein) the Commission was fully justified in concluding that a contract carrier is better qualified than a common carrier to meet Lone Star's motor transport needs. A common carrier must serve the public generally. A contract carrier is limited to serve the other party to the contract. G.S. 62-121.7 (3) and (4). The Commission's findings are fully sustained by the evidence in view of the entire record. *Utilities Comm. v. Ryder Tank Line,* 259 N.C. 363, 130 S.E. 2d 663; *Utilities Comm. v. Trucking Co.,* 223 N.C. 687, 28 S.E. 2d 201. The Commis-

sion's findings likewise furnish a valid basis for issuing the contract authority applied for in this proceeding. *Utilities Comm. v. Ray,* 236 N.C. 692, 73 S.E. 2d 870.

The judgment of the Superior Court of Randolph County is

Affirmed.

MAUDE LEE ADAMS COGGINS v. JUNE F. COGGINS, JR.

(Filed 19 December 1963.)

1. Divorce and Alimony § 22—

In an action for a divorce, either absolute or *a mensa,* and either before or after final judgment, the trial judge has discretionary authority to issue an order respecting the custody and care of the children of the marriage, and the amount allowed by the order for the support of the children will not be disturbed except where there is a gross abuse of discretion.

2. Divorce and Alimony § 23—

Ordinarily, in entering a judgment for the support of a minor child, the ability of the husband to pay, as well as the needs of such child, will be taken into consideration by the court.

3. Same—

Where it appears that the wife, with the four year old child of the marriage and two children of the wife's by a former marriage, lived in the house owned by the parties by the entireties, an allowance for the support of the child in excess of half of the husband's earnings, without finding facts in regard to the needs of the child, *is held* excessive, it not appearing that the husband had any financial resources other than his earnings, and the order is set aside as exceeding the discretionary authority of the court, it not being reasonable that more is required to maintain a child than a man who must work and support himself entirely from his earnings.

APPEAL by defendant from *Brock, S.J.,* February 1963 Session of RICHMOND.

Jones & Jones for plaintiff.
Morgan & Williams for defendant.

MOORE, J. Defendant appeals from an order fixing custody and making an allowance for the support of a minor child.

Plaintiff instituted an action against defendant for absolute divorce and alleged that a daughter, Maria Coggins, was born of the union.

Defendant answered.

Thereafter, plaintiff filed a motion "for an order of support and custody" of the child. The motion was heard upon the pleadings and affidavits of the parties.

The court found facts, which are paraphrased as follows:

Plaintiff and defendant were married 3 October 1958 and separated pursuant to a deed of separation of 15 November 1960. One child, now 3½ years old, was born of the union. Since the separation plaintiff has lived in a house owned by the parties as tenants by the entireties; there is a mortgage of $8500 against this property. Plaintiff is employed and earns $83 per week, take-home pay; defendant is employed as a railroad depot agent and earns $300 per month, after tax and retirement withholdings. Since the separation defendant has paid the $83 monthly installments on the mortgage and $100 per month to plaintiff for Maria's support.

The court awarded the custody of the child to plaintiff, subject to the right of defendant to have her one week-end each month. It was ordered that defendant make the $83 monthly payments on the mortgage, pay one-half of the taxes and insurance, and pay plaintiff $80 per month "towards the support of his minor daughter."

Defendant appeals on the ground that the required payments are excessive and the order therefor an abuse of discretion on the part of the court.

"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 . . . to make such orders respecting the care, custody, tuition and maintenance of the minor children of the marriage as may be proper . . . ." G.S. 50-13; *Griffin v. Griffin,* 237 N.C. 404, 75 S.E. 2d 133. "In proceedings of this nature the amount to be allowed . . . for the support of the children of the marriage is within the sound discretion of the trial judge and will not be disturbed except where such discretion has been grossly abused." *Wright v. Wright,* 216 N.C. 693, 6 S.E. 2d 555.

Ordinarily, in entering a judgment for the support of a minor child, the ability to pay as well as the needs of such child will be taken into consideration. *Bishop v. Bishop,* 245 N.C. 573, 96 S.E. 2d 721. Though the court below undertook to find the facts, it made no finding as to the needs of the child and found only inferentially the ability of defendant to pay.

There are matters set out in the affidavits with respect to which no facts were found. Plaintiff's affidavit: Plaintiff has two children of a former marriage, a daughter, age 15, and a son, age 11; plaintiff and

her children, including Maria, live in the house referred to in the findings of fact; plaintiff pays $20 per week for a person to care for Maria while plaintiff works; defendant is a member of a "substantial" family, lives with his parents, and at the time of the marriage had accumulated savings and had a substantial amount of government securities. Defendant's affidavit: At the time of the marriage defendant owned approximately $4000 in U. S. savings bonds, but he cashed them in and bought furniture and kitchen appliances which are now in plaintiff's possession; defendant now owns only two $50 bonds, they are payable to defendant and Maria; it is necessary for defendant to maintain an automobile in order to hold his present job, and he has to pay room and board and all personal expenses from his earnings; his payments on the mortgage and for the support of Maria have been so large that, had he not been living with his parents, his income would have been insufficient for his support.

Defendant's answer makes reference to a separation agreement and the judgment takes notice of it. Neither discloses its terms and it is not a part of the record on appeal. We do not know whether it purports to make provision for the support of the minor or whether it is relevant in considering that subject. In any event, the enforcement of such agreement was not the matter before the court. The motion involves only the custody and support of the minor child. Defendant does not challenge the order as to custody; the challenge is to the amount defendant is required to pay for the minor's support.

From the findings of fact we must conclude that defendant has no assets from which to pay such support except his salary of $300 per month. He was ordered to pay approximately fifty-five to sixty per cent of his salary for such support. It is not reasonable to conclude that it requires more to maintain a child four years of age than a man who must work and support himself entirely from his earnings. There is nothing in this record which justifies the conclusion that in order to support his child defendant must bear the entire cost of providing a house for her and three others besides. On this record the conclusion is inescapable that the payments required by the court are excessive. The court exceeded its discretionary authority.

That portion of the order appealed from which requires payments to be made by defendant is vacated. The cause is remanded for rehearing on the question of support for the minor. After considering the needs of the child and the ability of defendant to pay, the court below in the exercise of its sound discretion will enter such order of support "as may be proper."

Error and remanded.

JOHN JENKINS v. ROSE LEE THOMAS AND CHARLIE WILLIS THOMAS.

(Filed 19 December 1963.)

Automobiles § 41l—

Evidence disclosing that a pedestrian, instead of crossing at an intersection where he had the right of way, G.S. 20-174(a), elected to cross some 100 feet south of the intersection, and that he was struck by defendant motorist who was traveling, with his lights on, some 25 miles per hour in a 35 mile per hour zone, *is held* to warrant nonsuit in the absence of evidence not only that plaintiff was oblivious to the danger but that defendant saw, or in the exercise of reasonable care should have seen, that plaintiff was not aware of the approaching danger.

APPEAL by plaintiff from *Froneberger, J.*, July 22, 1963 Regular Civil Session of GASTON.

Plaintiff was injured when struck by an automobile owned by feme defendant, operated by male defendant. Plaintiff alleged his injuries resulted from the negligent operation of the motor vehicle. Defendants denied the injuries were caused by their negligence, but if so, plaintiff was contributorily negligent. Plaintiff replied defendants had the last clear chance to avoid the injury.

The court allowed defendants' motion to nonsuit, made at the conclusion of plaintiff's evidence. Plaintiff appealed.

Horace M. DuBose, III and Donald E. Ramseur for plaintiff appellant.

Hollowell & Stott by Grady B. Stott for defendant appellees.

PER CURIAM. Plaintiff's evidence is sufficient to establish these facts: The collision occurred about 9:00 p.m. when he was crossing Chester Street, U.S. Highway 321, in Gastonia. Chester Street runs north and south. It is approximately forty-five feet wide, paved, with paved sidewalks on each side. Allison Street runs east and west. It intersects the eastern side line of Chester but does not cross that street. There are dirt walkways on each side of Allison. About one hundred feet south of the intersection of Chester and Allison is a dirt path frequently used by pedestrians in going from Chester to Boyce Street which is west of and parallel to Chester. Plaintiff walked westwardly along Allison until he came to Chester. He then turned on Chester until he came to a "No Parking" sign near the southeast corner of the intersection of Chester and Allison. There he turned southwestwardly to cross Chester, intending to follow the path to Boyce Street. Before leaving the sidewalk, he looked. He saw no motor vehicle going south, but did see a vehicle going north. It was traveling

forty to forty-five m.p.h. He waited for that vehicle to pass. He then stepped in the street, crossing it diagonally in a southwestwardly direction, intending to enter the path. He was struck by defendants' vehicle when about three or four steps from the western curb of Chester Street and one hundred feet or thereabouts south of the intersection. Defendants were traveling south at a speed of twenty-five m.p.h. The maximum speed limit at the point where plaintiff was injured was 35 m.p.h. The highway was straight in each direction for three hundred yards or thereabouts. Defendants, going south, were going uphill. (The grade is not disclosed.) Plaintiff saw the bright lights of defendants' vehicle just a flash of an eye before he was struck.

Where Chester and Allison join is, by statutory definition, an intersection. G.S. 20-38(1). Even though there was no marked crosswalk at that point, a pedestrian crossing there had the right of way over a motorist traversing the intersection. G.S. 20-174(a). Plaintiff elected not to cross at a point where he had the right of way, but elected to cross at a point where the motorist had the right of way. Defendants, having the right of way, had the right to assume, until put on notice to the contrary, that the pedestrian would obey the law and yield the right of way. The mere fact that the pedestrian is oblivious to danger does not impose a duty on the motorist to yield the right of way. That duty arises when, and only when, the motorist sees, or in the exercise of reasonable care should see, that the pedestrian is not aware of the approaching danger and for that reason will continue to expose himself to peril. *Rosser, Admr. v. Smith, ante,* 647, *Griffin v. Pancoast,* 257 N.C. 52, 125 S.E. 2d 310; *Garmon v. Thomas,* 241 N.C. 412, 85 S.E. 2d 589.

Plaintiff failed to carry the burden of showing negligence imposing liability on defendants.

Affirmed.

STATE v. CLARENCE N. PERRY.

(Filed 19 December 1963.)

Criminal Law §§ 85, 101—

The fact that defendant's confession introduced in evidence by the State contains exculpatory statements does not justify nonsuit when the State introduces substantive evidence in contradiction of the exculpatory matter.

APPEAL by defendant from *Fountain, J.,* May Criminal Session 1963 of ALAMANCE.

At the May Term 1962 of the Superior Court of Alamance County, the Grand Jury returned two bills of indictment against the defendant, one charging that the defendant wilfully and maliciously damaged the residence of one Thomas Oakley by the use of an explosive, and the other charging he wilfully and maliciously injured Rosemond Perry, his wife, and damaged her residence by the use of an explosive.

The defendant was tried and convicted on these bills of indictment, without the benefit of counsel, at the May Term 1962 of the Superior Court of the aforesaid county.

As the result of a post conviction hearing, the defendant was granted a new trial with court appointed counsel. He was again tried and convicted on the original bills of indictment at the May Criminal Session 1963 of the Superior Court of said county.

The cases were consolidated for trial and judgment. From the judgment imposed, the defendant appeals, assigning error.

Attorney General Bruton, Deputy Attorney General Ralph Moody for the State.

W. C. Bumgarner for defendant.

PER CURIAM. The defendant contends that the State's evidence was insufficient to sustain the verdicts rendered below, and that his motion for judgment as of nonsuit made at the close of all the evidence should have been sustained.

The defendant relies upon the fact that the State used his confession as made to a police officer in Burlington, North Carolina. This confession was to the effect that he took two sticks of dynamite and capped and fused them; that he took this dynamite from his brother's home near Spring Hope, North Carolina, where he was living; that he got his nephew to take him to 1027 Rainey Street in Burlington, where his wife and children lived, on 13 April 1962; that "he lit the fuse, took the dynamite and threw it underhanded up beside the house." The defendant further stated, according to the testimony of the police officer, that "he had no intention of hurting his children."

The evidence tends to show that the home in which defendant's wife and children lived and the room in which they were asleep at the time, were substantially damaged and the wife was seriously injured. Likewise, the Oakley home located nearby was damaged.

The fact that a confession contains exculpatory statements does not justify a nonsuit when the State introduces substantive evidence in contradiction of such exculpatory declarations. *S. v. Tolbert,* 240 N.C. 445, 82 S.E. 2d 201.

In our opinion, the State's evidence was sufficient to withstand the motion for judgment as of nonsuit and to support the verdicts rendered.

The ruling below is

Affirmed.

COY F. NEAL v. ASSOCIATES DISCOUNT CORPORATION, A CORPORATION.

(Filed 19 December 1963.)

Appeal and Error § 4—

Where it appears of record that after the institution of the action, but before the hearing, the plaintiff died, a purported appeal in the name of the deceased plaintiff is a nullity as well as an anomaly, and the appeal must be dismissed, there being nothing to indicate that the personal representative was substituted as a party.

APPEAL by plaintiff from *Johnston, J.*, April 8, 1963, Session of FORSYTH.

Plaintiff instituted this action to recover compensatory and punitive damages for personal injuries allegedly caused by the tortious conduct of defendant.

Pleadings, consisting of complaint, answer and reply, were filed. Thereafter, there was a hearing on defendant's oral motion to dismiss. The court found "as a fact that the said plaintiff, Coy F. Neal, is now deceased," and dismissed the action on the ground the cause or right of action alleged in the complaint did not survive. G.S. 28-175.

The record shows that "plaintiff" excepted and appealed.

White & Crumpler, Harrell Powell, Jr., and Leslie G. Frye for plaintiff appellant.

McLennan & Surratt for defendant appellee.

PER CURIAM. Although the record shows "plaintiff" excepted to and assigned as error the finding of fact that he "is now deceased," on the ground no evidence was offered to support such finding, the "Plaintiff Appellant's Brief" does not bring forward this exceptive assignment of error. There appears in the record a stipulation dated July 10, 1963, signed by the "Attorneys for Plaintiff" and by the "Attorneys for Defendant," which includes the following: "It is further stipulated that Coy F. Neal died prior to the hearing and entering of the Judgment appealed from in this cause."

Assuming Coy F. Neal's cause or right of action survived his death, it could be continued and prosecuted only by his personal representative. The procedure to determine whether his cause or right of action was to be continued and prosecuted by his personal representative or dismissed is prescribed by G.S. 1-74 and G.S. 1-75. The question whether the alleged cause or right of action survived Coy F. Neal's death would necessarily be presented. See McIntosh North Carolina Practice and Procedure, Second Edition (Wilson), § 731 and § 732. Nothing in the record indicates compliance in any respect with the cited statutory provisions.

Nothing in the record indicates the personal representative, if any, of Coy F. Neal has been substituted as a party herein. Indeed, the *record* contains no reference to a personal representative of Coy F. Neal.

There appears in the file of the Clerk of this Court an "Undertaking on Appeal for Costs," dated and filed September 9, 1963, signed "Blake N. Neal, Administrator of the Estate of Coy F. Neal" and "Thurman Neal." Yet, even in this document, Coy F. Neal is designated as *appellant.*

"Plaintiff Appellant's Brief" states: "After the action was filed, the plaintiff died. The *administratrix* of Coy F. Neal then filed motion asking that *she* be made a party plaintiff and allowed to adopt the complaint filed herein." (Our italics). Nothing to this effect appears in the certified record or in appellee's brief.

To what extent, if any, the administrator or administratrix of the estate of Coy F. Neal, if there is such personal representative, is bound by the judgment entered by the court below, is not presented. Suffice to say, there can be no appeal from said judgment by Coy F. Neal, the deceased plaintiff. The purported appeal in his name "is a nullity as well as an anomaly." *S. v. Beasley,* 196 N.C. 797, 147 S.E. 301; *Hunt v. State,* 201 N.C. 37, 158 S.E. 703.

Appeal dismissed.

J. A. PEACOCK FOR HIMSELF AND ON BEHALF OF ANY OTHER TAXPAYERS OF SCOTLAND COUNTY v. COUNTY OF SCOTLAND AND SIDNEY D. SMITH, R. F. McCOY, ED McLAURIN, JESSE SNEED, AND JAMES A. GIBSON, CONSTITUTING THE BOARD OF COUNTY COMMISSIONERS FOR THE COUNTY OF SCOTLAND.

(Filed 19 December 1963.)

Injunctions § 8—

An action to enjoin the holding of a county-wide election is properly dismissed when plaintiff seeks only injunctive relief and he does not allege that he or persons similarly situated will be irreparably injured by the holding of the election and no facts are asserted from which such result may be inferred.

APPEAL by plaintiff from *McKinnon, J.*, October 1963 Civil Session of SCOTLAND.

Bailey, Dixon & Wooten for plaintiff.

Smith, Leach, Anderson & Dorsett and Henry A. Mitchell, Jr., for defendants.

PER CURIAM. Plaintiff, a citizen, resident, property owner and taxpayer of Scotland County, on behalf of himself and others similarly situated, instituted this action to enjoin the holding of a county-wide election called by the County Commissioners of Scotland County pursuant to procedure provided by Chapter 707, Session Laws 1963. The election, in accordance with said Act of the General Assembly, submits to the electorate of Scotland County proposals for the merger of the school administrative units of the City of Laurinburg and Scotland County, construction of a new consolidated high school, issuance of bonds for such construction and other purposes, requirement that there be appropriated annually from local sources funds to provide for a minimum per student expenditure for current school expenses, and authorization of a levy by the County Commissioners of a supplemental school tax not to exceed 50 cents on $100 valuation. The complaint alleges that the Act in question contravenes certain provisions of the North Carolina Constitution.

A jury trial was waived and the cause was heard upon the admissions in the pleadings and facts stipulated. The court declared the Act constitutional, refused to enjoin the election and dismissed the action.

We do not reach the constitutional questions and make no adjudication with respect thereto. Plaintiff seeks only injunctive relief. His allegations are insufficient to invoke the equity jurisdiction of the court. It is not alleged that plaintiff or persons similarly situated will be ir-

reparably injured by the holding of the election, and no facts are asserted from which such result may be inferred. *Clinton v. Ross,* 226 N.C. 682, 689, 40 S.E. 2d 593. To maintain an action to enjoin an election plaintiff must allege facts sufficient to show that he will suffer direct injury or that his civil or property rights will be invaded thereby. *Hill v. Comrs. of Greene,* 209 N.C. 4, 182 S.E. 709.

The judgment below, in denying injunctive relief and dismissing the action, is

Affirmed.

J. D. KERNODLE, JR. v. THOMAS E. BONEY.

(Filed 19 December 1963.)

Appeal and Error § 32—

Where the record is not docketed in the Supreme Court within the time allowed by the rules so that the appeal is carried beyond the term at which it should have been heard, the Supreme Court will dismiss the appeal *ex mero motu.*

APPEAL by defendant from *Hobgood, J.,* September, 1962 Civil Term, ALAMANCE Superior Court.

Clarence Ross, B. F. Wood for plaintiff appellee.
John D. Xanthos for defendant appellant.

PER CURIAM. Judgment in favor of the plaintiff in this action was entered in the Superior Court on September 19, 1962. The defendant on that day gave notice of appeal. The court allowed defendant sixty days for the service of the case on appeal and the plaintiff thirty days thereafter to serve countercase or to file exceptions. Date of the service of the case or of any countercase does not appear. The parties agree on the case on appeal, but the date of the agreement is not disclosed. The combined time for the service of the case and the countercase expired on December 19, 1962. The appeal should have been filed in this Court by 10:00 a.m., on April 23, 1963 and should have been heard on Tuesday, May 21, 1963, and successive days. The appeal was actually docketed on June 23, 1963. The delay in docketing carried the case beyond the Spring Term at which it should have been heard.

This Court, *ex mero motu,* dismisses the appellant's appeal for failure to file within the time fixed by the rules. Defendant will pay the costs.

Appeal dismissed.

STATE OF NORTH CAROLINA v. ALBERT (ALTON) E. BARNES.

(Filed 19 December 1963.)

ON *certiorari* further to review an order in a post conviction hearing held by *Mintz, J.*, on February 6, 1963, denying defendant's prayer for a new trial because of alleged denial of his constitutional rights in a jury trial and conviction in the Superior Court of ONSLOW County, North Carolina. The defendant was convicted of a felony and sentenced to a term of imprisonment in the Superior Court of Onslow County at its October Term, 1961. This Court, on April 16, 1963, denied the defendant's application for *certiorari* to review Mintz's order of February 6, 1963.

The defendant applied for and was granted a *writ of certiorari* by the Supreme Court of the United States. At its October Term, 1963, that Court ordered that the judgment of this Court of April 16, 1963, denying *certiorari*, be vacated and " . . . this cause be remanded to the Supreme Court of North Carolina for further consideration in the light of *Gideon v. Wainwright*, 372 U.S. 335."

T. W. Bruton, Attorney General, James F. Bullock, Assistant Attorney General for the State.

Earl Whitted, Jr., Samuel S. Mitchell for petitioner appellant.

PER CURIAM. After further review upon the application of the above named defendant, this Court concludes the defendant's constitutional rights as defined by the Supreme Court of the United States in *Gideon v. Wainwright* were not afforded him at his trial at the October Term, 1961, in the Superior Court of Onslow County. The verdict of guilty and the judgment of imprisonment thereon are, therefore, set aside and a new trial is ordered.

New trial.

APPENDIX.

AMENDMENT TO RULES OF THE BOARD OF LAW EXAMINERS.

TO THE HONORABLE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

AMENDMENTS TO THE RULES AND REGULATIONS OF THE BOARD OF LAW EXAMINERS.

The following amendment to the Rules and Regulations of the Board of Law Examiners and of The North Carolina State Bar has been duly adopted by the Board of Law Examiners and recommended to the Council of The North Carolina State Bar, and the Council of The North Carolina State Bar at a regular quarterly meeting did unanimously adopt the same and the recommendation of the Board of Law Examiners regarding said Rules as follows:

1. "Amend the Rules Governing Admission to the Practice of Law in the State of North Carolina, appearing 243 N. C. Reports 790, Rule 12, appearing on said page and third paragraph, line 7 under Rule 12, by deleting the word 'and' before the word 'Wills' and changing the period at the end of the sentence to a comma and adding the words 'Equity and Negotiable Instruments. The amendment adding Equity and Negotiable Instruments to apply beginning with the 1965 examinations'."

NORTH CAROLINA—WAKE COUNTY

I, Edward L. Cannon, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules of The Board of Law Examiners and Rules and Regulations of The North Carolina State Bar has been duly adopted by the Council of The North Carolina State Bar at a regular quarterly meeting of said Council.

Given over my hand and the seal of The North Carolina State Bar, this the 6th day of November, 1963.

/s/ EDWARD L. CANNON
Edward L. Cannon, Secretary
The North Carolina State Bar

After examining the foregoing amendment to the Rules of the Board of Law Examiners as adopted by The Council of The North Carolina State Bar, it is my opinion that the same complies with a permissible interpretation of Chapter 210, Public Laws 1933, and amendments thereto—Chapter 84, General Statutes.

This the 19th day of November, 1963.

/s/ WM. H. BOBBITT
For the Court

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules of The Board of Law Examiners and the Rules and Regulations of The North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating The North Carolina State Bar.

This the 19th day of November, 1963.

/s/ SHARP, J.
For the Court

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ANALYTICAL INDEX

ABATEMENT AND REVIVAL

§ 3. Abatement for Pendency of Prior Action.

The pendency of an action between the parties in another jurisdiction is not grounds for abatement of an action instituted in this jurisdiction. *Wilburn v. Wilburn*, 208.

Plea in abatement cannot be sustained merely upon a showing of the filing of complaint in a prior action when there is no proof of service of process or that process had ever been issued therein. *Ibid.*

ACCORD AND SATISFACTION

§ 1. Nature and Essentials of Agreement.

The trial court's charge as to the meaning of "accord and satisfaction" *held* without error. *Cooperative Exchange v. Scott*, 81.

Ordinarily when an offer of money or property in full discharge of an obligation is accepted and retained, such acceptance and retention is a complete discharge of the claim, even though the sum or property received is less than the amount owing. *Prentzas v. Prentzas*, 101.

Where a partnership in real estate held for rentals has title to land purchased with partnership funds put in the name of the wife of one of the partners and, after demand of the other partner for an accounting, one of the pieces of real estate is conveyed to him with verbal statement that it was in complete settlement, the retention of the deed and the collection of rentals would constitute a settlement regardless of the intent of the grantee partner if he accepted the deed as conveying the property to him in his individual capacity and collected the rentals on the basis of individual ownership, but would not constitute a settlement if he merely retain title for the partnership, offering to account for the rents and profits in the settlement of the partnership affairs. *Ibid.*

ADMINISTRATIVE LAW

§ 3. Duties and Authority of Administrative Boards and Agencies in General.

The fact of changes in membership of a municipal board of adjustment between the date of the original hearing and the date of approval of an application granting a discretionary permit, is immaterial, since changes in membership of an administrative board do not break the continuity of the board. *Brannock v. Board of Adjustment*, 426.

ADVERSE POSSESSION

§ 7. Adverse Possession Among Heirs and Tenants in Common.

Where lands of tenants in common are sold under a tax foreclosure in a suit in which some of the tenants are not served, the commissioner's deed to the purchaser pursuant to court order is not the act of a co-tenant, and therefore the contention that a tenant purchasing from the grantee of the commissioner could not acquire title against the other tenants is untenable. *Yow v. Armstrong*, 287.

APPEAL AND ERROR

§ 1. Nature and Grounds of Appellate Jurisdiction in General—Theory of Trial.

An appeal will be determined in accordance with the theory of trial below. *Cooperative Exchange v. Scott*, 81; *Steele v. Hauling Co.*, 486.

§ 2. Supervisory Jurisdiction of Supreme Court.

Even though an appeal is subject to dismissal as premature, the Supreme Court, in the exercise of its discretionary power, may decide a question relating to real property sought to be presented by the appeal. *Barrier v. Randolph*, 741.

Where appellant appearing *in propria persona* fails to comply with rules, the Supreme Court, in the exercise of its supervisory jurisdiction, may treat the purported appeal as a petition for *certiorari*. *Huffman v. Aircraft Co.*, 308.

On appeal from the refusal of the court to sign a judgment tendered more than a year after term, the Supreme Court, in the exercise of its supervisory jurisdiction, will order the cause heard *de novo*. *Weston v. Hasty*, 444.

§ 3. Right to Appeal and Judgments Appealable.

The refusal of the court to sign a judgment tendered over a year after the term is not appealable, since there is no judgment from which an appeal will lie. *Weston v. Hasty*, 444.

Ordinarily an appeal will lie only from a final judgment, and an appeal from an interlocutory order will be dismissed as fragmentary and premature unless it affects some substantial right and will work injury to appellant if not corrected before appeal from final judgment. *Steele v. Hauling Co.*, 486.

An appeal will lie immediately from an order allowing motion to strike a defendant's entire cross-action, since such motion is in effect a demurrer to the cross-action. *Ibid.*

The denial of a motion for judgment on the pleadings is not appealable and an attempted appeal therefrom is subject to dismissal as being premature, the proper procedure being to except to the denial of the motion and to bring the exception forward on an appeal from a final judgment. *Barrier v. Randolph*, 741.

An order striking allegations contained in a pleading is not appealable and may be reviewed prior to trial only by *certiorari*. *Williams v. Denning*, 539; *Williams v. Denning*, 540.

An order allowing the filing of an amended complaint, made in the discretion of the court, is not reviewable in the absence of a showing of abuse of discretion. *Williams v. Denning*, 539.

Where the verdict is set aside in the court's discretion, there is no judgment from which an appeal may be taken, and on appeal from the action of the court setting the judgment aside appellant cannot present his contentions of error in denying his motion for judgment as of nonsuit. *Atkins v. Doub*, 678.

Where notice of appeal is given solely from the refusal of the clerk to sign the judgment tendered after the verdict had been set aside by the trial judge, the appeal must be dismissed, since no appeal lies from the clerk of the Superior Court to the Supreme Court. *Ibid.*

§ 4. Parties Who May Appeal; "Party Aggrieved."

Only the party aggrieved by the judgment may appeal therefrom, and the

APPEAL AND ERROR—*Continued.*

party aggrieved is one whose substantial rights are affected by the judgment. *Coburn v. Timber Corp.*, 173.

Where plaintiffs are estopped from claiming the land in controversy by judgment on the merits that they are not the owners thereof, no judgment in regard to the use of the land can affect any substantial right of theirs, and their attempted appeal from an order continuing to the hearing an order restraining them from cutting timber from the land will be dismissed. *Ibid.*

Where a trustor's equity has been divested by foreclosure of the junior deed of trust on the property, he has no rights in the property and is not a party aggrieved by an order dissolving an injunction against foreclosure of the senior deed of trust. *Gaskins v. Fertilizer Works*, 191.

Where an action is entitled named individuals "t/a" a named corporation, the corporation cannot be the party aggrieved by an order striking the names of the individuals and the letters "t/a" from the captions of the summons and complaint and the references to said individuals from the complaint. *Williams v. Denning*, 541.

Where it appears of record that after the institution of the action, but before the hearing, the plaintiff died, a purported appeal in the name of the deceased plaintiff is a nullity as well as an anomaly, and the appeal must be dismissed, there being nothing to indicate that the personal representative was substituted as a party. *Neal v. Discount Corp.*, 771.

§ 6. Moot Questions and Advisory Opinions.

Where the act sought to be enjoined has been done pending the appeal, the appeal becomes moot and will be dismissed. *Gaskins v. Fertilizer Works*, 191; *Fulton v. Morganton*, 345.

Action held in effect one for advisory opinion and is dismissed. *Henderson v. Vance County*, 529.

§ 7. Demurrers and Motions in Supreme Court.

Upon demurrer *ore tenus* in the Supreme Court for failure of the complaint to state a cause of action, the Court will consider only the ground upon which the complaint is challenged in the brief. *Ins. Co. v. Blythe Brothers Co.*, 69.

§ 11. Appeal and Appeal Entries.

Appellant is required to have the appeal entered by the clerk on the judgment docket and notice of appeal given the adverse party within ten days from the entry of the judgment, G.S. 1-280, G.S. 1-279, and when the statutory requirements are not complied with, the Supreme Court obtains no jurisdiction of the purported appeal. *Walter Corp. v. Gilliam*, 211.

§ 12. Jurisdiction and Powers of Lower Court after Appeal.

The trial court may dismiss the appeal upon failure of appellant to file the stay bond ordered as a condition precedent to the appeal, G.S. 1-289, or when appellant fails to serve statement of the case on appeal within the time specified. *Walter Corp. v. Gilliam*, 211.

After appeal and the termination of the term, the trial court is *functus officio* except, after notice and on a proper showing, he may adjudge that the appeal has been abandoned, and has authority, provided countercase or ex-

APPEAL AND ERROR—*Continued.*

ceptions to appellant's statement of the case on appeal is filed within the time allowed, to settle the case on appeal. *Machine Co. v. Dixon,* 732.

§ 16. Certiorari as Method of Review.

Where plaintiff, appearing *in propria persona* because of an asserted inability to employ counsel, fails to comply with the rules of court governing appeals, the Supreme Court, in the exercise of its supervisory jurisdiction, may treat the purported appeal as a petition for certiorari. When, upon consideration of the entire record thus brought up, there is not sufficient error in the record or merit in the appeal to warrant issuance of the writ, the writ must be denied and the appeal dismissed. *Huffman v. Aircraft Co.,* 308.

§ 19. Form of and Necessity for Objections, Exceptions and Assignments of Error in General.

The Rules governing appeals are mandatory. *Walter Corp. v. Gilliam,* 211.

An assignment of error must be supported by an exception duly noted in the record. *Cooperative Exchange v. Scott,* 81.

Exceptions must be grouped under the assignments of error. *Walter Corp. v. Gilliam,* 211; *Williams v. Denning,* 539.

Where no assignment of error appears in the record, the appeal is subject to dismissal. *Williams v. Denning,* 540.

§ 29. Making Out and Hearing Case on Appeal.

In those instances requiring a case on appeal the appellant must serve statement of case on appeal on appellee or its attorney, and if the parties do not agree, the case must be settled by the court, G.S. 1-283, while if the appeal is on the record proper, it must be certified to the Supreme Court by the clerk of the Superior Court, G.S. 1-284. *Walter Corp. v. Gilliam,* 211.

Where appellant serves no statement of case on appeal on appellee and no case on appeal is settled by the court, there is no proper statement of case on appeal, and the Supreme Court can review only the record proper for errors appearing upon its face. *Twiford v. Harrison,* 217.

When no statement of case on appeal is served within the time allowed by valid order, there is no proper statement of case on appeal, and the appellate court is confined to a review of the record proper for error appearing on its face. *Machine Co. v. Dixon,* 732.

Judge of county civil court, after allowing, at the time of the appeal, extension of time for service of case on appeal, has no authority to enlarge the time further. *Ibid.*

§ 32. Docketing of Record.

Where the record is not docketed in the Supreme Court within the time allowed by the rules so that the appeal is carried beyond the term at which it should have been heard, the Supreme Court will dismiss the appeal *ex mero motu. Kernodle v. Boney,* 774.

§ 34. Form and Requisites of Record.

Objection that appellant, instead of reducing the testimony to narrative form, merely gave conclusions as to the meaning of the testimony, should ordinarily be presented by countercase or exceptions to the case on appeal, and the

APPEAL AND ERROR—*Continued.*

appeal will not be dismissed under Rule 19(4) unless the narration of the evidence is fatally defective. *Keller v. Mills, Inc.*, 571.

§ 35. Conclusiveness and Effect of Record and Matters not Appearing Therein.

The Supreme Court will take judicial notice of its own records. *Swain v. Creasman*, 163; *S. v. Patton*, 359.

The Supreme Court is bound by the record as certified. *In re Will of Taylor*, 232.

§ 38. Form and Contents of the Brief.

The brief must contain a clear and concise statement of the questions involved on appeal, and a succinct statement of the facts. *Walter Corp. v. Gilliam*, 211.

A question raised by assignments of error but not discussed in the brief is deemed abandoned. *Brenkworth v. Lanier*, 279; *Taylor v. Twin City Club*, 435; *White v. Cothran*, 510.

§ 39. Presumption and Burden of Showing Error.

The burden is on appellant not only to show error but that except for the asserted error a different result was reasonably probable. *Mayberry v. Coach Lines*, 126.

§ 41. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

Where the evidence excluded does not appear in the record, it cannot be determined on appeal that its exclusion was prejudicial. *Cooperative Exchange v. Scott*, 81.

The admission of incompetent evidence over objection cannot be held prejudicial where thereafter substantially similar evidence is admitted without objection. *Smith v. Simpson*, 601.

Where nonsuit would have to be sustained even if the evidence excluded were admitted, the exclusion of the evidence cannot be prejudicial. *Berger v. Cornwell*, 198.

§ 42. Harmless and Prejudicial Error in Instructions.

An instruction more favorable to a party than that to which he is entitled cannot be held prejudicial on his appeal. *Simpson v. Wood*, 158.

§ 44. Invited Error.

An erroneous instruction given in accordance with appellant's written prayer for special instructions is invited error of which appellant may not complain notwithstanding the statement of the court that it would have given such instructions even in the absence of a request. *Overton v. Overton*, 139.

Where the pleadings, evidence and record of the trial affirmatively show that plaintiff predicated his assertion of a defendant's liability under the family purpose doctrine solely upon the basis of such defendant's ownership of the vehicle, plaintiff is in no position to complain if the court submits the issue upon the theory advanced by plaintiff. *Smith v. Simpson*, 601.

APPEAL AND ERROR—*Continued.*

§ 46. Review of Discretionary Matters.

The action of the trial judge in setting the verdict aside in the exercise of its discretion is not reviewable in the absence of a showing of abuse of discretion. *Atkins v. Doub*, 678.

§ 49. Review of Findings or of Judgment on Findings.

A failure to find facts essential to the determination of the rights of the parties necessitates a remand of the cause to the fact finding agency. *Utilities Comm. v. Membership Corp.*, 59.

The findings of fact by the court upon the hearing of a motion to quash service and dismiss the action and cross action against defendant are conclusive on appeal if supported by competent evidence, notwithstanding that there may be evidence *contra*. *Farmer v. Ferris*, 619.

§ 51. Review of Judgments on Motions to Nonsuit.

Where defendant introduces testimony, only the motion to nonsuit made at the close of all of the evidence will be considered on appeal. *Rosser v. Smith*, 647.

§ 59. Force and Effect of Decision of Supreme Court.

Certification of the decision of the Supreme Court affirming the judgment below terminates the suspension effected by the appeal and the judgment of the lower court goes into effect. *Strickland v. Jackson*, 190.

§ 60. Law of the Case and Subsequent Proceedings.

A provision of a judgment from which no appeal is taken becomes the law of the case. *Bank v. Barbee*, 106.

Where the Supreme Court has held that a mortgagee was not estopped from attacking the validity of a materialman's lien, the decision becomes the law of the case, and an appeal from order of the Superior Court in conformity with the decision will be dismissed in the absence of new evidence sufficient to affect the ruling. *Priddy v. Lumber Co.*, 421.

Decision on appeal that the evidence was sufficient to be submitted to the jury on the issue of contributory negligence is the law of the case and requires the submission of the issue upon evidence at the retrial which is at least as favorable to defendant as that upon the original trial. *Weaver v. Bennett*, 427.

AUTOMOBILES

§ 2. Revocation and Suspension of Driver's License.

The revocation of a driver's license is a quasi-judicial act, and a driver may not sue his insurer for false statements by insurer leading to the revocation of the driver's license. *Robinson v. Casualty Co.*, 284.

Where no warrant, summons, arrest report, or other lawful process is served on or delivered to the driver of an automobile arrested in another state, evidence that a copy of the arrest report was placed among his personal effects and that he delivered a sum in cash to an official to obtain his release, which sum was not returned, is insufficient to show a judicial forfeiture of bail or collateral deposited to secure defendant's presence in court. G.S. 20-16(a) (7),

AUTOMOBILES—*Continued.*

and the Department of Motor Vehicles is not authorized to suspend or revoke the operator's license upon such evidence. *In re Donnelly,* 375.

A license to operate a motor vehicle on public highways of this State is a personal privilege and property right of which a person may not be deprived except in accordance with statutory provisions as they are written and construed in this jurisdiction, and a contrary holding in another jurisdiction is not conclusive here. *Ibid.*

The provisions of G.S. 20-16(a) (7) that the Department of Motor Vehicles shall have authority to suspend an operator's license upon a showing by its records or "other satisfactory evidence" that the licensee has committed an offense in another state which, if committed here, would warrant revocation, *held* to refer to the form of notice of conviction in another state and does not purport to confer extra territorial jurisdiction on our courts to determine the guilt or innocence of a person charged with committing an offense in another state. *Ibid.*

On appeal from the discretionary suspension of an automobile driver's license, the hearing in the Superior Court is *de novo,* and the Superior Court is not vested with any discretionary authority but is empowered to make only judicial review of the facts to ascertain whether the licensee is in fact and in law subject to suspension or revocation. *Ibid.*

§ 6. Safety Statutes and Ordinances in General.

The requirement of G.S. 20-140(b) that the driver of a vehicle must drive same with due caution and circumspection and in a manner so as not to endanger or be likely to endanger persons or property, provides an absolulte standard of care, and the violation of the statute constitutes negligence *per se. Boykin v. Bissette,* 295.

§ 7. Attention to Road and Due Care in General.

Irrespective of statute, the operator of a motor vehicle is under duty to exercise that care which a reasonably prudent person would exercise under similar circumstances to prevent injury to persons or property. *Boykin v. Bissette,* 295.

§ 8. Turning and Turn Signals.

A driver intending to go straight through an intersection has the right to assume and act on the assumption that all other travelers will observe the law and not block his lane of travel by a left turn without first ascertaining that such move could be made in safety. *Harris v. Parris,* 524.

§ 9. Stopping, Parking, Signals and Lights.

It is negligence to permit a disabled vehicle to stand on a highway at night without lights, blocking a lane of traffic, without giving warning to approaching vehicles. *Dezern v. Board of Education,* 535; *Beasley v. Williams,* 561.

§ 10. Negligence and Contributory Negligence in Hitting Vehicle Stopped or Parked on Highway.

Where a motorist is traveling within the maximum legal speed he will not be held contributorily negligent as a matter of law in colliding with the rear of a vehicle left in his lane of traffic at nighttime without lights. *Dezern v. Board of Education,* 535.

AUTOMOBILES—*Continued.*

§ 11. Lights.

The statutory provisions prescribing lighting devices to be used at night on vehicles, including bicycles, were enacted in the interest of public safety, and the violation of the statutory provisions is negligence *per se*. *Oxendine v. Lowry*, 709.

§ 14. Following Vehicles and Passing Vehicles Traveling in Same Direction.

The audible warning with horn or other signaling device required by G.S. 20-149(b) to be given by a driver before passing or attempting to pass a preceding vehicle must be given in reasonable time to afford the driver of the preceding vehicle opportunity to avoid injury which would result from a left turn or a crossing over of the center of the highway, and while the failure to observe the requirements of the statute is not negligence *per se*, it is evidence to be considered with other facts and circumstances upon the issue. *Boykin v. Bissette*, 295.

§ 15. Right Side of Road and Passing Vehicles Traveling in Opposite Direction.

Where defendant's vehicle careens to his left of the highway as the result of his loss of control because he was following the preceding vehicle too closely, his negligence is the proximate cause of his collision with a car approaching from opposite direction. *Forga v. West*, 182.

Complaint alleging that a driver approaching from the opposite direction drove to his left of the center line of the highway and collided with two stationary cars, inflicting injuries to plaintiff, who was sitting in one of them, *held* to state a cause of action against such driver. *Copple v. Warner*, 727.

§ 17. Intersections.

The charge of the court in regard of the duty of a motorist, notwithstanding he is given the right-of-way by a flashing yellow traffic signal, to keep a lookout commensurate with the danger created by the weather and the obstructed view of the intersection, and that if he saw or should have seen the other vehicle approaching under circumstances which gave or should have given notice that the other motorist could not or would not stop, he was required to use all precautions reasonably at his command to avoid collision, *held* not to contain prejudicial error. *Mayberry v. Coach Lines*, 126.

Where both parties introduce evidence that the intersection at which the collision occurred had electric control signals and the municipal ordinance is pleaded by the one party and its existence admitted by the other, the fact that the ordinance is not introduced in evidence is not fatal and G.S. 20-155 is not applicable. *White v. Phelps*, 445.

Where the evidence discloses that the street intersection in question had electrically operated traffic signals, with the usual red, yellow, and green lights, the rights of a motorist at such intersection are controlled by the traffic signals and not by G.S. 20-154(b). *White v. Cothran*, 510.

A motorist approaching an intersection controlled by signal lights is under duty to maintain a proper lookout and to keep his vehicle in reasonable control in order that he may stop before entering the intersection if the green light changes to yellow or red before he enters the intersection, and a following mo-

AUTOMOBILES—*Continued.*

torist is under duty to keep his vehicle under reasonable control in order that he may avoid collision with the preceding vehicle in the event its driver is required to stop before entering the intersection by reason of the changing of the signal lights. *Ibid.*

§ 19. Sudden Emergencies.

A party may not invoke the doctrine of sudden emergency when such party's negligence contributes to the creation of the emergency. *Forga v. West,* 182; *Boykin v. Bissette,* 295.

§ 25. Speed in General.

The fact that the speed of a vehicle is lower than that fixed by statute does not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, or when hazard exists with respect to weather or highway conditions, and speed shall be reduced as may be necessary to avoid colliding with any vehicle on the highway. *Keller v. Mills, Inc.,* 571.

§ 33. Pedestrians.

A pedestrian violates the statute if he walks on his right of the highway, even though he walks on the shoulder. *Simpson v. Wood,* 157.

It is the duty of a pedestrian to look before attempting to cross a highway in a rural section and to keep a timely lookout for approaching motor traffic in the exercise of the duty to use ordinary care for her own protection, and the law will hold her to the duty of seeing what she could and should have seen if she had exercised such care. *Rosser v. Smith,* 647.

§ 35. Pleadings in Automobile Accident Cases.

Allegations held insufficient to state cause of action against one of two defendants, since the facts alleged failed to show a causal relation between such defendant's negligence and the injuries suffered by plaintiff. *Batts v. Faggart,* 641.

Plaintiff is not entitled to plead a prior conviction of defendant of manslaughter growing out of the same accident. *Moore v. Young,* 654.

§ 37. Relevancy and Competency of Evidence in General.

Evidence of defendant's conviction of manslaughter growing out of the same accident is incompetent. *Moore v. Young,* 654.

Evidence that defendant pleaded guilty to a criminal charge arising out of the same accident is ordinarily competent, and the admission of such evidence in this case could not have prejudiced defendant in view of defendant's own theory of how the accident occurred. *Grant v. Shadrick,* 674.

§ 38. Opinion Evidence as to Speed.

Testimony as to speed of plaintiff's car some one-half mile before reaching the intersection at which the accident occurred *held* not too remote under the circumstances of this case. *Adkins v. Dills,* 206.

A 13-year-old boy may testify as to speed of car from his observation of the movement of the lights along the highway. *S. v. Harrington,* 663.

§ 41a. Sufficiency of Evidence of Negligence and Nonsuit in General.

The court will take judicial notice that a truck traveling forty-five miles per hour cannot be stopped within thirty-three feet, and when plaintiff's con-

AUTOMOBILES—*Continued.*

tention of negligence is based on such inherently impossible situation, nonsuit is proper. *Burgess v. Mattox,* 305.

Testimony and the physical facts at the scene of an accident which are sufficient for the jury to infer that defendant was traveling at excessive speed under the circumstances in driving on a wet street entering an intersection, that he attempted to turn right and was unable to control his vehicle so that it struck the side of a vehicle stopped on the intersecting street in obedience to the traffic control signal, *held* sufficient to be submitted to the jury on the issue of defendant's negligence. *Keller v. Mills, Inc.,* 571.

Allegations that defendant's truck, approaching from the opposite direction, suddenly swerved into plaintiff's lane of travel, but with evidence that defendant's truck was moving slowly behind an unlighted truck and that defendant's truck had its left wheel some two to two and one-half feet to the left of the centerline of the highway, and that plaintiff ran into the wheel, held to warrant nonsuit for variance. *Taylor v. Garrett Co.,* 672.

§ 41c. Sufficiency of Evidence of Negligence in Failing to Stay on Right Side of Highway in Passing Vehicles Traveling in Opposite Direction.

Evidence that defendant, traveling in the opposite direction, pulled out from behind the second car preceding her on the highway into plaintiff's lane of travel, *held* sufficient to take the issue of negligence to the jury. *Grant v. Shadrick,* 674.

§ 41d. Sufficiency of Evidence of Negligence in Passing Car Traveling in Same Direction.

Evidence tending to show that defendant driver attempted to pass a preceding truck in open country on two occasions but was prevented from doing so by the weaving of the truck over the center line of the highway, that defendant attempted to pass on a third occasion without previously sounding her horn and, as the vehicles came abreast, the preceding vehicle veered to its left over the center line of the highway, and that defendant, upon apprehending the danger, then sounded her horn, was forced onto the shoulder to her left, lost control and ran off the highway to her left, resulting in the fatal injury to a passenger, *is held* sufficient to overrule nonsuit in an action for the wrongful death of the passenger. *Boykin v. Bissette,* 295.

§ 41e. Sufficiency of Evidence of Negligence in Stopping or Parking.

Evidence that the driver of a car left the vehicle standing unattended without lights at nighttime, partially on the hard surface, and that plaintiff was unable to stop before striking the rear of the vehicle when he first saw it upon resuming his bright lights after dimming his lights in response to oncoming traffic, *held* sufficient to be submitted to the jury on the issue of negligence. *Beasley v. Williams,* 561.

§ 41f. Sufficiency of Evidence of Negligence in Following too Closely and in Hitting Preceding Vehicle.

The evidence in this case *is held* sufficient to be submitted to the jury on the issue of defendant's negligence in colliding with the rear of the automobile driven by plaintiff. *Parlier v. Barnes,* 341.

AUTOMOBILES—*Continued.*

Evidence tending to show that plaintiff stopped behind a preceding car, which had stopped for a stop light at an intersection, that defendant, who was following behind plaintiff's car at a speed not exceeding ten miles per hour and a distance of about thirty feet, applied his brakes but that his car skidded on the ice and snow down an incline and bumped the rear of plaintiff's vehicle, inflicting no damage to defendant's car and insignificant damage to plaintiff's vehicle, *held* insufficient to be submitted to the jury in plaintiff's action to recover for personal injury. *Culver v. LaRoach,* 579.

§ 41g. Sufficiency of Evidence of Negligence in Excessive Speed at Intersection.

Plaintiff's evidence *held* sufficient to be submitted to the jury on the issue of defendant's negligence in entering the intersection at excessive speed and colliding with plaintiff's car which had first entered the intersection. *Tripp v. Harris,* 200.

§ 41h. Sufficiency of Evidence of Negligence in Turning and in Hitting Turning Vehicles.

Evidence that a driver, immediately upon the turning of the traffic control signal facing him from red to green, turned left in an attempt to cross the three lanes for traffic approaching the intersection from the opposite direction, and was struck by a vehicle in the middle lane which she did not even see before impact, *is held* sufficient to be submitted to the jury on the issue of such driver's negligence. *Harris v. Parris,* 524.

Evidence that the driver of a car traveling in the middle lane of three lanes of traffic for his direction, struck a vehicle which had approached the intersection from the opposite direction and which, immediately upon the changing of the traffic control signal from red to green, had turned left suddenly in the path of oncoming traffic, *held* insufficient to be submitted to the jury on the issue of such driver's negligence. *Ibid.*

§ 41l. Sufficiency of Evidence of Negligence in Striking Pedestrian.

Evidence disclosing that a pedestrian, instead of crossing at an intersection where he had the right of way, G.S. 20-174(a), elected to cross some 100 feet south of the intersection, and that he was struck by defendant motorist who was traveling, with his lights on, some 25 miles per hour in a 35 mile per hour zone, *is held* to warrant nonsuit in the absence of evidence not only that plaintiff was oblivious to the danger but that defendant saw, or in the exercise of reasonable care should have seen, that plaintiff was not aware of the approaching danger. *Jenkins v. Thomas,* 768.

§ 41m. Sufficiency of Evidence of Negligence in Striking Children.

In an action to recover for the death of a five year old child, fatally injured when struck by an automobile driven by defendant at night as the child was crossing the street at an angle in the same general direction as defendant was driving, nonsuit is erroneously allowed when there is testimony of a witness permitting the inference that defendant overtook and passed the witness as the witness was traveling at the maximum lawful speed of 35 miles per hour for that zone. *Davis v. Parnell,* 522.

Evidence that a child less than five years old was on the hard surface of a highway, unattended, and clearly visible to defendant while he traveled a

AUTOMOBILES—*Continued.*

distance of one-half mile, that she ran across the highway toward her companion, another small child, when defendant was only some 40 feet away, and that defendant could not then avoid striking the child, notwithstanding he had reduced his speed from some 45 miles per hour to 25 miles per hour, *held* sufficient to be submitted to the jury. *Henderson v. Locklear,* 582.

§ 41s. Sufficiency of Evidence of Negligence in Striking Bicyclists.

Evidence favorable to plaintiff which tends to show that plaintiff was riding his bicycle on the right side of the highway, that the bicycle was equipped with a reflector on the rear as required by G.S. 20-129(e), and that plaintiff was struck from the rear by the automobile driven by defendant, who had drunk some beer and was traveling at excessive speed and rammed the bicycle without slackening speed or sounding his horn, etc., *is held* sufficient to be submitted to the jury on the issue of defendant's negligence. *Oxendine v. Lowry,* 709.

§ 42d. Contributory Negligence in Hitting Stopped or Parked Vehicle.

Plaintiff will not be held contributorily negligent as a matter of law in striking the rear of a vehicle left unattended on a highway at nighttime without lights when plaintiff at the time is traveling within the statutory maximum speed limit. *Beasley v. Williams,* 561.

§ 42e. Contributory Negligence in Following too Closely.

Evidence held to show contributory negligence as matter of law in following more closely than was reasonable and prudent under the circumstances. *Forga v. West,* 182.

§ 42g. Nonsuit for Contributory Negligence in Failing to Yield Right of Way at Intersection.

Plaintiff, traveling east, entered the intersection after stopping and seeing defendant's truck, still some distance away, approaching from the south. The evidence supported conflicting inferences as to whether a driver of reasonable care and prudence at the time of seeing the approaching truck, would have been justified in believing that he could pass safely through the intersection ahead of the approaching truck. *Held:* The evidence does not show contributory negligence as a matter of law. *Tripp v. Harris,* 200.

§ 42i. Contributory Negligence in Taking Position of Peril on Vehicle.

A plaintiff who voluntarily and without any obligation to do so places himself upon the hood of a truck in order to weigh down its bumper so that the truck might push an automobile to start its motor will be held guilty of contributory negligence barring as a matter of law his right to recover for injuries sustained when he was thrown from the hood of the truck by a sudden movement which might have been anticipated in such operation. *Burgess v. Mattox,* 305.

§ 42k. Contributory Negligence of Pedestrian.

Evidence held to show contributory negligence as a matter of law on part of pedestrian. *Rosser v. Smith,* 647.

§ 42m. Contributory Negligence of Bicyclists.

Absence of front bicycle lamp held not proximate cause or contributing cause to collision from the rear. *Oxendine v. Lowry,* 709.

AUTOMOBILES—*Continued.*

§ 43. Sufficiency of Evidence of Concurring Negligence.

Allegations held insufficient to show that injuries were the result of the first of two collisions. *Batts v. Faggart*, 641.

Author of negligence causing first collision not resulting in injury is not jointly liable with author of negligence independently causing second collision. *Copple v. Warner*, 727.

§ 46. Instructions in Automobile Accident Cases.

Where there is no evidence that the scene of the accident was within a business district as defined in G.S. 20-38(a), a charge as to the maximum speed in a business district must be held for prejudicial error in charging on an abstract principle of law not supported by any evidence in the case. *Parlier v. Barnes*, 341

Instruction on inapplicable law is error. *White v. Phelps*, 445; *Motor Freight v. DuBose*, 497; *White v. Cochran*, 510.

§ 47. Liabilities of Driver to Guests or Passengers.

In those jurisdictions having a host-guest statute limiting the liability of the driver of an automobile for injuries to a guest passenger, the burden is upon plaintiff passenger to allege and prove facts sufficient to show that the actual relationship existing between plaintiff and defendant at the time of the collision was not that of guest and host within the meaning of the statute. *Frisbee v. West*, 269.

Evidence held insufficient to show that plaintiff was other than a gratuitous guest at the time of the accident in suit. *Ibid.*

Evidence that defendant, while his invitee was attempting to enter the vehicle but before he was actually in, started the vehicle, resulting in injury to the invitee, *held* sufficient to be submitted to the jury on the issue of negligence. *Farrar v. Farrar*, 583.

§ 49. Contributory Negligence of Guest or Passenger.

Evidence that the driver, turning left and stopping in the crossover in the median separating the lanes in a four-lane highway, waited for several cars to pass, asked his passenger if there were any more cars coming, that the passenger, without looking, stated no and that the driver drove into the highway and was struck about 25 feet from the crossover, *held* to show contributory negligence as a matter of law on the part of the passenger. *Martin v. Martin*, 442.

The evidence in this case *is held* sufficient to be submitted to the jury on the question of plaintiff passenger's contributory negligence in voluntarily riding without protest in a car driven by defendant when plaintiff knew defendant to be under the influence of intoxicating beverages. *Howell v. Lawless*, 670.

§ 52. Liability of Owner for Driver's Negligence in General.

The mere fact of ownership of a vehicle does not impose liability for injury inflicted as a result of the negligent operation of the vehicle by the driver, but in order to hold the owner liable, plaintiff must show facts calling for the application of the doctrine of *respondeat superior*, or that the owner was negligent himself in providing a dangerously defective vehicle or in permitting a known incompetent to drive, and mere evidence that the owner permitted the tortfeasor to drive is insufficient to be submitted to the jury on the question of the owner's liability. *Beasley v. Williams*, 561.

AUTOMOBILES—*Continued.*

§ 54f. Sufficiency of Evidence on Issue of Respondeat Superior.

Evidence of the color and size of the truck which struck plaintiff and that it had on its doors signs reading "Biggers Brothers Wholesale Fruit & Produce", without evidence tending to identify the signs on the truck with defendant or with other trucks owned by defendant, or any evidence of the nature of defendant's business, *is held* insufficient to show that defendant, "Biggers Brothers, Inc.," was the owner of the truck. *Freeman v. Biggers Brothers, Inc.*, 300.

§ 55. Family Purpose Doctrine.

The application of the family purpose doctrine does not depend upon ownership of the vehicle, and a person who is not the owner but who maintains or provides an automobile for the use, pleasure, and convenience of his family and who controls or has the right to control its use for such purposes, and who actually or impliedly authorizes members of his family to so use it, is liable under the family purpose doctrine for the negligent operation of the car by a family member, be he a minor or adult, a spouse, parent, brother, sister, niece, or even more remote kin, provided such person is a *bona fide* member of the household. *Smith v. Simpson*, 601.

Evidence held insufficient predicate for application of family car doctrine. *Ibid.*

§ 55½. Right of Owner to Recover Damages to Vehicle Driven by Employee.

The owner of a truck is precluded from recovery of damages to the truck resulting from a collision when the negligent operation of the truck by the owner's employee in the course of his employment constitutes a proximate cause of the collision, since the negligence of the driver will be imputed to the owner as contributory negligence. *Forga v. West*, 182.

§ 57. Homicide — Proximate Cause and Contributory Negligence.

The contributory negligence of the persons injured is relevant solely on the question of whether defendant's negligence was a proximate cause of the fatal injury. *S. v. Harrington*, 663.

In a prosecution of a motorist for manslaughter in the deaths of two small boys who were struck by defendant's car as defendant was attempting to pass another vehicle traveling in the same direction, evidence that the children were walking on the hardsurface when they were struck and that the preceding car speeded up as defendant attempted to pass it, requires the court to instruct the jury upon the conduct of the children in walking on the hardsurface and the conduct of the other driver in increasing his speed as bearing upon the question of whether defendant's negligence was a proximate cause of the deaths. *Ibid.*

§ 58. Competency and Relevancy of Evidence in Homicide Prosecutions.

In a prosecution for manslaughter growing out of the operation of an automobile it is competent for a 13 year old boy to testify as to the speed of the car from his observation of the movement of the lights along the highway for a considerable distance. *S. v. Harrington*, 663.

§ 59. Sufficiency of Evidence and Nonsuit in Homicide Prosecutions.

Evidence in this case that defendant was driving some 60 miles per hour in going from open country into a residential district at which a highway sign

AUTOMOBILES—*Continued.*

cautioned motorists to "reduce speed," and that defendant, while attempting to pass a preceding vehicle, struck two small children in his lane of travel, together with other facts and circumstances adduced by the evidence, ***is held*** sufficient to be submitted to the jury on the issue of defendant's culpable negligence. *S. v. Harrington*, 663.

BANKS AND BANKING

§ 1. Control and Regulation of Banks in General.

A national bank by qualifying as a testamentary trustee waives any right to have an action against it for an accounting moved from the county in which the will was probated to the county in which it maintains its principal office. *Lichtenfels v. Bank*, 146.

BILLS AND NOTES

§ 17. Defenses and Competency of Parol Evidence.

Where a note for the balance of the purchase price of a chose in action pledged as collateral security for the note, stipulates that upon default the holder should have full power to sell the chose at public or private sale at his option and that after such sale there should be no liability for any deficiency, *held* the stipulation gives the holder an option to sell the chose upon default but does not, within itself, disclose an agreement that the note should be paid solely out of the proceeds of sale of the collateral so as to preclude the maker from maintaining an action on the note when he has elected not to sell the pledged security. *Langston v. Brown*, 518.

§ 20. Prosecutions for Issuing Worthless Checks.

Where the evidence discloses that the check issued by defendant was returned by the bank, not on account of insufficient funds, but because it was written on the wrong kind of check form, the court should enter a judgment of not guilty in a prosecution for issuing a worthless check. *S. v. Coppley*, 542.

BOATING

Mere ownership of a boat does not impose liability for injury received by a passenger due to the negligence of the operator of the boat. *Jackson v. Mauney*, 388.

Evidence tending to show that a corporation maintained a boat for use in entertaining its customers and for entertaining and in furtherance of better relations between its employees, and that the injury in suit was inflicted on the corporation's vice president, riding as a guest, by the negligent operation of the boat by the corporation's secretary and treasurer while on a boat ride during vacation for pleasure, *is held* insufficient to be submitted to the jury upon the issue of *respondeat superior*, notwithstanding evidence of casual discussions of business among the parties during the trip. *Ibid.*

BOUNDARIES

§ 2. Courses and Distances and Calls to Natural and Artificial Monuments.

The number of acres supposed to be contained in a tract is the least reli-

BOUNDARIES—*Continued.*

able of all descriptive particulars to ascertain boundaries and cannot control boundaries which are otherwise defined. *Wagoner v. Evans*, 419.

§ 4½. Description by Reference to Map.

A map referred to in a deed becomes a part of the deed without registration. *Kaperonis v. Highway Comm.*, 587.

§ 9. Sufficiency of Description and Admissibility of Evidence Aliunde.

It will be presumed that the parties to a deed acted in good faith, the grantor intending to sell and the grantee intending to purchase, and such intent will not be thwarted if the language of the instrument is sufficient to permit the property sold to be identified. *Light Co. v. Waters*, 667.

A deed describing the lands over which grantor conveyed the easement in suit as lying in a named county, that the lands were "formerly known as West lands," across which ran a power line already owned by the grantee and that the property was bound on one side by the lands of a named person and on the other side by the lands of another named person, *held* sufficiently definite to permit the introduction of evidence *aliunde* to fit the lands to the description. *Ibid.*

§ 12. Evidence — Maps and Ancient Documents.

A map referred to in a deed becomes a part of the deed and need not be registered, and a duly authenticated copy of the original plat duly identified made by a registered surveyor and referred to in the deed is properly admitted in evidence. *Kaperonis v. Highway Comm.*, 587.

BURGLARY

§ 9. Punishment for Possession of Implements of Burglary.

Punishment for possession of instruments for housebreaking may not exceed ten years. *S. v. Blackmon*, 352.

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 2. For Fraud.

Evidence tending to show that the owner of an interest in land was induced to execute a deed conveying his interest to two of his children by the false representation of another child that the instrument signed was a paper necessary to be executed to prevent him from losing his social security payments, that he received no consideration for the deed and that he did not know that the instrument he was executing was a deed, *is held* sufficient to raise the issue of fraud for the determination of the jury. *Nixon v. Nixon*, 251.

The grantees are not entitled to nonsuit in an action to annul a deed for fraud on the ground that they did not make or participate in the making of the misrepresentations inducing the execution of the instrument when the evidence tends to show that they paid no consideration and that the execution of the deed was procured by fraud, regardless of whether the fraud was fraud in the *factum* or fraud in the treaty, since if the instrument was procured by fraud in the *factum* it is a nullity even in the hands of innocent third parties, and if the fraud was fraud in the treaty a volunteer takes same tainted with the fraud. *Ibid.*

CANCELLATION AND RESCISSION OF INSTRUMENTS—*Continued.*

§ 4. For Mistake.

The fact that an agreement between the widower and beneficiaries in regard to the settlement of an estate and the deed and the consent judgment effectuating the agreement are made in reliance upon the statute giving the husband the right to dissent from the will of his wife, *held* not ground for the cancellation of the consent judgment and deed sequent to the declaration by the court of the unconstitutionality of the statute, the agreement having been made by parties *sui juris* dealing at arms length and who were represented by competent counsel, and there being no suggestion of fraud. *Roberson v. Penland,* 502.

CARRIERS

§ 2. State License and Franchise and Control.

Agreement between carriers respecting services to public is valid when approved by Utilities Commission and Commission may not arbitrarily rescind such order of approval but may rescind it after notice and opportunity to be heard for change of condition; construction of highway making new and shorter route between cities feasible is such change of condition; Commission's order granting respective carriers closed door operations on segments of route upheld. *Utilities Comm. v. Coach Co.,* 43.

The evidence before the Utilities Commission in regard to a manufacturer's need to work in close cooperation with its carrier in having trucks and personnel available at all times near its plant for loading shipments day or night as orders were received, etc., *held* sufficient to sustain the Commission's findings and conclusion thereon that a contract carrier is better qualified than a common carrier to meet the manufacturer's needs, and order of the Commission granting the contract carrier's application for such authority is affirmed. *Utilities Comm. v. Transport,* 762.

CONSTITUTIONAL LAW

§ 24. What Constitutes Due Process in Civil Cases.

The Utilities Commission must determine a petition for an increase in rates on the basis of the facts existing at the time such increase is effective, and if a subsequent change in condition warrants a new rate, such new rate must relate to the date of change and the parties must be accorded an opportunity to be heard with respect to the effect, if any, such change had on the rate structure, and a denial of such opportunity would be a deprivation of due process. *Utilities Comm. v. Tel. Co.,* 369.

Statute giving judge authority to determine issues raised in action for compensation for taking by Highway Commission without jury, is constitutional. *Kaperonis v. Highway Comm.,* 587.

Evidence held to support findings that corporation was doing business in this state so as to subject it to service of process by service on Secretary of State. *Farmer v. Ferris,* 619.

§ 29. Right to Jury Trial in Criminal Prosecutions.

Upon motion to quash on ground that members of defendant's race were arbitrarily excluded from grand jury, defendant is entitled to reasonable opportunity to procure evidence in support of the motion. *S. v. Inman,* 311.

CONSTITUTIONAL LAW—*Continued.*

§ 30. Due Process in Trial in Criminal Cases.

Refusal of motion for continuance does not deprive defendant of constitutional right when it is apparent that evidence which he intended to procure, if continuance were allowed, would have no probative value, *S. v. Patton*, 359; Delay of more than four years between time offense was committed and retrial of defendant does not deprive defendant of constitutional rights when the delay is due to acts of defendant. *Ibid.*

§ 36. Cruel and Unusual Punishment.

Sentence within the discretionary limits provided by statute cannot be deemed cruel or unusual punishment in the constitutional sense. *S. v. Brooks*, 186.

Punishment in excess of statutory maximum violates constitutional rights. *S. v. Blackmon*, 352.

CONTRACTS

§ 19. Novation and Substitution.

Evidence that parties abandoned original contract and substituted new agreement therefor *held* for jury. *Ipock v. Daugherty*, 213.

§ 27. Actions on Contracts — Sufficiency of Evidence and Nonsuit.

Where plaintiff's evidence is to the effect that the contract under which plaintiff was to make certain repairs to defendant's dwelling for a specified sum was abandoned upon defendant's decision to materially increase the work to be done, and that the parties thereupon substituted an agreement under which defendant agreed to pay plaintiff for labor and materials used in remodeling the dwelling, upon which agreement there was a balance due in a specified sum, the evidence is properly submitted to the jury, and defendant's motion to nonsuit properly denied. *Ipock v. Daugherty*, 213.

CORPORATIONS

§ 13. Liabilities of Officers and Agents to Corporation.

G.S. 55-33(c) has no application to an action against a person who is not a director at the time the action is instituted or to an action which seeks recovery against a director for alleged wrongful conduct subsequent to his removal from office as director, and even when the statute is applicable G.S. 55-33(d) provides the exclusive method of service of process. *Trucking Co. v. Haponski*, 514.

§ 26. Liability of Corporation for Torts of Officers and Agents.

A corporation may be held liable for false imprisonment and slander committed by its employees in the course of their employment and within the scope of their authority in having a person arrested on a charge of shoplifting. *Hales v. McCrory-McLellan Corp.*, 568.

COURTS

§ 3. Original Jurisdiction of Superior Courts in General.

The Superior Court is a court of general legal and equitable jurisdiction. *Cocke v. Duke University*, 1.

COURTS—*Continued.*

Our courts have jurisdiction of an action to modify a trust when the trust operates principally in this State, a majority of the trustees reside here, and the trustees, pursuant to authority conferred upon them by the trust, have established administrative offices in this State, notwithstanding the trustor resided in another state and executed the instrument there. *Ibid.*

§ 7. Appeal from Inferior Court to Superior Court.

Under Article 35, Chapter 7, of the General Statutes, the judge of a county civil court has the discretionary power to enlarge beyond the statutory 30 day period the time within which appellant must serve statement of case on appeal, but after allowing such extension at the time of appeal he is *functus officio* and has no authority thereafter to enter any order enlarging the time beyond that allowed in his original order. *Machine Co. v. Dixon,* 732.

§ 9. Jurisdiction of Superior Court After Orders or Judgments of Another Superior Court Judge.

The denial of a motion to be allowed to amend during the course of the trial does not preclude a like motion prior to retrial, since *res judicata* does not apply to ordinary motions incidental to the trial. *Overton v. Overton,* 139.

§ 17. Justices of the Peace.

Petition for removal of justice of the peace held under G.S. 7-115 and not G.S. 128-16, and justice was not entitled to recover his costs and attorney's fees upon final judgment in his favor. *Swain v. Creasman,* 163.

§ 20. What Law Controls — Laws of This and Other States.

Our courts have jurisdiction to modify a trust which operates principally in this State with its administrative offices here, but will apply the law of state in which trustor resided and in which the trust was executed. *Cocke v. Duke University,* 1.

In an action instituted in this State to recover for injuries resulting from an automobile accident occurring in the State of Washington, the substantive rights and liabilities of the parties are to be determined in accordance with the law of Washington while procedural matters are to be determined in accordance with the law of this State. *Frisbee v. West,* 269.

Where an act performed in another state in reconditioning machinery in a defective manner results in injury to a person in this State in the use of such machinery, the place of the wrong is in this State. *Farmer v. Ferris,* 619.

CRIMINAL LAW

§ 2. Intent as Element of Crime.

Intent is an attitude or emotion of the mind and is usually susceptible of proof only by circumstantial evidence. *S. v. Gammons,* 753.

§ 9. Aiders and Abettors.

While all who are present at the place of a crime and are aiding, abetting, assisting, or advising in its commission or who are present for such purpose to the knowledge of the actual perpetrator of the crime, are principals and equally guilty, mere presence of a by-stander without encouragement to the perpetrator by word or deed or conveying to the perpetrator in any manner the belief that

CRIMINAL LAW—*Continued.*

he was standing by to lend assistance if necessary, is insufficient to constitute the by-stander and aider or abettor. *S. v. Gaines*, 228.

§§ 10, 11. Accessories Before and After the Fact.

The crime of accessory before the fact and that of accessory after the fact are distinct; the crime of accessory after the fact must have its beginning after the prior offense has been committed, and is a separate substantive crime and not a lesser degree of the principal crime. *S. v. McIntosh*, 749.

§ 26. Pleas of Former Jeopardy.

A valid plea of former jeopardy must be based upon a prior prosecution for an offense which is the same both in fact and in law, and it is not sufficient that the two offenses grow out of the same transaction. *S. v. McIntosh*, 749.

An acquittal of a charge of accessory after the fact of armed robbery will not support a plea of former jeopardy in a subsequent prosecution of the same defendant for armed robbery, since the two offenses are different in law and in fact. *Ibid.*

§ 32. Burden of Proof and Presumptions.

Defendant's plea of not guilty controverts and puts in issue the existence of every fact essential to constitute the offenses charged in the indictment, and places the burden upon the State to prove beyond a reasonable doubt each of the essential elements of the offenses. *S. v. Mitchell*, 235.

§ 46. Flight of Defendant.

While flight of an accused person is a circumstance to be considered with other facts and circumstances upon the question of an implied admission of guilt, it is insufficient, standing alone, to warrant the submission of the issue of guilt to the jury. *S. v. Gaines*, 228.

§ 71. Confessions.

Only a voluntary confession is competent in evidence, and a confession is voluntary when, and only when, it is in fact voluntarily made. *S. v. Crawford*, 548.

A confession otherwise voluntary is not rendered involuntary and therefore incompetent by the mere fact that the accused at the time of making the confession was under arrest or in jail or in the presence of armed officers. *Ibid.*

Evidence upon the preliminary inquiry that defendant was advised of his rights and that defendant then, without being threatened or coerced, made the incriminating statements offered in evidence, that defendant's counsel was given opportunity to cross-examine the witness in regard to the voluntariness of the confession made by defendant to the witness, *is held* to support the court's finding that the confession was in fact voluntary, and the admission of the confession in evidence will not be disturbed. *Ibid.*

§ 72. Admissions and Declarations.

Declarations, statements, and admissions of a defendant of facts pertinent to the issue and which tend, in connection with other facts, to prove his guilt of the offense charged, are competent against him in a criminal action. *S. v. Woolard*, 133.

CRIMINAL LAW—*Continued.*

§ 84. Credibility of Witnesses, Corroboration and Impeachment.

A written statement of a witness which is generally consistent with the witness' testimony upon the trial is competent for the purpose of corroboration, and slight variation with the witness' testimony upon the trial merely affects the credibility of the evidence, but the State is not entitled o discredit its own witness by introducing prior contradictory statements under the guise of corroboration, nor entitled to introduce "new" evidence upon the guise of corroboration. *S. v. Brooks,* 186.

§ 85. Rule That Party is Bound By Own Evidence.

When the State introduces evidence of statements tending to exculpate defendant and such statements are not contradicted or shown to be false by any fact or circumstance in evidence, the State is bound by the statements. *S. v. Gaines,* 228.

§ 86. Time of Trial and Continuance.

Defendant must be given reasonable opportunity to procure evidence in support of his motion to quash on the ground that members of his race were arbitrarily excluded from grand jury. *S. v. Inman,* 311.

When it appears from the record that defendant's witness would testify that he drove defendant to a city in another state some time before the alleged offense was committed in this State, that the witness knew defendant had no automobile and "believed" it would have been almost impossible for defendant to have been in this State at the time the offense was committed, the fact that such witness was incapacitated at the time of trial is not ground for continuance, since such testimony would have no probative force in support of defendant's defense of alibi. *S. v. Patton,* 359.

§ 98. Function of Court and Jury in Regard to Evidence.

The credibility of witnesses and the weight to be given their testimony are questions for the jury and not the court. *S. v. Orr,* 177.

§ 99. Consideration of Evidence on Motion to Nonsuit.

The evidence must be viewed in the light most favorable to the State upon defendant's motion to nonsuit. *S. v. Orr,* 177.

§ 101. Sufficiency of Evidence to Overrule Nonsuit.

While flight of an accused person is a circumstance to be considered with other facts and circumstances upon the question of an implied admission of guilt, it is insufficient, standing alone, to warrant the submission of the issue of guilt to the jury. *S. v. Gaines,* 228.

Circumstantial evidence which raises a mere suspicion or conjecture of guilt is insufficient to withstand nonsuit. *S. v. Gaines,* 228.

An extrajudicial confession of a defendant is alone insufficient to sustain a conviction, but if the confession is corroborated by other evidence in regard to all of the elements of the crime, the evidence is sufficient to be submitted to the jury on the question of guilt. *S. v. Crawford,* 548.

The fact that defendant's confession introduced in evidence by the State contains exculpatory statemenrs does not justify nonsuit when the State introduces substantive evidence in contradiction of the exculpatory matter. *S. v. Perry,* 769.

CRIMINAL LAW—*Continued.*

§ 106. Instructions on Burden of Proof and Presumptions.

Erroneous placing of burden of proof on State "by greater weight of evidence" held cured by court's emphatic correction and repeated correct charges on the burden. *S. v. Orr*, 177.

An instruction which, in effect, places the burden upon defendant to prove his defense of an alibi is prejudicial error. *S. v. Godwin*, 580.

§ 108. Expression of Opinion by Court on the Evidence in the Charge.

The court may not intimate in its charge that any controverted fact had or had not been established. *S. v. Mitchell*, 235.

§ 111. Charge on Character Evidence and Credibility of Witnesses.

Where defendant introduces evidence of ill will between himself and his Brother-in-law, the deputy sheriff who arrested him for drunken driving and the principle witness for the State, it is error for the court, after charging on defendant's contentions that the prosecution arose out of a family dispute, to charge that the jurors should disabuse their minds of any family connection and all that had been said about the family connection, since the evidence of bias of the witness was proper for the consideration of the jury in passing upon his credibility. *S. v. Kirk*, 447.

§ 114. Charge on Right to Recommend Life Imprisonment.

Charge on right of jury to recommend life imprisonment *held* without error. *S. v. Crawford*, 548.

§ 116. Additional Instructions After Initial Retirement of Jury.

The jury returned as a verdict "we decided he is guilty of an assault on this person," whereupon the court asked the jury if the court should understand that the jury found the defendant guilty of an assault with a deadly weapon inflicting serious injuries not resulting in death, as charged in the indictment. *Held:* It was prejudicial error for the trial court to intimate to the jury what their verdict should be. *S. v. Godwin*, 580.

§ 131. Severity of Sentence.

Where statute provides punishment by fine or imprisonment within discretion of court, it does not provide specific punishment and therefore punishment is limited under G.S. 14-2 to a maximum of ten years in prison. *S. v. Blackmon*, 352.

§ 133. Concurrent and Cumulative Sentences.

Where sentence is imposed to begin at the expiration of another sentence theretofore imposed upon the same defendant in another prosecution, and thereafter the judgment in the prior prosecution is set aside and a new trial ordered, defendant is not entitled to his release from the subsequent sentence, but the cause should be remanded to the court entering that sentence for a proper judgment. *S. v. Hollars*, 195.

§ 136. Revocation of Suspension of Sentence.

Where a new trial is awarded, provision of the judgment activating a prior suspended sentence, solely on the ground of the conviction, will be vacated. *S. v. Harrington*, 663.

CRIMINAL LAW—*Continued.*

§ 151. The Record.

The Supreme Court will take judicial notice of its own records in an inter-related proceeding where the parties are the same, and therefore will take notice of an affidavit filed in proceedings for *certiorari* relating to the same prosecution. *S. v. Patton,* 359.

§ 155. Objections, Exceptions and Assignments of Error to Evidence and Motions to Strike.

If portions of a written statement of a witness are not identical with the testimony of the witness upon the trial and are not, therefore, competent for the purpose of corroboration, it is the duty of defendant to point out the objectionable portions, and objection to the statement *en masse* will not ordinarily be sustained if any part of the statement is competent. *S. v. Brooks,* 186.

§ 156. Exceptions and Assignments of Error to the Charge.

An exception to the charge on the ground that it failed to explain and apply or correlate the law to the various aspects of the case presented by the evidence, without specifying the specific legal propositions which appellant asserts were improperly omitted from the charge, is a broadside exception and will not be considered. *S. v. Woolard,* 133.

§ 159. The Brief.

An assignment of error not brought forward and discussed in the brief will be taken as abandoned. *S. v. Woolard,* 133.

§ 160. Presumptions and Burden of Showing Error.

The burden is upon appellant not only to show error but also that the asserted error was prejudicial so that a different result would likely have ensued. *S. v. Woolard,* 133.

§ 161. Harmless and Prejudicial Error in Instructions.

In this prosecution for a capital crime the court correctly placed the burden upon the State to show guilt beyond a reasonable doubt and correctly defined that term, but in one instance in stating defendant's contentions and also in attempting to correct the inadvertence, used the phrase "by the greater weight of the evidence." Immediately before the jury retired, the court emphatically corrected its inadvertence and charged that the burden was on the State to prove guilt beyond a reasonable doubt. *Held:* It must be assumed that the jurors were men of sufficient intelligence to understand the court's unequivocal correction of its slip of the tongue, and the conflict in the instructions was removed. *S. v. Orr,* 177.

§ 162. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

The admission of evidence relating to charges upon which defendant is acquitted cannot have prejudiced defendant in regard to such charges. *S. v. Woolard,* 133.

§ 164. Whether Error Relating to One Count Alone Is Prejudicial.

Where there is ample evidence to be submitted to the jury on the question of defendant's guilt of the charges upon which he was convicted, the fact in regard to other charges upon which defendant was acquitted the evidence may

CRIMINAL LAW—*Continued.*

have been insufficient to be submitted to the jury, ordinarily could not prejudice him. *S. v. Woolard*, 133.

DAMAGES

§ 3. Compensatory Damages for Injury to Person.

The general rule relating to recovery of damages for personal injuries is that the injured party is entitled to recover the present worth of the damages sustained in consequence of the tort, embracing indemnity for loss of time, or loss from inability to perform ordinary labor, or incapacity to earn money, which are the immediate and necessary consequences of his injury. *Smith v. Corsat*, 92.

In actions to recover for personal injuries, the age and occupation of the injured person, the nature and extent of his employment, the value of his services and the amount of his income at the time, whether from fixed wages or salary, are matters properly to be considered by the jury. *Ibid.*

§ 12. Competency and Relevancy of Evidence on Issue of Compensatory Damages.

In personal injury actions, great latitude is allowed in the introduction of evidence to aid in determining the extent of the damages, and as a broad general rule any evidence which tends to establish the nature, character and extent of injuries which are the natural and proximate consequences of the tortfeasor's acts is admissible in such actions, if otherwise competent. *Smith v. Corsat*, 92.

As a general rule evidence that after the injury the business in which the injured party was interested suffered a loss or diminution of profits is not competent to be considered for the purpose of establishing the pecuniary value of lost time or diminution of earning capacity of the injured party, but such evidence may be competent for such purpose where the business is small and the income which it produces is principally due to the personal services and attention of the injured owner. *Ibid.*

Evidence of loss of profits from personal business held competent as aid in determining damages for loss of earning capacity. *Ibid.*

DEATH

§ 2. Presumption of Death from Unexplained Absence.

The continuous and unexplained absence of a person from his domicile for a period of seven years, without being heard from by those who would naturally expect to hear from him if he were alive, raises a presumption that such person is dead, and the period at which it is presumed that life ceased may be shortened by proof of facts and circumstances from which a jury may reasonably infer, by the test of reason and experience, that death ensued at an earlier date. *Stewart v. Rogers*, 475.

Evidence held to support finding that missing person was dead some three years after disappearance. *Ibid.*

§ 3. Nature and Grounds of Actions for Wrongful Death.

An action for wrongful death is purely statutory and must be brought by the personal representative; if brought by a person who has not been appointed

DEATH—*Continued.*

in this State the action must be dismissed; if the personal representative is permitted to become a party to an unauthorized action for wrongful death, the action is deemed to have been commenced only from the time he became a party. *Graves v. Welborn*, 688.

§ 4. Limitations of Actions for Wrongful Death.

The amendment of G.S. 28-173 by G.S. 1-54(3) removed the time limitation on an action for wrongful death as a condition annexed to the cause of action and made it a two-year statute of limitations. *Graves v. Welborn*, 688.

The widow, prior to filing complaint in this action for wrongful death, had applied for appointment as administratrix, and order had been issued adjudging that she was entitled to appointment and she had signed the bond, but the surety had not signed and the letters did not actually issue until more than two years after intestate's death. The caption of the complaint was in the name of the widow individually, but the complaint alleged in good faith that she was the duly appointed and acting administratrix of decedent. *Held:* Upon the issuance of letters they related back to the time of the order, and the court should permit an amendment and should not dismiss the action on the ground that it was not instituted within the time limited. *Ibid.*

DECLARATORY JUDGMENT ACT

§ 1. Nature and Grounds of Remedy.

Where the action is to determine the general rights of the parties under a statute without allegation or demand as to any specific sum to which plaintiff deems itself entitled, the proceeding is in fact for an advisory opinion as to whether plaintiff should bring an action, and it will be dismissed as moot. *Henderson v. Vance County*, 529.

DEEDS

§ 11. Construction and Operation in General.

Unless in conflict with some canon of construction or settled rule of law, a deed must be construed to effectuate the intent of the parties as expressed in the instrument, giving effect to each part thereof if this can be done by any fair and reasonable interpretation. *Rouse v. Strickland*, 491.

The heart of a deed is the granting clause, and if there is a repugnancy between the granting clause and the habendum and warranty, the granting clause prevails. *Ibid.*

A quitclaim deed transfers the grantor's title as effectively as any other form of conveyance. *Hutchins v. Hutchins*, 628.

A deed will be construed to ascertain the intent of grantor as expressed in the entire instrument, giving effect to every part thereof, unless the deed contains conflicting provisions which are irreconcilable or contains a provision which is contrary to public policy or runs counter to some rule of law. *Barrier v. Randolph*, 741.

Reservations and restrictions contained in a deed between the description and the habendum are not void for repugnancy even though the granting, habendum, and warranty clauses are sufficient to convey a fee simple, since reservations and restrictions are not in conflict with the conveyance of the fee simple. *Ibid.*

DEEDS—*Continued.*

§ 13. Life Estates and Remainders.

A deed to the grantee for life and at her death to her children does not include a child adopted by the grantee after execution of the deed as one of the members of the class to take by remainder. G.S. 48-23(a) has no application since the deed was executed prior to its enactment. *Allen v. Allen,* 431.

The deed in this case from the heirs at law to the widow stated that grantors did "bargain and sell" to the widow "all our rights, title, and interest in fee simple" in three described tracts of land, and, the grantors did convey to the widow for and during her natural life certain lands described, the conveyance being in satisfaction of all dower rights of the widow in the lands of the estate. *Held:* The deed contained two separate granting clauses, each complete within itself, and the deed conveyed only an estate for life to the widow in the fourth tract. *Rouse v. Strickland,* 491.

§ 19. Restrictive Covenants.

Restrictive covenants constituting a part of the consideration for the grant are binding on the grantee upon his acceptance of the deed, even though he does not sign same. *Barrier v. Randolph,* 741.

§ 21. Covenants of Seizin.

Where plaintiff's allegations of the breach of a covenant of seizin is denied in the answer, the burden rests on plaintiff to establish his cause of action by showing want of title in defendants, and the fact that defendants, after denying breach of the covenant, further allege the manner in which they acquired title does not alter the burden of proof. *Yow v. Armstrong,* 287.

Where, in an action for breach of covenant of seizin, the evidence tends to show that the deed to defendants' predecessor in title was defective in that it was a commissioner's deed in an action in which all the parties having an interest in the land were not served, but the evidence further tends to show that defendants' predecessor in title went into possession under the deed and remained in open notorious and adverse possession thereunder for more than seven years and that defendants acquired their title, the evidence shows title in defendants and nonsuit was proper. *Ibid.*

DIVORCE AND ALIMONY

§ 1. Jurisdiction.

The provisions of G.S. 50-3 that summons in a divorce proceeding should be returnable to the county in which either the plaintiff or the defendant resides is not jurisdictional but relates to venue, and in the absence of fraud the Superior Court of any county in North Carolina has jurisdiction of an action for divorce if either of the parties are domiciled in this State. *Stokes v. Stokes,* 203.

§ 13. Divorce on the Ground of Separation.

The wife's decree for permanent alimony under G.S. 50-16 legalizes their separation notwithstanding the initial separation was due to the husband's abandonment of his wife and children, and he may maintain an action for absolute divorce two years after the separation has been thus legalized notwithstanding intervening proceedings for contempt were necessary to enforce the payment of the alimony decreed, although his decree will not impair his lia-

DIVORCE AND ALIMONY—*Continued.*

bility for alimony under the former judgment or affect the power of the court to enforce it. *Wilson v. Wilson*, 347.

§ 18. **Alimony and Subsistence Pendente Lite.**

While a change of condition is necessary to support an order modifying a prior order for the support of children and for permanent alimony, an order for subsistence, *pendente lite* may be modified at any time before the trial on application of either party without a finding of a material change of condition. *Rock v. Rock*, 223.

An order for subsistence *pendente lite* may be modified at any time before trial on application of either party without a finding of a material change of condition. *Snuggs v. Snuggs*, 533.

§ 22. **Jurisdiction to Award Custody and Support of Children of the Marriage.**

A court rendering a decree of divorce has jurisdiction to hear a motion in the cause thereafter made for an allowance for the support of the children of the marriage, notwithstanding the original decree did not refer to the custody or support of the children or to a prior separation agreement between the parties providing, *inter alia*, for their support. *Fuchs v. Fuchs*, 635.

Provisions in a separation agreement for the support of the minor children of the marriage cannot deprive the courts of their inherent statutory jurisdiction to protect the interest and provide for the welfare of the infants, nevertheless, in the absence of evidence to the contrary, it will be presumed that the amount mutually agreed upon is just and reasonable. *Ibid.*

In an action for a divorce, either absolute or *a mansa*, and either before or after final judgment, the trial judge has discretionary authority to issue an order respecting the custody and care of the children of the marriage, and the amount allowed by the order for the support of the children will not be disturbed except where there is a gross abuse of discretion. *Coggins v. Coggins*, 765.

§ 23. **Orders for Support of Children.**

Upon a motion for an increase in the allowance for support of the children of the marriage, the wife's allegation attacking the subsequent marriage of the husband on the ground that the divorce of the second wife from her prior husband was invalid and that therefore the husband was not under legal obligation to support the second wife and her minor child, *held* irrelevant and should have been stricken on motion, there being no contention that the defendant husband was not financially able to provide adequate support for his minor children of the first marriage. *Fuchs v. Fuchs*, 635.

It is error for the court to allow a motion for increase in the allowance for the support of minor children of the marriage solely upon the ground that the husband's income has increased, without evidence of any change of circumstances affecting the welfare of the children or any increase in their needs. *Ibid.*

In fixing the allowance for the support of minor children of the marriage the court should consider the earnings and life expectancy of the husband as well as the needs of the minor children. Fixing the amount of such support by dividing the income of the husband by the number of people dependent upon him for support, is not approved. *Ibid.*

DIVORCE AND ALIMONY—*Continued.*

Ordinarily, in entering a judgment for the support of a minor child, the ability of the husband to pay, as well as the needs of such child, will be taken into consideration by the court. *Coggins v. Coggins,* 765.

Where it appears that the wife, with the four year old child of the marmiage and two children of the wife's by a former marriage, lived in the house owned by the parties by the entireties, an allowance for the support of the child in excess of half of the husband's earnings, without finding facts in regard to the needs of the child, *is held* excessive, it not appearing that the husband had any financial resources other than his earnings, and the order is set aside as exceeding the discretionary authority of the court, it not being reasonable that more is required to maintain a child than a man who must work and support himself entirely from his earnings. *Ibid.*

§ 26. Validity and Attack of Domestic Decrees.

Where the findings of the court after a full hearing support the court's conclusion that there was no fraud in the procurement of the divorce in question upon substitute service, there being evidence that defendant had eloped with a third person and that plaintiff had made every reasonable effort to locate her so that notice of service could be delivered, etc., judgment denying motion to vacate the divorce decree will be upheld. *Stokes v. Stokes,* 203.

DOMICILE

§ 1. Definitions and Distinctions.

The fact that a party's work requires extensive travel, preventing him from remaining constantly in the State, does not deprive him of his right to establish his residence here. *Wilburn v. Wilburn,* 208.

DOWER

§ 3. Lands to Which Dower Attaches.

The widow of an heir is not entitled to dower in the heir's share of the proceeds of sale for partition of the dower estate of the heir's mother. *Brenkworth v. Lanier,* 279.

§ 8. Allotment of Dower.

Under the 1943 amendment to G.S. 8-47 the interest rate of 6 per cent must be used in computing the present cash value of the widow's dower in the distribution of the proceeds of sale of the dower estate for partition between the widow and the heirs at law. *Brenkworth v. Lanier,* 279.

EASEMENTS

§ 1. Nature and Kinds of Easements.

An easement appurtenant is incident to and exists only in connection with a dominant estate owned by the same person, and passes with the title to the dominant estate; an easement in gross is a mere personal interest or right to use the land of another, is not appurtenant to any estate and attaches only to the person, and ends with the death of the owner of the easement. *Shingleton v. State,* 451.

Whether a deed creates an easement appurtenant or in gross must be determined by a construction of the language of the contract to ascertain the in-

EASEMENTS—*Continued.*

tention of the parties aided, if necessary, by the situation of the parties and the surrounding circumstances, and an easement which in its nature is appropriate and a useful adjunct of land owned by the grantee of the easement, in the absence of a showing that the parties intended a mere personal right, will be declared an easement appurtenant, regardless of the form in which such intention is expressed. *Ibid.*

The fact that the words "heirs and assigns" are not entered after the name of the grantee of an easement is not controlling in determining whether the easement granted is an easement appurtenant or in gross, G.S. 39-1. *Ibid.*

Deed held to convey easement appurtenant and not merely in gross. *Ibid.*

§ 6. Actions to Establish Easements.

An action under the Declaratory Judgment Act may be maintained to establish an easement against the State, but injunction may not issue against the State to enjoin interference with the easement. *Shingleton v. State,* 451.

§ 8. Nature and Extent of Easement.

An easement will ordinarily be construed to embrace all uses which are reasonably necessary and convenient in connection with the enjoyment of the dominant estate not only for those purposes to which it is devoted at the time of the grant but also those to which it may thereafter be reasonably devoted, without unnecessarily burdening the servient estate. *Shingleton v. State,* 451.

The grant of an easement appurtenant for ingress and egress to lands owned by the grantee, in the absence of a showing that the lands of the grantee were used for business purposes, does not embrace the right of ingress and egress by the public generally, but only to the grantee, his agents, servants, employees and licensees, and it is no violation of the grantee's rights that he be required to give permission to those who use the easement in connection with the use and enjoyment of the dominant estate. *Ibid.*

EJECTMENT

§ 7. Presumptions and Burden of Proof.

A party asserting a right to go upon lands pursuant to an easement has the burden of establishing title to the easement, which it may do by showing title from a common source. *Light Co. v. Waters,* 667.

ELECTION OF REMEDIES

§ 4. Acts Constituting Election and Effect Thereof.

Within a reasonable time after the discovery of fraud inducing the purchase of a chattel the purchaser must either rescind the sale and recover the consideration paid or affirm the sale and recover the difference between the value of the chattel if it were as represented and its actual value at the time of the sale, and when the purchaser continues to use the chattel for two years after discovery of the misrepresentation the remedy of rescission is no longer available. *Bruton v. Bland,* 429.

ELECTRICITY

§ 2. State License and Franchise and Control.

A public service corporation operating under a certificate of public con-

ELECTRICITY—*Continued.*

venience and necessity may not be allowed to abandon its obligations to provide the authorized service to the public unless it establishes that the public no longer needs the service it was created to render, or that there is no reasonable probability of its being able to realize sufficient revenue to meet its expenses in the rendition of such service. *Utilities Comm. v. Membership Corp.*, 59.

Commission held to have failed to find facts essential to support order approving sale of power facilities. *Ibid.*

EMINENT DOMAIN

§ 1. Nature and Extent of Power.

The constitutional prohibition against the taking of private property for a public use without just compensation is self-executing. *Ins. Co. v. Blythe Bros. Co.*, 69.

§ 2. Acts Constituting a "Taking."

The infliction of damage to nearby dwellings from concussion or vibration from blasting for sewer line constitutes a "taking." *Ins. Co. v. Blythe Bros. Co.*, 69.

The owner of land may recover damages as for a "taking" for a nuisance resulting from the construction of a highway at an elevation which prevents waters from the ocean periodically coming over the dunes in time of storm from being dissipated into the sound, and which thus diverts surface water onto the land to its damage. If such flooding is so extraordinary and unusual as to constitute an "Act of God" in the legal sense, no recovery can be had, but when the matter is controverted the question is ordinarily a matter for the jury. *Midgett v. Highway Comm.*, 241.

In order to constitute a nuisance amounting to a "taking" of private property, the structure creating the nuisance must be permanent in nature, which is one which may not be readily altered at reasonable expense so as to obviate its harmful effects. But even if a structure be "permanent," its removal after damage does not abate the action, although its removal prior to the infliction of damage precludes action. *Ibid.*

But owner may not recover for damage to personal property resulting from overflow of water into building in which it was stored. *Ibid.*

§ 5. Amount of Compensation.

An instruction that just compensation must be full and complete and that respondent is entitled to be put in as good position pecuniarily as if the property had not been taken will not be held for error when the charge, construed contextually, makes clear that just compensation is the fair market value of the property as thereafter correctly defined by the court. *Redevelopment Comm. v. Hinkle*, 423.

§ 6. Evidence of Value.

Whether the price the owner paid for the property has any probative force in determining its value in condemnation proceedings is dependant upon the similarity of conditions at the time of purchase and at the time of the inquiry, and when the evidence discloses the elapse of some ten years between the two dates and material changes in the property by enlargements and additions to buildings by the owner, the exclusion of evidence tending to show the price the

EMINENT DOMAIN—*Continued.*

owner paid for the property will not be held for error. *Redevelopment Comm. v. Hinkle,* 423.

§ 11. Actions by Owner for Compensation or Damages.

When no statute provides procedure to recover compensation under the circumstances of the taking, the owner may maintain an action to obtain just compensation therefor. *Ins. Co. v. Blythe Bros. Co.,* 69.

The requirement that compensation be paid for the taking of land or an interest therein under the power of eminent domain is self-executing, and therefore when no statute affords an adequate remedy under the particular fact situation, plaintiff may maintain an action at common law. *Midgett v. Highway Comm.,* 242.

The owner of land may maintain an action at common law to recover for the depreciation in the value of land resulting from a nuisance created by the construction of a highway at an elevation which periodically diverts storm waters of the ocean across the land, there being no undertaking by defendant to condemn plaintiff's property under G.S. 115-85 or G.S. 40-12 et seq., or otherwise, and if G.S. 136-19 were applicable in such instances, plaintiff's right of action might be barred before it accrued. *Ibid.*

G.S. 136-108 giving the trial judge authority to hear and determine any issues raised by the pleadings, other than the issue of damages, in an action brought by the owner of land to recover compensation for its taking for a right of way by the Highway Commission is constitutional, since it does not deprive a property owner of any right to trial by jury in any instance in which such right existed at the time of the adoption of the Constitutions. *Kaperonis v. Highway Comm.,* 587.

A copy of a resolution or ordinance of the Highway Commission, certified by its secretary as a true copy as recorded in the minutes of the Commission on the date specified, is competent in evidence. *Ibid.*

In an action by the owner of land to recover compensation for the alleged additional taking of his lands by increasing the width of the highway easement, it is competent for the Commission to introduce its duly certified resolution authorizing the original easement for the greater width, with testimony of its engineers and agents that it had occupied and maintained the full right of way, which was duly marked on the ground, and had obtained a release from plaintiffs' predecessor in title for the full width of the right of way as claimed by it. *Ibid.*

It is not required that an easement obtained by the Highway Commission prior to June 1, 1959 be recorded, G.S. 47-27, and evidence in this case of the Commission's initial acquisition of the right of way for the full width claimed by it, that such right of way was marked on the ground and encroachments thereon required to be removed, and that plaintiff's predecessor in title signed a release for the right of way to its full width as claimed by the Commission, *held* sufficient to sustain the court's finding that the Highway Commission originally appropriated the right of way for the full width claimed by it. *Ibid.*

Where it is adjudicated upon supporting evidence that the Highway Commission had taken no property of the complaining land owners, G.S. 136-119 does not apply and plaintiffs may not complain of the taxing of the costs against them upon the dismissal of their action to recover compensation for the asserted taking. *Ibid.*

ESTOPPEL

§ 4. Equitable Estoppel.

The fact that the mortgagee, after filing the last and highest bid at the sale of the property in the foreclosure of a materialman's lien, takes possession of the property has no bearing upon whether the mortgagee is estopped from attacking the materialman's lien for fraud, since after default the mortgagee is entitled to possession under his mortgage irrespective of any foreclosure sale. *Priddy v. Lumber Co.*, 421.

EVIDENCE

§ 1. Judicial Notice of Governmental Acts.

A court judicially knows its own records and therefore will take judicial notice of the filing dates of the pleadings in an action before it. *Gaskins v. Ins. Co.*, 122.

§ 3. Judicial Notice of Facts Within Common Knowledge.

The court will take judicial notice that a truck traveling forty-five miles per hour cannot be stopped within thirty-three feet, and when plaintiff's contention of negligence is based on such inherently impossible situation, nonsuit is proper. *Burgess v. Mattox*, 305.

The court will take judicial notice that gasoline, either alone or mixed with kerosene, constitutes a flammable commodity and a highly explosive agent. *Stegall v. Oil Co.*, 459.

The courts will take judicial notice of the fact that in this State 8:15 p.m. on June 4 is more than a half hour after sunset. *Oxendine v. Lowry*, 709.

§ 15. Relevancy and Competency of Evidence in General.

Evidence of a corcumstance surrounding the parties which is necessary to understand properly their conduct and motives, or to weigh the reasonableness of their contentions, is competent, and it is not required that it bear directly on the question in issue. *Jones v. Hester*, 264.

§ 24. Proof of Public Records and Documents.

Authentication adds nothing to the weight and effect of a public document as evidence, but merely renders the copy competent in evidence. *Overton v. Overton*, 139.

A copy of a resolution or ordinance of the Highway Commission, certified by its secretary as a true copy as recorded in the minutes of the Commission on the date specified, is competent in evidence. *Kaperonis v. Highway Comm.*, 587.

§ 25. Accounts, Ledgers and Private Writings.

In plaintiff's action to recover for labor and materials, plaintiff may identify invoices rendered him by laborers and material suppliers and testify that the laborers rendering the invoices worked on defendant's dwelling and that he paid them the sums shown, and that the invoices for materials were for materials used in making the repairs to defendant's dwelling, and objection to the introduction of the invoices in evidence cannot be sustained, it being competent for plaintiff to show in this manner what the laborers did and what kinds and quantities of materials were used. *Ipock v. Daugherty*, 213.

EVIDENCE—*Continued.*

§ 26. Best and Secondary Evidence Relating to Writings.

Parol evidence in regard to writings is properly excluded in the absence of a showing of any effort to procure the writings to offer them in evidence. *Co-operative Exchange v. Scott,* 81.

§ 31. Admissions or Declarations of Agents.

In an action against an international union to recover damages resulting from an unlawful secondary boycott carried on by a local union as its agent, testimony of admissions by an officer of the local union made in proceedings to which the international union was not a party, which admissions were to the effect that the local union was reimbursed by the labor union's joint counsel to the extent of payments to the pickets carrying on the unlawful activities and that the joint council was reimbursed in part by the international union, *held* incompetent as hearsay. *Motor Lines v. Brotherhood,* 315.

§ 35. Opinion Evidence in General.

The exclusion of a witness's estimate in regard to a matter, without any facts in evidence upon which the estimate could be based, is properly excluded. *Cooperative Exchange v. Scott,* 81.

Testimony of a witness as to the net profits from his business for the year in question from memory and estimates, instead of from records and accounts, *held* not to render the testimony too speculative, the opposing party having had full opportunity to cross-examine him with respect to all phases of the business. *Smith v. Corsat,* 92.

§ 40. Testimony as to Handwriting.

Where a witness, found by the court to be a handwriting expert, testifies that the signature on the release offered in evidence was identical with the signature on the last will and testament of plaintiff's predecessor in title, the admission in evidence of a duly authenticated copy of the release is proper. *Kaperonis v. Highway Comm.,* 587.

§ 57. Direct Examination.

The fact that the answer of a witness to a competent question is not responsive to the question does not in itself render the answer inadmissible, since if the answer contains relevant and competent statements it is competent notwithstanding the particular matter was not called for by the question, while if a unresponsive answer contains irrelevant facts they may be stricken on objection. *In re Will of Taylor,* 232.

EXECUTION

§ 16. Supplementary Proceedings.

A judgment creditor of the husband alone is not entitled, in supplemental proceedings after execution is returned unsatisfied, to the appointment of a receiver for lands held by the husband and wife by the entireties. *Grabenhofer v. Garrett,* 118.

EXECUTORS AND ADMINISTRATORS

§ 2. Appointment of Administrators.

Where action is instituted by person adjudged to be entitled to appointment, issuance of letters relates back to time of order. *Graves v. Welborn,* 688.

EXECUTORS AND ADMINISTRATORS—*Continued.*

§ 8. Collection of Assets.

Whether an action is brought by a person in his individual capacity or in his capacity as personal representative is to be determined from the allegations of the complaint and not the caption to the action. *Graves v. Welborn*, 688.

§ 24a. Right of Action for Personal Services Rendered Decedent.

As a general rule, if one performs personal services for another which are knowingly and voluntarily accepted, and nothing else appears, the law will imply a promise on the part of the recipient to pay the reasonable value of the services rendered; nevertheless, the burden remains upon the person rendering such services to show circumstances from which it may be inferred that the services were rendered and received with the mutual understanding that they were to be paid for. *Johnson v. Sanders*, 291.

Testimony that the recipient of personal services stated to witnesses that the person rendering the services had been good to him and that he wanted her to have the house in which she lived because she deserved it, and that he said in the presence of the person rendering the services and her husband that he was going to leave the realty to her because they had been so good to him, while competent to be considered with other facts and circumstances upon the question of whether payment was intended on the one hand and expected on the other, is insufficient to establish a definite contract to pay for the services by testamentary disposition. *Ibid.*

§ 24b. Limitation of Actions for Personal Services Rendered Decedent.

While a cause of action to recover the reasonable value of personal services rendered in reliance upon oral contract to devise does not accrue until the recipient of the services dies without having made the agreed testamentary provision, the mere fact that services were rendered under circumstances from which a mutual understanding that they were to be paid for may be inferred does not imply a promise to pay at death or by will, and in the absence of a contract to pay by testamentary provision the services rendered more than three years prior to the death of the recipient are barred by the statute of limitations. *Johnson v. Sanders*, 291.

§ 24c. Presumption that Services Were Gratuitous.

There is no presumption that personal services rendered by an adult daughter to her father are gratuitous when such services are rendered after the daughter has married and left her father's house and established a home of her own. *Johnson v. Sanders*, 291.

§ 24d. Amount of Recovery and Evidence of Value.

The failure of proof of the definite value of personal services rendered a decedent does not justify nonsuit in an action against the estate if the evidence is sufficient to establish implied assumpsis, since in such instance nominal damages are recoverable at least, notwithstanding that plaintiff must prove the value of the services rendered in order to be entitled to recover more. *Johnson v. Sanders*, 291.

§ 32. Duty to Account.

An executor or administrator, as well as a trustee or successor trustee performing duties imposed upon the executors by a testamentary trust, may be

EXECUTORS AND ADMINISTRATORS—*Continued.*

compelled to account by special proceedings or civil action, G.S. 28-122, G.S. 28-147, or the court which appointed them may, *ex mero motu*, compel a proper accounting by attachment for contempt, G.S. 20-118. *Lichtenfels v. Bank*, 146.

An executor's duty to account is not fulfilled by the mere filing of a statement of receipts and disbursements, but he must also pay over to the parties entitled thereto the monies which they are entitled to receive. *Ibid.*

An executor, clothed with the duties of a testamentary trustee, may not be required to file his final account and make settlement prior to the date fixed for the settlement of the trust. *Ibid.*

§ 36. Actions Against Personal Representatives and Their Sureties.

An action against the trustee of an estate alleging mismanagement is properly brought in the county in which the will was probated notwithstanding the trustee is a national bank with its principal office in another county. *Lichtenfels v. Bank*, 146.

FALSE IMPRISONMENT

§ 1. Nature and Essentials of Right of Action.

Calling a policeman to aid in restraining a person does not legalize an unlawful restraint. *Hales v. McCrory-McLellan Corp.*, 568.

While restraint must be involuntary in order to constitute the basis of an action for false imprisonment, no actual force is required if there be an implied threat of force sufficient to compel a person to remain where he does not wish to remain or go where he does not wish to go. *Ibid.*

§ 2. Actions for False Imprisonment.

Plaintiff's evidence to the effect that while she was engaged in exchanging certain articles previously purchased at defendant's store she was charged with shoplifting, that an employee ordered her to come to a designated spot and told another employee to call the police, that after the arrival of the police plaintiff was taken to the police station where an affidavit was sworn to by another employee, and that plaintiff was released upon bond, *held* sufficient to support an inference by the jury that plaintiff was induced to believe that any attempt on her part to leave the scene would not be allowed, and therefore that the restraint was involuntary. *Hales v. McCrory-McLellan Corp.*, 568.

FIDUCIARIES

All fiduciaries may be compelled by appropriate proceedings to account for the handling of properties committed to their care. *Lichtenfels v. Bank*, 146.

FRAUD

§ 2.1. Fraud in the Factum and Fraud in the Treaty.

The distinction between fraud in the *factum* and fraud in the treaty is dependent in a measure on the attendant facts and circumstances; fraud in the *factum* arises when a person is induced to execute an instrument different than the one intended so that the instrument intended to be executed and the instrument actually executed are not the same, while fraud in the treaty is based upon misrepresentations knowingly made with fraudulent intent which

FRAUD—*Continued.*

induce a person to execute an instrument which he otherwise would not have done. *Nixon v. Nixon*, 251.

FRAUDS, STATUTE OF

§ 3. Pleadings.

The defense of the statute of frauds is raised by a general denial of a parol agreement. *Riggs v. Anderson*, 221.

§ 6a. Contracts Affecting Realty in General.

Nonsuit is properly entered in an action to compel the conveyance of land by some of the tenants in common to plaintiff tenants in accordance with an alleged parol agreement. *Riggs v. Anderson*, 221.

GAMES AND EXHIBITIONS

§ 2. Liabilities of Proprietor to Patrons.

The operators of an automobile race track are not insurers of the safety of a patron but are under duty to exercise care commensurate with the known or reasonably forseeable dangers to prevent injury. *Lynn v. Wheeler*, 658.

Evidence held insufficient to make out case of negligence on part of proprietors of ract track. *Ibid.*

GRAND JURY

§ 1. Selection and Qualifications.

When defendant, upon the call of the case for trial and prior to pleading to the indictments, moves to quash on the ground that members of his race were systematically excluded from the grand and petit juries because of race, and requests time to gather evidence substantiating his motion, due process requires that he be given reasonable opportunity to produce such evidence if any he has. *S. v. Inman*, 311.

HIGHWAYS

§ 2. Ordinances and Regulations.

G.S. 136-20 relates only to the construction of underpasses, overpasses, or the installation and maintenance of gates, alarm signals or other safety devices at railroad grade crossings, and a proceeding under the statute to require defendant railroad company to widen solely at its own expense its crossing sequent to the widening of the intersecting highway, should be dismissed. *Highway Comm. v. R. R.*, 274.

HOMICIDE

§ 4. Murder in the First Degree.

A homicide committed in the prepetration of the capital offense of rape is murder in the first degree, irrespective of premeditation and deliberation. *S. v. Crawford*, 548.

§ 6. Manslaughter.

Any careless and reckless use of a loaded gun which jeopardizes the safety

HOMICIDE—*Continued.*

of another is unlawful, and if death results therefrom is an unlawful homicide. *S. v. Brooks*, 186.

§ 11. Indictment.

An indictment for homicide in the language of the statute is sufficient, and proof that the murder was committed in the prepetration of a felony constitutes no variance. *S. v. Crawford*, 548.

§ 20. Sufficiency of Evidence and Nonsuit.

Evidence favorable to the State tending to show that defendant, as deceased advanced in his direction, picked up a gun and pushed deceased with the gun and with his other hand, and that the gun discharged, inflicting fatal injury, *is held* sufficient to support conviction of defendant of involuntary manslaughter. *S. v. Brooks*, 186.

Evidence of defendant's guilt of murder in the first degree held sufficient to sustain conviction. *S. v. Crawford*, 548.

§ 28. Submission of Question of Guilt of Less Degrees of Crime.

When all of the evidence tends to show that defendant killed deceased in the perpetration of rape, without evidence of guilt of a less degree of the crime, the court correctly refrains from submitting the question of defendant's guilt of murder in the second degree. *S. v. Crawford*, 548.

§ 29. Charge on Right to Recommend Life Imprisonment.

Charge on right of jury to recommend life imprisonment *held* without error. *S. v. Crawford*, 548.

HUSBAND AND WIFE

§ 11. Construction and Operation of Deeds of Separation.

Provisions in a separation agreement for the support of the minor children of the marriage cannot deprive the courts of their inherent statutory jurisdiction to protect the interest and provide for the welfare of the infants, nevertheless, in the absence of evidence to the contrary, it will be presumed that the amount mutually agreed upon is just and reasonable. *Fuchs v. Fuchs*, 635.

§ 12. Revocation and Rescission of Deeds of Separation.

Separation agreements ordinarily are revoked by the subsequent renewal of marital relations by the parties, but a duly executed conveyance of property in accordance with the settlement is not revoked. *Hutchins v. Hutchins*, 628.

The separation agreement between the parties, duly acknowledged as required by G.S. 52-12, provided that the wife did thereby quitclaim any and all right, title and interest in particularly described property held by the entireties, and she therein agreed to execute a warranty deed conveying such interest, but the deed was not acknowledged in conformity with G.S. 52-12. The parties thereafter resumed the marital relationship. *Held:* The deed of separation constituted a conveyance to the husband all of the wife's right, title, and interest in such property, and the resumption of the marital relationship did not affect the executed conveyance. *Ibid.*

§ 15. Nature and Incidents of Estates by Entireties.

A judgment creditor of the husband alone is not entitled, in supplemental proceedings after execution is returned unsatisfied, to the appointment of a re-

HUSBAND AND WIFE—*Continued.*

ceiver for lands held by the husband and wife by the entireties. *Grabenhofer v. Garrett*, 118.

INCEST

Consanguinity is basis of the offense and carnal relations with adopted daughter will not support conviction under statute, *S. v. Rogers*, 406.

INDEMNITY

§ 3. Actions on Indemnity Agreements.

In an action by an injured person against two employers and their common employees, one employer may not file a cross-action against the other on the contract of indemnity executed by the other, since such cross-action is not germane to plaintiff's action, but one employer may file a cross-action against his employee for indemnity under the doctrine of primary and secondary liability. *Steele v. Hauling Co.*, 486.

INDICTMENT AND WARRANT

§ 5. Finding and Return of Grand Jury.

The provisions of G.S. 9-27 are directory and not mandatory, and the absence of an endorsement upon the back of an indictment indicating that witnesses were duly examined is not sufficient to overcome the presumption of the validity of the indictment arising from its return by the grand jury as "a true bill," and, in the absence of a motion to quash or motion in arrest of judgment, an assignment of error to the indictment on this ground will not be sustained. *S. v. Mitchell*, 235.

INJUNCTIONS

§ 1. Nature and Elements of Injunctive Relief.

Injunction is an equitable remedy exercised *in personam* and not *in rem*. *Trucking Co. v. Haponski*, 514.

§ 3. Inadequacy of Legal Remedy and Irreparable Injury in General.

An action to enjoin the holding of a county-wide election is properly dismissed when plaintiff seeks only injunctive relief and he does not allege that he or persons similarly situated will be irreparably injured by the holding of the election and no facts are asserted from which such result may be inferred. *Peacock v. Scotland County*, 773.

§ 16. Liabilities on Bonds.

Where judgment on the merits is entered adjudicating that plaintiffs are not the owners of the tract of land in controversy, and the cause is retained solely for the assessment of damages against plaintiffs' injunction bond, a trespass committed by plaintiffs subsequent to the judgment does not come within the scope of the action, and defendant's may not recover damages for such trespass by motion in the cause. *Coburn v. Williams*, 174.

INSURANCE

§ 3. Construction and Operation of Policies in General.

That part of a contract under which a company agrees to indemnify the

INSURANCE—*Continued.*

assured for loss or damage from perils therein defined, with provision for subrogation of the company to the right of assured against third persons, constitutes a contract of insurance, G.S. 58-3; while that part of the contract under which the company obligates itself to pay to any shipper or consignee, claims for which the assured would be liable by provision of statute (G.S. 62-121.26), with stipulation that the assured should reimburse the company for any such payment, is a surety contract. *Ins. Co. v. Gibbs*, 681.

§ 8. Agreements to Procure Life Insurance.

The beneficiary under a group policy may sue the employer and the insurer in the alternative, seeking recovery against insurer if the policy were in force and against the employer for breach of contract to keep the insurance in force if the policy had been cancelled for nonpayment of premium. *Conger v. Ins. Co.*, 112.

§ 16. Avoidance of Certificate Under Group Policy for Nonpayment of Premium.

Plaintiff alleged that she was the beneficiary under a certificate of group insurance, that insured's portion of the premium was regularly deducted from his wages by defendant employer, and that insured died less than 31 days after the last deduction of the premium from his wages. Plaintiff sought to recover against insurer on the policy if the policy were in force, and against the employer if the policy were not in force, for breach of contract by the employer to keep the policy in force by the payment of premiums. *Held:* Demurrer of the respective defendants for misjoinder of parties and causes of action should have been overruled. *Conger v. Ins. Co.*, 112.

§ 36. Hospital Insurance.

Where, as a result of an injury, plaintiff is continuously confined in a hospital for eleven days, and some four months after his discharge from that hospital he enters another hospital for the same injury, the second confinement is a new and not a continuous one, and does not come within the purview of a hospital rider providing benefits for each day insured is continuously confined in a hospital as the result of injury. *Atkinson v. Ins. Co.*, 348.

§ 47. Automobile Personal Injury Policies.

A granddaughter living with her parents in her grandmother's home at the time of the accident is a relative "residing" in the grandmother's home notwithstanding the arrangement is temporary and the parents maintain a home to which they intend to repair upon the return home of another member of the grandmother's family, and therefore the granddaughter does not come within the provisions of a policy issued to the grandmother for expenses and medical payments to persons other than the named insured and her relatives resident of the same household. *Newcomb v. Ins. Co.*, 402.

That section of a policy of insurance providing coverage for medical payments to the named insured and each relative of the named insured, but excluding liability for such injuries while occupying an automobile owned by insured or one furnished for the regular use of insured or any relative, *held* not to cover bodily injury to insured's granddaughter occurring while insured was driving a vehicle owned by the granddaughter's parents. *Ibid.*

INSURANCE—*Continued.*

§ 48b. Risks Covered by Collision and Upset Provisions.

A policy of collision insurance covering the specified automobile owned by insured or any other automobile unless such other vehicle is owned by insured or any relative does not cover a vehicle owned by insured's daughter and son-in-law and damaged in an accident while being driven by insured. *Newcomb v. Ins. Co.*, 402.

§ 54. Vehicles Insured Under Liability Policies.

The North Carolina Motor Vehicle Safety and Financial Responsibility Act does not require an owner's assigned risk policy to cover any vehicle except the one described in the policy. G.S. 20-279.21(b) (2), and an assigned risk policy covering in addition the use by insured of other automobiles is an additional coverage not required by the Act, and as to such additional coverage the provisions of the Act are not applicable. *Woodruff v. Ins. Co.*, 723.

§ 57. Drivers Insured Under Liability Policies.

Where the evidence discloses that a prospective purchaser was permitted to drive the dealer's vehicle seven miles to the purchaser's home to show it to his wife and was to return the vehicle within two and one-half hours, but that he actually drove 70 miles to another municipality and had an accident resulting in plaintiff's injury more than 20 hours after he should have returned the vehicle, *held* the evidence does not bring the claim within the coverage of the dealer's liability policy. *Fehl v. Surety Co.*, 440.

§ 60. Notice of Accident to Insurer.

The failure of insured under an assigned risk policy to give notice of an accident occurring while he was driving an automobile other than the one named in the policy precludes recovery by the insured or by the injured third person against insurer, even though the policy contains additional coverage if insured is driving another vehicle, since such additional coverage is not required by the Motor Vehicle Safety and Financial Responsibility Act and therefore the provisions of the Act are not applicable thereto. *Woodruff v. Ins. Co.*, 723.

§ 61.1. Compromise and Settlement of Claim by Insurer.

The compromise and settlement of a claim by insurer for which it would be liable under the terms of its policy will not bar the right of insured, or anyone covered by the policy, from suing the releasor for his damages provided he has neither ratified nor consented to such settlement. *Bradford v. Kelly*, 382.

In an action for wrongful death by the personal representative of insured against the driver of the other car involved in the fatal collision, defendant pleaded as a bar a compromise and settlement procured by plaintiff's insurer of defendant's claim for her damages arising from the same collision, and, in the alternative, set up a cross action for her damages. Insurer sought to be allowed to intervene to plead the release as against the cross action. *Held:* Insurer is not a proper party and does not have such interest in the subject matter of the litigation as to constitute it a necessary party, and its motion to intervene was properly denied, since, if the plea in bar is sustained, insurer has no further liability, and, if the plea in bar is overruled and plaintiff pleads the release or moves to strike the counterclaim it would bar not only the counterclaim but also plaintiff's action, while if plaintiff declines to plead the release she would assume the risk of a judgment in excess of the settlement, and in no event would insurer be adversely affected. *Ibid.*

INSURANCE—*Continued.*

§ 87. Time Limitations on Actions on Fire Policies.

Where plaintiff insured filed complaint stating an enforceable cause of action within twelve months of the loss by fire, and after the expiration of the twelve-month period the parties consent that defendant's demurrer should be sustained, and thereafter amended complaint is filed in accordance with the consent order, defendant insurer will not be permitted to assert the provision of the policy that action be instituted within twelve months after loss, since the provision is contractual and subject to waiver or estoppel. *Gaskins v. Ins. Co.*, 122.

The agreement in this case contained a contract insuring a carrier from loss by fire and theft, etc., and also a contract of suretyship in regard to claims of third persons under statutory provision (G.S. 62-121.26). *Held:* Provisions of the insurance contract that action be commenced within a specified time are not applicable to claims under the surety contract, and the surety's right of action for reimbursement of claims of third persons paid by it does not arise until such payment, and action brought within three years of such payment is not barred either under the contract or by the three year statute of limitations. *Ins. Co. v. Gibbs*, 681.

§ 88. Actions on Fire Policies.

In an action on a policy of fire insurance, a complaint alleging that defendant insurer issued its policy on the premises in question in a stated amount and that the building and its contents, valued in a specified amount as itemized in the complaint, were destroyed by fire, and that plaintiff gave insurer immediate notice and had performed all the conditions of the policy, *is held* to state an enforceable cause of action notwithstanding its failure to allege plaintiff's ownership of the property and consideration for the policy, and, upon demurrer, the cause should not be dismissed but plaintiff should be allowed to amend. *Gaskins v. Ins. Co.*, 122.

INTOXICATING LIQUOR

§ 13. Sufficiency of Evidence and Nonsuit.

Evidence tending to show that an officer followed an automobile into a driveway, had his headlights shining on the car, saw a person sitting in the car, and saw defendant get out of the car on its left side, saw through the back window of the car jars of clear liquid, searched the car and found 30 gallons of nontaxpaid whiskey therein, and that defendant fled, *is held* sufficient to overrule nonsuit on the charges of possession of alcoholic beverages upon which the Federal and State taxes had not been paid, G.S. 18-48, possession of such liquor for the purpose of sale, G.S. 18-50, and with the unlawful transportation of such liquor for the purpose of sale, G.S. 18-2. *S. v. Mitchell*, 235.

§ 15. Instructions in Prosecutions for Violating Control Statutes.

Upon defendant's plea of not guilty to charges of possession of alcoholic beverages upon which the Federal and State taxes had not been paid, and unlawful possession and transportation of such beverages for the purpose of sale, it is error for the court to charge the jury that defendant did not challenge whether the liquor was nontaxpaid or the question of who had it for what purpose, but simply denied that he was the driver of the car in which the patrolman found the whiskey being transported, since the burden remains upon the

INTOXICATING LIQUOR—*Continued.*

State upon defendant's plea of not guilty, to prove each essential element of the offenses charged. *S. v. Mitchell,* 235.

JUDGMENTS

§ 1. Nature and Requisites of Judgments in General.

Jurisdiction of the person is essential to a judgment *in personam. Church v. Miller,* 331; *Trucking Co. v. Haponski,* 514.

§ 2. Time and Place of Rendition.

Where, after agreement that the court might enter judgment out of term and out of the district, plaintiff's counsel, who was to prepare the judgment, becomes ill and no judgment is tendered until some year and four months after the term, the judge may properly refuse to sign the judgment and properly directs that the action be heard *de novo. Weston v. Hasty,* 444.

§ 5. Interlocutory and Final Judgments.

A judgment on the merits is a final judgment notwithstanding its retention solely for the assessment of damages against plaintiff's bond, and therefore the action is not pending for the purpose of a motion in the cause for the assessment of further damages inflicted subsequent to the rendition of the judgment. *Coburn v. Timber Corp.,* 174.

§ 13. Rendition of Judgments by Default.

A judgment by default final is not apposite pending the hearing of a motion to strike. *Williams v. Denning,* 540.

Judgment by default may not be entered pending the hearing of a motion to strike on the ground that the motion was not verified, since a motion is not a pleading within the meaning of G.S. 1-144. *Williams v. Denning,* 539.

§ 18. Direct and Collateral Attack.

The suspension or revocation of an automobile driver's license by the Department of Motor Vehicles is a quasi-judicial act and cannot be collaterally attacked. *Robinson v. Casualty Co.,* 284.

§ 22. Attack of and Setting Aside Default Judgments.

Evidence that the individual defendant relied upon assurances by the corporate defendant and that the corporate defendant relied on its insurance agent and insurance carrier, who failed to forward the papers to an attorney until after a default judgment had been taken, *held* not to establish excusable neglect, since ordinarily the neglect of a responsible agent will be imputed to the principal. *Milks v. Clark's,* 676.

§ 24. Attack of Judgments for Fraud.

Evidence held to support finding that there was no fraud in procurement of divorce upon substituted service. *Stokes v. Stokes,* 203.

§ 25. Validity and Attack of Consent Judgments.

A *consent judgment* between the widower and beneficiaries in regard to the settlement of the estate may not be set aside merely because it was executed in reliance on the void statute giving the widower the right to dissent from the will. *Roberson v. Penland,* 502.

JUDGMENTS—*Continued.*

§ 29. Parties Concluded.

A conviction of defendant of involuntary manslaughter in the death of plaintiff's wife resulting from the same collision will not bar defendant driver from maintaining a cross action against plaintiff driver, since a judgment ordinarily binds only the parties and those in privity with them so that the estoppel is mutual. *Moore v. Young*, 654.

§ 30. Matters Concluded.

Res judicata does not apply to ordinary motions incidental to the trial. *Overton v. Overton*, 139.

§ 35. Conclusiveness of Judgments of Retraxit and Dismissal.

In an action to restrain the cutting and removal of timber, a judgment of dismissal based on findings of the referee, approved by the court, that plaintiffs had failed to show title to the tract in controversy, is not equivalent to a voluntary nonsuit but is equivalent to an express jury finding that plaintiffs were not the owners of the land in controversy, and precludes plaintiffs thereafter from asserting title to such land. *Coburn v. Timber Corp.*, 174.

§ 38. Plea of Bar of Judgment.

It is not required that the complaint allege evidentiary matters, therefore the failure to except to a judicial determination that the claim asserted was a partnership liability may be competent as evidence of an admission, notwithstanding that the judgment in the partnership proceedings is not pleaded as an estoppel. *Brewer v. Elks*, 470.

JUDICIAL SALES

§ 1. Nature and Grounds of Remedy.

There must be an order for a judicial sale entered by a court having jurisdiction of the subject matter and the parties as prerequisites of a valid judicial sale. *Wadsworth v. Wadsworth*, 702.

§ 2. Conduct of Sale.

The court has discretionary power to order either a public or private sale of an interest in land owned by a minor who is represented by a guardian *ad litem*. *Wadsworth v. Wadsworth*, 702.

§ 3. Advance Bids and Resales.

Every private sale of real property under order of the court is subject to upset bids, G.S. 1-339.36(a) and upon the filing of an upset bid G.S. 1-339.27(a) applies, and to all intents and purposes the sale thereafter becomes a public sale and is subject to the statutory requirements of resale. *Wadsworth v. Wadsworth*, 702.

Reports of intermediate bids as sales by commissioner authorized to sell to highest bidder at private sale is irregularity. *Ibid.*

§ 5. Validity and Attack.

Confirmation cannot validate a void judicial sale. *Wadsworth v. Wadsworth*, 702.

§ 7. Compelling Purchaser to Comply With Bid.

The purchaser at a judicial sale may not void his obligation to comply with

JUDICIAL SALES—*Continued.*

his bid after confirmation for mere irregularities which do not prejudice him, there being no mistake, fraud, or collusion. *Wadsworth v. Wadsworth*, 702.

JURY

§ 5. Right to Trial by Jury.

The constitutional guaranties of the right to trial by jury relate only to the trial of issues of fact in those instances in which such right existed at common law or by virtue of statute at the time the constitutional provisions were adopted. *Kaperonis v. Highway Comm.*, 587.

LARCENY

§ 7. Sufficiency of Evidence and Nonsuit.

Evidence held insufficient to be submitted to the jury on question of defendants' guilt as aiders or abettors. *S. v. Gaines*, 228.

LIBEL AND SLANDER

§ 8. Qualified Privilege.

The act of the president or manager of a corporation in making inquiry and bringing to the attention of the stockholders evidence of dishonesty of any employee, past or present, is qualifiedly privileged, and he is protected from liability for charges of dishonesty made by him in such instances when they are made in good faith, but the person defamed may defeat the defense of qualified privilege by alleging and proving malice, or that the publication was prompted by some improper or ulterior motive and was not made in good faith. *Jones v. Hester*, 264.

§ 11. Parties Liable.

An individual making a statement containing libelous matter to a newspaper and the newspaper publishing such matter are joint tort-feasors in publishing the libel. *McFarland v. Publishing Co.*, 397.

Where the party defamed institutes separate actions for libel against the individual making the statement and the newspaper publishing the defamatory matter, a release of the individual from liability is a release of the newspaper also, regardless of the adequacy of the consideration paid for the release. *Ibid.*

§ 13. Competency and Relevancy of Evidence.

In an action by a manager of a store against an officer and director of the corporation for libel in calling a stockholders' meeting to present evidence of the alleged dishonesty of plaintiff and a former co-manager of the corporation, it is competent to show upon the question of defendant's want of good faith that defendant, between the time of the call and the meeting, acquired the beneficial ownership of the co-manager's stock at greatly less than its par value and released such co-manager from further responsibility. *Jones v. Hester*, 264.

LIMITATION OF ACTIONS

§ 8. Fiduciary Relations and Trusts.

The right of action by one partner to compel an accounting by the other does not arise and the statute of limitations does not begin to run until the de-

LIMITATION OF ACTIONS—*Continued.*

manding partner has notice of the other partner's termination of the partnership and refusal to account, and evidence disclosing that demands for an accounting were met with requests for time in which to prepare an account and that the demanding partner had no notice that the other partner would not account until less than the crucial three year period had expired warrants a peremptory instruction to answer the issue of the bar of the statute in the negative. *Prentzas v. Prentzas,* 101.

§ 9. Death and Administration.

Where a claim is not barred at the time of the debtor's death, the death suspends the running of the statute until the qualification of an administrator, and the creditor has one year from the date of the appointment of the administrator within which to bring suit. *Prentzas v. Prentzas,* 101.

MARRIAGE

§ 1. Nature and Requisites of the Relationship.

The personal presence of both contracting parties is essential to a proper ceremonial marriage, and marriage by proxy is invalid as a ceremonial marriage. *Overton v. Overton,* 139.

§ 2. Validity and Attack.

Proof or admission of a ceremonial marriage raises a presumption of its regularity and validity, but the introduction in evidence of an authenticated marriage record does not establish the marriage even *prima facie* in the absence of evidence or admission of the identity of the contracting parties, and therefore when the adverse parties contend that claimant, asserting rights as the widow of the decedent, was not actually present but that another stood in for her, the burden remains upon claimant to prove her presence as an essential element of a valid marriage. *Overton v. Overton,* 139.

The introduction of a certified copy of the marriage record, authenticated according to the Act of Congress, does not establish marriage *prima facie* when the identity of the contracting parties is questioned and there is a material discrepancy between the age of the bride as given in the marriage record and the then age of the litigant who claims to have been the bride, an instruction that the authenticated marriage record itself established the marriage *prima facie* is prejudicial error. *Ibid.*

A second or subsequent marriage is presumed legal until the contrary is proved, and the burden is upon the person asserting a property right based upon the invalidity of the second marriage to prove its invalidity. *Stewart v. Rogers,* 475.

Evidence held sufficient to support finding that first husband, not seen again after taking off on airplane flight, was dead prior to widow's second marriage. *Ibid.*

MASTER AND SERVANT

§ 16. Strikes and Picketing.

In this action against an international labor union to recover damages resulting from an unlawful secondary boycott to compel plaintiff employer to recognize as a bargaining agent a labor union which had not been certified by

MASTER AND SERVANT—*Continued.*

any authority as a bargaining agent, the evidence considered in the light most favorable to plaintiff *is held* sufficient to be submitted to the jury upon the theory that the local unions and labor councils were the agents of the international union in committing the unlawful acts, and that the activities of the union pickets amounted to an unlawful secondary boycott in violation of § 303 (a) of the Labor Management Relations Act. *Motor Lines v. Brotherhood,* 315.

§ 20. Liability of Contractee for Injuries to Third Persons.

A city may not escape liability for damage to nearby dwellings caused by concussion from explosions in excavating for a governmental purpose by employing an independent contractor to do the work. *Ins. Co. v. Blythe Bros. Co.,* 69.

§ 33. Liability of Employer for Injuries to Third Persons.

The master or principal is liable for the acts of his servant or agent only when the servant or agent is engaged in the course of his employment at the time of and in respect to the very transaction out of which the injury arises, and if the servant or agent is acting outside the scope of his employment the employer or principal is not responsible therefor. *Jackson v. Mauney,* 388.

§ 33.1. Right of Employer to Indemnity Against Employee.

Employer may file cross action for indemnity against employee under the doctrine of primary-secondary liability. *Steele v. Hauling Co.,* 486.

§ 44. Validity of Compensation Act.

The fact that the North Carolina Workmen's Compensation Act does not provide for trial by jury does not render the act unconstitutional. *Huffman v. Aircraft Co.,* 308.

§ 53. Injuries Compensable in General.

The Workman's Compensation Act is not intended to provide general health and accident insurance but to provide compensation only for such injuries to employees which arise out of and in the course of their employment. *Lewis v. Tobacco Co.,* 410.

A claimant under the Workmen's Compensation Act has the burden of showing injury from an accident which arose out of and in the course of the employment. *Taylor v. Twin City Club,* 435.

A fall is in itself an unusual and unforeseen occurrence which is an accident within the purview of the Compensation Act, and it is not essential that there be evidence of any unusual or untoward occurrence causing a fall. *Ibid.*

An accident occurs in the course of the employment if it occurs during the time and at the place the employee is required to be at work and if he is engaged in the performance of his duties or in activities incidental thereto. *Ibid.*

"Arising out of" as used in the Compensation Act relates to the origin or cause of the accident, and the accident arises out of the employment if there is some causal relation between the accident and the performance of some service of the employment, so that it may be seen that the accident had its origin in the employment. *Ibid.*

§ 54. Causal Relation Between Employment and Injury in General.

In order to arise out of the employment an injury must spring from the employment, and an injury by accident occurring while the employee is per-

MASTER AND SERVANT—*Continued.*

forming acts solely for his own benefit or the benefit of a third person, without any appreciable benefit to the employer, does not arise out of the employment. *Lewis v. Tobacco Co.,* 410.

§ 58. Unauthorized Acts of Employee and Personal Missions.

The fact that an employee continues to receive his pay while on an all expense paid pleasure trip does not entitle him to compensation for injuries received while on such trip if the trip is solely for his own benefit or that of a third person. *Lewis v. Tobacco Co.,* 410.

Evidence that an employee customarily acted as chauffer, cook and valet to an official of the company on the official's trips to his cottage at a resort and that while on such trip he went on a hunting trip with the official's sons and was fatally injured in an automobile accident occurring while he was riding on the back seat of the car owned and operated by one of the sons, *held* insufficient to support a finding that the accident arose out of the employment, the official merely consenting that the employee go on the hunting trip at the request of one of the sons, and the employee not being sent on the trip for the purpose of supervision or protection. *Ibid.*

§ 60. Injuries While on Way to or From Work.

Where the employee is directed by his superiors to report for duty at successive municipalities for work as a necessary incident to the employment, and is paid for his travel and travel time and permitted to travel by bus or his private car, a fatal accident to the employee while driving his car to the city designated arises out of the employment. *Kiger v. Service Co.,* 760.

§ 63. Hernia and Back Injuries.

A back injury to an employee from a herniated disc does not arise by accident if the employee at the time was merely carrying out his usual and customary duties in the usual way. *Byrd v. Cooperative,* 215.

A back injury or hernia suffered by an employee while carrying on his usual and customary duties in the usual way does not arise by accident, but such injury does arise by accident only if there is an interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences. *Pardue v. Tire Co.,* 413.

Findings of the Industrial Commission disclosing what the employee was doing when he suffered a back injury, without findings as to whether such activities were a part of his usual and customary duties or whether they were being performed in the usual manner, or facts from which these matters may be inferred, *held* insufficient to support a finding that the back injury resulted from an accident. *Ibid.*

§ 64. Whether the Accident Produces the Injury.

Where there is evidence that the injured employee died from angina and also evidence that he died from loss of blood resulting from an accidental injury to his head, the finding of the Industrial Commission that the death resulted from the accident, being supported by evidence, is binding on the court. *Taylor v. Twin City Club,* 435.

Evidence tending to show that plaintiff employee was injured when a cement block wall collapsed and blocks struck him on the left hand and head, that the injury to the hand resulted in a permanent partial disability but that

MASTER AND SERVANT—*Continued.*

the injury to the head did not break the skin but caused a knot which subsided shortly thereafter, *held* to support an award for disability of the hand but not to support a finding that a disfiguring scar on the head some eighth of an inch wide and five inches long, which appeared subsequent to the injury, was the result of the injury. *McRae v. Wall,* 576.

§ 93. Review of Award in Superior Court.

The findings of fact of the Industrial Commission which are supported by competent evidence are conclusive on appeal. *Huffman v. Aircraft Co.,* 308; *Taylor v. Twin City Club,* 435.

Neither the Superior Court nor the Supreme Court may receive or consider evidence on appeal from the Industrial Commission which was not introduced in the hearing before the Hearing Commissioner or the full Commission. *Huffman v. Aircraft Co.,* 308.

On appeal to the Superior Court from the Industrial Commission the findings of the Commission supported by competent evidence must be accepted as true and the Superior Court is limited to determining whether such findings justify the legal conclusions and the decision of the Commission, but in no event may the Superior Court or the Supreme Court consider the evidence for the purpose of finding the facts for itself, and therefore if the findings of the Commission do not include all determinative facts the proceeding must be remanded. *Pardue v. Tire Co.,* 413.

On appeal from the Industrial Commission the courts determine only whether as a matter of law the facts found by the Commission support its conclusions and whether they justify the award, and the findings of fact of the Commission are conclusive when supported by competent evidence, and may be set aside only for want of evidentiary support. *McRae v. Wall,* 576.

MONEY RECEIVED

A complaint alleging unauthorized charges for delinquent payment of installments on a note secured by a mortgage, without allegations as to when, under what circumstances, and in what amounts the creditor required plaintiff to pay the "late charges" *held* insufficient to state a cause of action. *Nodine v. Mortgage Corp.,* 302.

MORTGAGES AND DEEDS OF TRUST

§ 41. Title and Rights of Purchaser.

The purchaser at the foreclosure of a junior deed of trust acquires title subject to the lien of the senior deed of trust and acquires the equity of redemption thereunder, and the trustor is divested of all interest in the land. *Gaskins v. Fertilizer Co.,* 191.

MUNICIPAL CORPORATIONS

§ 10. Liability of Municipality for Torts.

If plaintiff's dwelling is damaged as a result of concussion from the use of explosives in excavating for a sewer outfall line, the municipality is not immune from liability for such damage, even though the damage is caused in the performance of a governmental function, since it amounts to a "taking" of private prop-

MUNICIPAL CORPORATION—*Continued.*

erty, and therefore, in an action against the city's contractor doing the excavation work, the contractor's demurrer on the ground that it was clothed with the governmental immunity of the city, is properly overruled. *Ins. Co. v. Blythe Bros. Co.*, 69.

A city may not escape liability for damage to nearby dwellings caused by concussion from explosions in excavating for a governmental purpose by employing an independent contractor to do the work. *Ibid.*

§ 25. Zoning Ordinances and Building Permits.

The issuance of a building permit by a municipal board of adjustment within is discretionary power under the zoning code will not be disturbed on appeal when the board makes ample findings to sustain the action. *Brannock v. Board of Adjustment*, 426.

§ 26. Review of Orders of Municipal Boards of Adjustment.

The fact of changes in membership of a municipal board of adjustment between the date of the original hearing and the date of approval of an application granting a discretionary permit, is immaterial, since changes in membership of an administrative board do not break the continuity of the board. *Brannock v. Board of Adjustment*, 426.

NEGLIGENCE

§ 4. Dangerous Instrumentalities.

Blasting operations are inherently dangerous, and persons using explosives may be held liable as for a trespass, irrespective of any question of negligence, for damage from concussion or vibration to hearby dwellings proximately caused by an explosion, even though the explosion throws no rocks or debris on the property, and the complaint in this action *is held* sufficient to state a cause of action on this ground. *Ins. Co. v. Blythe Bros. Co.*, 69.

The basic duty to use ordinary or reasonable care under the circumstances requires a person handling an inherently dangerous instrumentality to use increased caution commensurate with the exceptional danger. *Stegall v. Oil Co.*, 459.

Complaint held insufficient to state cause of action against manufacturer or distributor for injury in explosion of fuel used to start fire, there being no allegation that manufacturer had either express or implied knowledge that the fuel was delivered by the distributor as kerosene, or that the distributor knew or should have known that fuel was other than standard kerosene. *Ibid.*

§ 7. Proximate Cause.

Only negligence which constitutes a proximate cause of injury is of legal import, either on the issue of negligence or the issue of contributory negligence. *Oxendine v. Lowry*, 709.

Ordinarily, the question of proximate cause is for the determination of the jury and it is only when the facts are all admitted and only one inference may be drawn from them that the court may declare whether an act was a proximate cause of an injury or not. *Ibid.*

§ 8. Concurring and Intervening Negligence.

Separate and distinct factors may concur and join in producing a single injury, in which event the author of each is jointly and severally liable to the injured party. *Batts v. Faggart*, 641.

NEGLIGENCE—*Continued.*

Whether an intervening act insulates the original wrong depends upon whether there is an unbroken connection between the original wrong and the injury so that the injury is the natural and probable consequence of the original negligence and should have been foreseen in the light of the attending circumstances. *Ibid.*

§ 9. Primary and Secondary Liability and Indemnity.

An employer is secondarily liable for the negligence of his employee and therefore in an action by the injured third person may file a cross-action against the employee for indemnity. *Steele v. Hauling Co.*, 486.

§ 11. Contributory Negligence in General.

The law imposes upon a person *sui juris* the duty to use ordinary care to protect himself from injury, and the degree of such care should be commensurate with the danger to be avoided. *Rosser v. Smith*, 647.

§ 16. Contributory Negligence of Minor.

A seventeen year old boy is presumed to have sufficient capacity to understand and avoid a clear danger, and is chargeable with contributory negligence as a matter of law if he fails to do so. *Burgess v. Mattox*, 305.

Presumption that infants are incapable of contributory negligence is inapposite to homicide prosecutions, since contributory negligence, as such, is no defense to culpable negligence. *S. v. Harrington*, 663.

§ 20. Pleadings in Actions for Negligence.

In action by injured person against two employers and their common employees, one employer may not file a cross-action against the other on an indemnity agreement, but may file a cross-action for indemnity against his employee under the doctrine of primary and secondary liability. *Steele v. Hauling Co.*, 486.

§ 24a. Sufficiency of Evidence and Nonsuit on Issue of Negligence in General.

Evidence that defendant left his passenger sitting in defendant's car on a cold night while defendant went into a house, that defendant had a five gallon can of kerosene with an uncovered two inch hole in its top sitting on the floor in the back, that the passenger was a cigarette smoker, that the car was discovered afire some thirty to forty-five minutes after defendant left it, and that the passenger died in the fire, *held* insufficient to be submitted to the jury on the issue of negligence in an action for wrongful death. *Stafford v. Griffin*, 218.

In order to be entitled to have the issue of negligence submitted to the jury, plaintiff must offer evidence permitting a legitimate inference of defendant's negligence in regard to at least one of the particulars asserted in the complaint and that such negligence proximately caused plaintiff's injury. *Lynn v. Wheeler*, 658.

§ 25. Sufficiency of Evidence to Require Submission of Issue of Contributory Negligence to Jury.

In determining the sufficiency of evidence of contributory negligence to require the submission of that issue to the jury, the evidence must be considered in the light most favorable to defendant. *Weaver v. Bennett*, 427.

§ 32. Contributory Negligence as Affecting Culpable Negligence.

In a prosecution for manslaughter in the deaths of children 7 and 10 years of age, contributory negligence, as such, has no relevancy, but is pertinent only

NEGLIGENCE—*Continued.*

upon the question of whether the conduct of the minors was such that plaintiff's negligence did not constitute a proximate cause of their deaths, and therefore the presumption that the infants were incapable of contributory negligence is not apposite. *S. v. Harrington*, 663.

§ 37a. Who Are Invitees and Scope of Invitation.

Evidence that patrons of defendant's dining room frequently went into the kitchen area of the premises to pay their bills and that on the occasion in question plaintiff was directed by defendant's employee to go into that area to purchase cigarettes at a vending machine, *held* sufficient to support a finding that plaintiff was an invitee at the time and place of her fall in the kitchen area. *Harrison v. Williams*, 392.

§ 37b. Duties of Owner of Land to Invitees.

The owners of premises are under duty to maintain their parking area in such condition as a reasonably prudent proprietor would deem sufficient to protect patrons from danger while exercising ordinary care for their own safety. *Berger v. Cornwell*, 198.

A proprietor owes his invitees the legal duty to maintain the aisles and passageways of his place of business in such condition as a reasonably careful and prudent person would deem sufficient to protect patrons from danger while exercising ordinary care for their own safety. *Harrison v. Williams*, 392.

Ordinarily, the existence of a step between floor levels raises no inference of negligence on his part of the proprietor. *Ibid.*

A store proprietor is not an insurer of the safety of customers but is under duty to exercise ordinary care to keep the premises in reasonably safe condition and to give warning of hidden perils or unsafe conditions so far as he can ascertain them by reasonable inspection and supervision, but he is not required to give warning of conditions that are obvious. *Shaw v. Ward Co.*, 574; *Grady v. Penney Co.*, 745.

§ 37c. Contributory Negligence of Invitee.

Evidence tending to show that small patches of snow and ice remained in shady places in defendant's parking lot, and that plaintiff walked to the building and returned to her parked taxi without looking down or observing the ice and snow, and then fell while attempting to re-enter the taxi when she stepped on a patch of ice, *is held* to show contributory negligence on her part as a matter of law in failing to exercise due care for her own safety. *Berger v. Cornwell*, 198.

§ 37f. Sufficiency of Evidence of Negligence and Nonsuit in Actions by Invitees.

Evidence to the effect that plaintiff, in going as directed by defendant's employee to purchase cigarettes at a vending machine, failed to see a step downward between floor levels because the area was "dimly lighted," without evidence as to the amount, kind, or location of the lights then burning or the difference in the floor levels, *is held* insufficient to be submitted to the jury on the issue of defendant's negligence. *Harrison v. Williams*, 392.

Evidence that the steps in defendant's store were illuminated by natural light from a glass door and window in front and half a glass door in the rear and by flourescent light, except to the extent of shadows caused by the guard

NEGLIGENCE—*Continued.*

rail, that the wooden step was worn to a depth of one-quarter to one-half inch by long use, with testimony of plaintiff that she did not know at the time she fell what caused her to fall but that she concluded, based upon an inspection some 45 days after the accident, that she fell because the step was worn and slick, *is held* insufficient to be submitted to the jury on the issue of negligence. *Shaw v. Ward Co.*, 574.

Evidence tending to show that plaintiff customer, after having been directed to a dressing room, opened the curtain to an adjacent stair landing, took two steps and lost her balance and fell down the stairs, without evidence of defective lighting or any inherent danger in the plan of construction, with testimony by plaintiff herself that there was nothing to prevent her from seeing the steps if she had looked, *is held* to warrant judgment as of nonsuit. *Grady v. Penney Co.*, 745.

NUISANCE

§ 1. Conditions Constituting Private Nuisances in General.

A fence which is of no beneficial use to the owner and which is erected and maintained by him solely for the purpose of annoying a neighbor is a spite fence and may be abated subject to the same equitable principles which govern injunctive relief generally. *Welsh v. Todd*, 527.

Whether fence was spite fence held question for jury on evidence in this case. *Ibid.*

PARENT AND CHILD

§ 1. The Relation.

In a prosecution for incest, the married mother of the prosecutrix may not testify that defendant, a person not her husband, is the natural father of the prosecutrix, since a mother will not be permitted to bastardize her own issue and testify to illicit relations except in an action which directly involves the parentage of the child, and, the prosecutrix having been born in wedlock, the law will conclusively presume legitimacy in the absence of evidence that the husband was impotent or could not have had access. *S. v. Rogers*, 406.

§ 4. Emancipation.

If the father, with full knowledge of the facts and acquiescence therein, permits his son to receive his own earnings and does not restrict him in the use thereof, there is an emancipation *pro tanto*. *Smith v. Simpson*, 601.

§ 7. Liability of Parent for Torts of Child.

A parent may not be held liable for the negligent operation of an automobile by his child merely by reason of the relationship, an automobile not being a dangerous instrumentality, and there being no contention that the parent knew that the child was a reckless driver so as to present the question of liability under G.S. 1-538.1. *Smith v. Simpson*, 601.

PARTIES

§ 2. Parties Plaintiff.

A party plaintiff may not join with his own cause of action against defendant causes of action against the same defendant in favor of other parties

PARTIES—*Continued.*

similarly situated, certainly in the absence of a showing of authority to bring such actions in their behalf. *Nodine v. Mortgage Corp.*, 302.

The court has no authority, over objection, to convert a pending action which cannot be maintained into a new and independent action by admitting a party who is solely interested as plaintiff. *Graves v. Welborn*, 688.

But where the facts alleged disclose that the action is instituted by the personal representative in her representative capacity, the caption may be amended to so show. *Ibid.*

§ 3. **Parties Defendant.**

Under G.S. 1-69 a plaintiff who is uncertain as to which of two defendants is liable may sue them both in the alternative. *Conger v. Ins. Co.*, 112.

§ 5. **Representation by Members of the Class.**

Where the potential beneficiaries of a trust are so numerous that it is practically impossible to bring them all before the court in an action seeking modification of the trust, a beneficiary of each class may be made a party and represent the class. *Cocke v. Duke University*, 1.

PARTITION

§ 1. **Nature and Extent of Right to Partition in General.**

Proceedings for partition are equitable in nature, and in a suit for partition a court of equity has power to adjust all equities between the parties with respect to the property. *Roberts v. Barlowe*, 239.

§ 8. **Sale for Partition and Confirmation.**

Where respondent admits petitioner's allegation of tenancy in common and that the land should be sold for partition, but asserts claims against petitioner for payments by respondent of obligations of petitioner and liens against the land, judgment on the pleadings decreeing sale is proper, but respondent is entitled as a matter of right to have his claims determined before an order for distribution of the proceeds of the sale is entered. *Roberts v. Barlowe*, 239.

The sale pursuant to the decree does not terminate a partition proceeding since the proceeding remains pending until the proceeds of the sale have been distributed, and therefore a motion in the cause and not an independent action for a declaratory judgment is the proper procedure to present conflicting claims as to the proper distribution of the fund, but, the parties being the same, the independent action may be treated as a motion in the cause. *Brenkworth v. Lanier*, 279.

Under the 1943 amendment to G.S. 8-47 the interest rate of 6 per cent must be used in computing the present cash value of the widow's dower in the distribution of the proceeds of sale of the dower estate for partition between the widow and the heirs at law. *Ibid.*

PARTNERSHIP

§ 4. **Liabilities of Partners Ex Contractu.**

In order for the payee to establish a note as a partnership liability, notwithstanding it was not signed in the partnership name, it is required that he show that the partner signing the note acted on behalf of the partnership in

PARTNERSHIP—*Continued.*

procuring the loan and was authorized to so act, or that the other partners, with knowledge of the transaction, thereafter ratified the act of the maker. *Brewer v. Elks*, 470.

The mere fact that a partnership ultimately benefits from a contract made by a partner in his own name does not create a partnership obligation. *Ibid.*

Where in proceedings for dissolution the partners fail to except to finding that note executed by one partner alone was a partnership liability, such failure is admission of partnership liability. *Ibid.*

§ 9. Dissolution and Accounting.

Action by partner for an accounting does not accrue until he has notice that other partner has denied right of action. *Prentzas v. Prentzas*, 101.

Where a receiver is appointed to take possession of partnership assets for dissolution, the creditors must file and prove their claims against the partnership as directed by the court or be barred, G.S. 1-507.6, and upon the filing of such claim any partner may challenge the validity of the claim as a partnership liability. *Brewer v. Elks*, 470.

PERJURY

§ 5. Sufficiency of Evidence and Nonsuit.

Testimony of two or more witnesses as to conflicting statements made by defendant while under oath in courts of competent jurisdiction, but without evidence that the statement upon which the bill of indictment was predicated was the false testimony, is insufficient to be submitted to the jury in a prosecution for perjury. *S. v. Allen*, 220.

§ 6. Civil Actions.

The driver of an automobile may not sue his insurer for damages resulting from the revocation of his driver's license allegedly resulting from the false representation of his insurer that the driver did not have insurance in force at the time he was involved in an accident. G.S. 20-166.1(b), G.S. 20-279.4, G.S. 20-279.5, since such action amounts to a collateral attack upon the order of the Commissioner suspending the license and is based on subordination of perjury. *Robinson v. Casualty Co.*, 284.

PLEADINGS

§ 2. Statement of Cause of Action in General.

It is not required that the complaint allege evidentiary matters. *Brewer v. Elks*, 470.

A cause of action consists of the facts alleged in the complaint. *Copple v. Warner*, 727.

§ 3. Joinder of Causes.

The provision of G.S. 1-69 permitting a plaintiff, uncertain as to which of two defendants is liable, to sue both of them in the alternative will not be construed to authorize the joinder of unrelated and distinct causes of action against separate defendants, G.S. 1-123, but when the allegations of the complaint tell a connected story and plaintiff does not assert any inconsistent positions therein, and the action affects both defendants in that if the one is liable

PLEADINGS—*Continued.*

the other is not, the statute applies and demurrer for misjoinder should be overruled. *Conger v. Ins. Co.*, 112.

§ 4. Prayer for Relief.

Prayer for unavailable relief does not warrant demurrer if facts alleged constitute cause of action, since prayer for relief is not controlling. *Bruton v. Bland*, 429.

§ 8. Counterclaims and Cross-Actions.

In an action by an injured person against two employers to recover for negligent injury inflicted by their common employees, the one employer may not file a cross-action against the other on a contract indemnifying the first for any loss resulting from the performance of the work out of which the injuries arose, since plaintiff is not privity thereto and such cross-action is not germane to plaintiff's cause and is properly stricken on motion even though all references therein to liability insurance are deleted. *Steele v. Hauling Co.*, 486.

In an action by an injured person against an employer and employee for injuries resulting from the negligence of the employee in the performance of the work, the employer is entitled to file a cross-action for indemnity against the employee under the doctrine of primary-secondary liability. *Ibid.*

§ 12. Office and Effect of Demurrer.

The sufficiency of the allegations of the further answer to set up a defense may be tested by demurrer. *Ins. Co. v. Blythe Bros. Co.*, 69.

A demurrer admits the truth of all factual averments contained in the amended complaint and such relevent inferences as may be reasonably drawn therefrom, liberally construing the pleadings with a view to substantial justice between the parties, but the demurrer does not admit inferences or conclusions of law. *Stegall v. Oil Co.*, 459; *Copple v. Warner*, 727.

A motion for judgment on the pleadings on the basis that the facts alleged in the complaint are insufficient to state a cause is, in effect, a demurrer. *Woodruff v. Ins. Co.*, 723.

§ 14. Statement of Grounds, Form and Requisites of Demurrer.

G.S. 1-128 applies to all demurrers, written or oral, and a demurrer asserting in general terms that the complaint did not allege facts sufficient to constitute a cause of action, without specifically stating the grounds of objection, may be disregarded. G.S. 1-127(6). *Ins. Co. v. Blythe Bros. Co.*, 69.

This rule applies to a motion to strike an entire defense from the answer, since such motion is in effect a demurrer. *Ibid.*

§ 15. Defects Appearing on Face of Pleading and "Speaking" Demurrers.

Where a demurrer presents a contention of the maker of a note that it was agreed between the parties that the note should be paid solely out of sale of the collateral pledged, without personal liability, the existence of such an agreement, for the purpose of the demurrer, must be determined from the face of the complaint and the note attached to the complaint and made a part thereof, without evidence *aliunde*. *Langston v. Brown*, 518.

§ 18. Demurrer for Misjoinder of Parties and Causes.

If the demurrer of one of two defendants is sustained for failure of the

PLEADINGS—*Continued.*

complaint to state a cause of action against him, the question presented by the demurrer for misjoinder of parties and causes is eliminated. *Batts v. Faggart*, 641; *Copple v. Warner*, 727.

§ 19. Demurrer for Failure of Pleading to State Cause of Action or Defense.

Upon sustaining a demurrer to a complaint stating a cause of action in a defective manner in omitting essential averments, the action should not be dismissed until plaintiff is given opportunity to amend. *Nodine v. Mortgage Corp.*, 302; *Stegall v. Oil Co.*, 459.

§ 21.1. Judgment on Demurrer.

Where the record indicates that a demurrer was sustained on incorrect grounds, the cause will be remanded for order sustaining the demurrer for the correct reason. *Copple v. Warner*, 727.

§ 24. Motions to Be Allowed to Amend.

The denial of a motion to be allowed to amend during the course of the trial does not preclude a like motion prior to retrial. *Overton v. Overton*, 139.

Where the Superior Court sustains demurrer and grants leave to amend, and plaintiff appeals therefrom, the appeal stays further proceedings, but upon certification of decision affirming the judgment the thirty-day period begins to run, and an amendment filed after the thirty-day period may be stricken. *Strickland v. Jackson*, 190.

Ordinarily the court may allow in its discretion an amendment to correct a misnomer or mistake in the name of a party where the amendment does not amount to a substitution or entire change of parties. *Graves v. Welborn*, 688.

§ 30. Motions for Judgment on Pleadings.

Where it appears upon the face of the pleadings that defendant was a joint tort-feasor in publishing a libel and that plaintiff released the other tort-feasor, defendant's motion for judgment on the pleadings should be allowed, since judgment on the pleadings is proper when all facts necessary to establish a plea in bar are either alleged or admitted in plaintiff's pleadings. *McFarland v. Publishing Co.*, 397.

In passing upon plaintiff's motion for judgment on the pleadings, the facts alleged in defendant's pleadings must be accepted as true. *Hutchins v. Hutchins*, 628.

Where motion for judgment on the pleadings is allowed, not on the basis of the admitted facts but on the basis that the facts alleged in the complaint are insufficient to state a cause of action, the allowance of the motion is tantamount to the granting of a demurrer, and the action should not be dismissed, since plaintiff is entitled to amend, if so advised. *Woodruff v. Ins. Co.*, 723.

§ 34. Motions to Strike.

In defendant driver's cross action against plaintiff driver, plaintiff is not entitled to plead a prior conviction of defendant of involuntary manslaughter in the death of plaintiff's wife resulting from the same collision, and therefore defendant's motion to strike allegations in regard thereto from plaintiff's reply should have been allowed. *Moore v. Young*, 654.

PRINCIPAL AND AGENT

§ 4. Proof of Agency.

Testimony held incompetent as hearsay and as tending to prove agency by declarations of the agent. *Motor Lines v. Brotherhood,* 315.

PRINCIPAL AND SURETY

§ 1. Nature and Construction of Surety Contracts in General.

That part of a contract under which a company agrees to indemnify the assured for loss or damage from perils therein defined, with provision for subrogation of the company to the right of assured against third persons, constitutes a contract of insurance, G.S. 58-3; while that part of the contract under which the company obligates itself to pay to any shipper or consignee, claims for which the assured would be liable by provision of statute (G.S. 62-121.26), with stipulation that the assured should reimburse the company for any such payment, is a surety contract. *Ins. Co. v. Gibbs,* 681.

§ 2. Actions on Surety Bonds in General.

The agreement in this case contained a contract insuring a carrier from loss by fire and theft, etc., and also a contract of suretyship in regard to claims of third persons under statutory provision (G.S. 62-121.26). *Held:* Provisions of the insurance contract that action be commenced within a specified time are not applicable to claims under the surety contract, and the surety's right of action for reimbursement of claims of third persons paid by it does not arise until such payment, and action brought within three years of such payment is not barred either under the contract or by the three year statute of limitations. *Ins. Co. v. Gibbs,* 681.

§ 10. Liability of Sureties for Contribution.

Where two sureties are liable for claims of third persons under provision of statute (G.S. 62-121.26) against the principal, the surety paying the entire claim may sue the other for contribution, but the cosurety is not liable, either under the bond or under the statute, for the entire amount, there being neither contractual nor statutory liability for indemnity. *Ins. Co. v. Gibbs,* 681.

PROCESS

§ 8. Personal Service on Nonresidents in Another State.

An action for breach of contract to rebuild a church organ, the contractor claiming no interest in the organ nor any lien thereon, is an action solely *ex contractu* and does not come within the provisions of G.S. 1-98.2(1) so as to authorize service of process on the nonresident under G.S. 1-104(a). *Church v. Miller,* 331.

G.S. 1-98.2(6) does not authorize service of process under G.S. 1-104(a) unless the defendant is a resident of this State and has departed therefrom with intent to defraud creditors or avoid service of summons, and therefore the statute can have no application when it appears from the complaint that defendant is a nonresident or if it does not affirmatively appear that he is a resident who has left the State for the purpose of defrauding his creditors and avoiding service of summons. *Ibid.*

A judgment *in personam* cannot be rendered against a defendant unless personal service of process is had upon him within the State or he has accept-

PROCESS—*Continued.*

ed service, or by general appearance, actual or constructive, has waived service, and personal service outside the State under G.S. 1-104 is ineffectual to give the court jurisdiction over the person. *Ibid.*

In order to a valid service of process under G.S. 1-104 it must appear by affidavit or by verified complaint treated as an affidavit, that the requirements of G.S. 1-98.4 have been met and that the cause of action is within the purview of G.S. 1-98.2. *Trucking Co. v. Haponski,* 514.

§ 9. Service by Publication.

Where plaintiff's affidavit states that defendant's residence remained unknown after diligent search and inquiry had been made to discover it, the clerk is not required to mail defendant a copy of the notice of service by publication. *Stokes v. Stokes,* 203.

§ 12. Service of Process on Agent of Foreign Corporation.

G.S. 55-143 applies to service of process on a foreign corporation only in those instances in which the corporation has domesticated here, regardless of whether or not the cause of action arose in this State and regardless of whether the action relates to business transacted in this State, and the statute has no application to a foreign corporation which has not domesticated here. *R. R. v. Hunt & Sons,* 717.

§ 13. Service of Process on Foreign Corporation by Service on Secretary of State.

Whether a foreign corporation has sufficient contacts within the state of the forum to subject it to service of process in an action *in personam,* and whether the manner of service is a reasonable method of notification to it of the action, present a question of due process which must be decided in accordance with the decisions of the Supreme Court of the United States upon the facts of each particular case upon the basis of what is fair and reasonable and just under the circumstances. *Farmer v. Ferris,* 619.

Evidence held to support findings that foreign corporation was doing business in the State so as to subject it to service of process by service on Secretary of State. *Ibid.*

G.S. 55-144 applies only when the cause of action against a foreign corporation arises out of business conducted by it in this State, and therefore when a transitory cause of action arises in another State, G.S. 55-144 can have no application. *R. R. v. Hunt & Sons,* 717.

There is no statutory authority in this State for service of process on a foreign corporation by service on the Secretary of State when the cause of action arises in another state and the corporation has not domesticated here. *Ibid.*

In a suit by an employer to recover indemnity for amounts paid the estate of an employee fatally injured by the explosion of a gas heater, motion of the nonresident manufacturer to quash the service of summons upon it by service upon the Secretary of State is properly allowed when the manufacturer has not domesticated here and the sale of the heater to the distributor was consumated in another state. *Ibid.*

PUBLIC OFFICERS

§ 2. Appointment and Election by Boards.

Where a board of county commissioners appoints one of its members a

PUBLIC OFFICERS—*Continued.*

member of the county board of public welfare for a three-year term, the fact that the member's term of office as county commissioner expires during the three-year term does not terminate his term as a member of the county board of public welfare, G.S. 108-11. The statute does not use the term "ex officio" in its technical sense. *Pitts v. Williams,* 168.

§ 9. Personal Liability of Public Officers.

A public officer, even though he assumes to act under the authority and pursuant to the direction of the State, may be held personally liable by an individual whose rights are invaded by such officer in disregard of law. *Shingleton v. State,* 451.

QUASI CONTRACTS

§ 1. Elements and Essentials of Right of Action.

As a general rule, if one performs personal services for another which are knowingly and voluntarily accepted, and nothing else appears, the law will imply a promise on the part of the recipient to pay the reasonable value of the services rendered, nevertheless, the burden remains upon the person rendering such services to show circumstances from which it may be inferred that the services were rendered and received with the mutual understanding that they were to be paid for. *Johnson v. Sanders,* 291.

RAPE

§ 1. Nature and Elements of the Offense.

Rape is the carnal knowledge of a female, forcibly and against her will. *S. v. Crawford,* 548.

§ 5. Sufficiency of Evidence and Nonsuit.

The evidence in this prosecution for rape *held* sufficient to require the court to submit the issue of guilt to the jury. *S. v. Orr,* 177.

§ 8. Elements of Offense of Carnal Knowledge of Female under Twelve Years.

Carnal knowledge of any female child under the age of twelve years, regardless of consent, is rape. *S. v. Crawford,* 548.

§ 17. Assault with Intent to Commit Rape.

In order to be guilty of assault with intent to commit rape, defendant must have the intent at least at some time during the assault to gratify his passion on the person of the woman at all events, notwithstanding any resistance on her part. *S. v. Gammons,* 753.

Evidence that defendant assaulted prosecutrix and attempted to have sexual intercourse with her under the pretense that the act was a religious rite necessary to her cure, but that the defendant immediately desisted when she threatened to scream, *is held* insufficient to show that defendant had at any time during the assault intended to have intercourse with her at all events, notwithstanding any resistance on her part, and nonsuit of the charge of the felony should have been allowed. *Ibid.*

In a prosecution of a defendant for assault with intent to commit rape, nonsuit of the felony does not entitle the defendant to his discharge, but the

RAPE—*Continued.*

State may put defendant on trial under the same indictment for assault on a female, defendant being a male over the age of 18. *Ibid.*

REFERENCE

§ 3. Compulsory Reference.

Where an action involves purchases on account over a period of years it cannot be said that the action does not require the examination of a long account within the meaning of the reference statute. *Cooperative Exchange v. Scott,* 81.

§ 4. Pleas in Bar.

When appellants have objected to an order of compulsory reference but have no exception to the order except in their assignments of error, their contention that it was error to order a compulsory reference prior to the determination of their plea in bar, is not properly presented, it being required that an assignment of error be supported by an exception duly noted in the record. *Cooperative Exchange v. Scott,* 81.

Where appellants have objected to an order of compulsory reference but do not enter an exception on the ground that the court could not order the reference prior to the determination of their plea in bar until upon the trial by jury in the Superior Court upon the referee's report, the exception is not to the order of compulsory reference when made and is ineffectual. *Ibid.*

SALES

§ 15. Actions or Counterclaims for Fraud.

Where plaintiff's evidence is sufficient to take her case to the jury on the issue of actionable fraud inducing her purchase of a chattel, nonsuit is improperly entered even though plaintiff prays for the relief of rescission and plaintiff's evidence shows a delay barring that relief, since the prayer for relief is not controlling and plaintiff's allegation and evidence are sufficient to make out a case on the issue of actionable fraud and damages. *Bruton v. Bland,* 429.

§ 16. Actions by Purchaser or User for Personal Injuries.

The manufacturer and the distributor of an inherently dangerous chattel, with actual or constructive knowledge of the danger, are under duty to give warning of such danger to persons for whose use the commodity is supplied when the manufacturer or distributor has reason to believe that they would not realize such danger, so that injury to them is reasonably foreseeable in the absence of such warning. *Stegall v. Oil Co.,* 459.

STATE

§ 4. Actions Against the State.

In an action under the Declaratory Judgment Act to construe an easement granted by the State, judgment may not be entered enjoining the State and its employees from interfering with the easement as defined by the court, since no action may be maintained against the State or any agency thereof in tort or to restrain the commission of a tort. *Shingleton v. State,* 451.

STATE—*Continued.*

Controversy between an individual and the State as to the extent of an easement granted to the individual by the State may be made the basis of a suit against the State in the Superior Court under the Declaratory Judgment Act, since such suit involves title to realty within the purview of G.S. 41-10.1. *Ibid.*

STATUTES

§ 4. Construction of Statutes in Regard to Constitutionality.

The legal principle that an unconstitutional statute is a complete nullity and cannot justify any acts under it, must be construed with respect to the particular factual situation, and while a party may not assert a right arising out of a statute which has been declared unconstitutional, the principle does not strike down all undertakings made in reliance upon such statute. *Roberson v. Penland*, 502.

§ 5. General Rules of Construction.

G.S. 7-115, relating to the removal of a justice of the peace by the resident judge appointing him, is restricted in its scope and provides a procedure different from that specified in G.S. 128-16 through G.S. 128-20, and the two statutes are not in *pari materia*, and the provisions of G.S. 128-20, relating to the recovery of costs and attorney's fees is not applicable to a proceeding under G.S. 7-115. *Swain v. Creasman*, 163.

TAXATION

§ 23. Construction of Taxing Statutes in General.

Where the language of a taxing statute is plain and unambiguous, the courts must give its language its obvious meaning; but when the language leaves reasonable doubt, the courts will give it the meaning intended by the legislature as ascertained with reference to the particular factual situation, the legislative history, judicial interpretation of prior statutes dealing with the situation, and the changes, if any, made following a particular interpretation. *Ingram v. Johnson*, 697.

§ 27. Liability for Inheritance, Estate and Gift Taxes.

Step grandchildren of testatrix who are the daughters of testatrix' stepchildren who predeceased testatrix, fall within Class A as defined by G.S. 105-4, and not class C as defined by G.S. 105-6, for the purpose of determining the rate of tax to be paid on properties bequeathed them. *Ingram v. Johnson*, 697.

TELEPHONE COMPANIES

§ 1. Control and Regulation.

The Utilities Commission is given general supervision over rates and services rendered by telephone companies and has the duty, either on its own motion or upon petition, to hold hearings to determine the just, reasonable and sufficient rates which such utility may charge. *Utilities Comm. v. Tel. Co.*, 369.

TORTS

§ 2. Joint Tort Feasors.

An individual making a statement containing libelous matter to a news-

TORTS—*Continued.*

paper and the newspaper publishing such matter are joint tort-feasors in publishing the libel. *McFarland v. Publishing Co.*, 397.

§ 6. Liability of Joint Tort Feasor for Contribution.

Where the jury finds that the individual defendant was not guilty of negligence in connection with the accident in suit, judgment is properly entered upon the verdict dismissing the action as to the individual defendant and the corporate defendant sought to be held liable under the doctrine of *respondeat superior*, and also as to the defendants joined for contribution by the original individual defendant. *Lee v. Hohn*, 351.

§ 7. Release from Liability.

Where the party defamed institutes separate actions for libel against the individual making the statement and the newspaper publishing the defamatory matter, a release of the individual from liability is a release of the newspaper also, regardless of the adequacy of the consideration paid for the release. *McFarland v. Publishing Co.*, 397.

TRESPASS

§ 1. Trespass to Realty in General.

Blasting operations resulting in damage to nearby dwellings from concussion or vibration constitute a trespass even though the explosions throw no rocks or debris on the property. *Ins. Co. v. Blythe Bros. Co.*, 69.

TRIAL

§ 3. Time of Trial and Continuances.

Continuances are not favored, and the denial of a motion for continuance will not be disturbed in the absence of a showing of abuse of discretion. *Wilburn v. Wilburn*, 208.

Evidence that the case was set for a specified date for the convenience of the parties, that upon defendant's motion it was continued to a later specified date, and that upon the later date defendant moved for a continuance based upon a physician's written statement, dated some twelve days prior to the hearing, that defendant was suffering from a virus, without more, *is held* insufficient to show abuse of discretion in the denial of defendant's second motion for continuance. *Ibid.*

§ 6. Stipulations.

A stipulation by the parties is a judicial admission and binding upon them. *Farmer v. Ferris*, 619.

§ 17. Admission of Evidence Competent for Restricted Purpose.

Where evidence competent for a restricted purpose is admitted generally, an exception will not be sustained in the absence of a request that its admission be restricted. *Smith v. Corsat*, 92; *Motor Lines v. Brotherhood*, 315.

§ 21. Consideration of Evidence on Motion to Nonsuit.

On motion for nonsuit, the evidence is to be considered in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn therefrom. *Nixon v. Nixon*, 251; *Davis v. Parnell*, 522; *Oxendine v. Lowry*, 709.

TRIAL—*Continued.*

In passing upon motion to nonsuit made at the close of all of the evidence, so much of defendant's evidence as may be favorable to plaintiff or which tends to explain and make clear the evidence offered by plaintiff will be considered in an addition to plaintiff's evidence, but defendant's evidence which tends to establish a different state of facts or tends to impeach plaintiff's evidence is to be disregarded. *Rosser v. Smith*, 647.

§ 22. Sufficiency of Evidence to Overrule Nonsuit in General.

Where the evidence most favorable to complainant makes out a *prima facie* case, contradictions and inconsistencies in complainant's evidence do not justify nonsuit. *Smith v. Corsat*, 92; *Nixon v. Nixon*, 251.

§ 33. Instructions — Statement of Evidence and Application of Law Thereto.

An inadvertence in charging that a party's evidence tended to show certain facts when such party's evidence tended to show the contrary, must be held for prejudicial error notwithstanding that the inadvertence was due to a slip of the tongue or that the charge was incorrectly reported. *In re Will of Taylor*, 233.

A charge which contains a statement of the respective contentions of the parties and a statement of the abstract principles of law involved in the case, but which fails to apply the law to the facts in evidence or charge the jury the respective circumstances under which the issues should be answered in the affirmative and in the negative, must be held for prejudicial error. *Parlier v. Barnes*, 341.

It is error to charge on principle of law not presented by the evidence. *Ibid; Motor Freight v. DuBose*, 497; *White v. Cothran*, 510.

The court is required to charge the jury on the applicable statutory law as well as the common law, and the court's failure to do so must be held for prejudicial error. *Greene v. Harmon*, 344.

An instruction which presents an erroneous view of the law on a substantive phase of the case is prejudicial error. *White v. Phelps*, 445.

§ 35. Expression of Opinion on Evidence by Court in Instructions.

An instruction on the issue of the amount of compensation for the taking of land that plaintiff nad testified to a difference in the value of his land before and after the taking in a specified amount "which is more than some of his own witnesses testified to" must be held for error as tending to impeach the credibility of defendant as a witness. *Highway Comm. v. Oil Co.*, 131.

§ 57. Findings and Judgment in Trial by Court.

In a trial by the court under agreement of the parties the credibility of the evidence is for the court, sitting as a jury. *Yow v. Armstrong*, 287.

In a trial by the court under agreement of the parties, the findings of the court are as conclusive as the verdict of a jury when the findings are supported by competent evidence. *Stewart v. Rogers*, 475.

TROVER AND CONVERSION

§ 2. Actions in Trover and Conversion.

In an action in trover and conversion against lessor by a stranger to the lease, demurrer is properly allowed when it appears from the pleadings that

TROVER AND CONVERSION—*Continued.*

under the terms of the lease the personalty attached to the realty should become the property of lessor upon the termination of the contract or lease and that the particularly described equipment alleged to have been converted was of such weight as to be *prima facie* attached to the realty and that the other personalty was not described with sufficient definiteness, since in no event could plaintiff have rights in the personalty superior to that of the lessee. *Williams v. Wallace*, 537.

TRUSTS

§ 5. Construction, Operation and Modification.

Courts of equity have jurisdiction to modify a trust indenture, but in order to invoke such equitable power it must be made to appear that some exigency, contingency, or emergency not anticipated by the trustor has arisen requiring a disregard of some specific provision of the trust in order to preserve the trust estate or protect the *cestuis*. *Cocke v. Duke University*, 1.

Evidence held insufficient to invoke power of equity to modify trust indenture. *Ibid.*

§ 6. Authority and Duties of Trustee.

Where the trustees of a testamentary trust are given broad powers to hold and dispose of lands in accordance with their best judgment, and are empowered to sell the realty of the trust if necessary to carry out the purpose of the trust, provisions of the will that it was testator's "wish and desire" that if sale of realty became necessary a designated tract be first sold, *held* not to preclude the trustees from first selling a portion of another tract when such sale is rendered more feasible and desirable because of the location of a hard surfaced road and school near thereto, since the precatory words will be given their commonly accepted sense and will not be artifically construed by the court as embodying a mandatory condition. *Rouse v. Kennedy*, 152.

USURY

§ 1. Contracts and Transactions Usurious.

If transaction is sale and not a loan or forbearance of money, the fact that credit price exceeds cash price by more than the legal interest does not render transactions usurious. *Bank v. Merrimon*, 335.

UTILITIES COMMISSION

§ 1. Nature and Functions of Commission in General.

Procedures before the Utilities Commission are not as strictly technical as proceedings in the Superior Court, and the Commission may regulate its own procedure within broad limits by rules and regulations not inconsistent with statutory provisions. *Utilities Comm. v. Tel. Co.*, 369.

§ 3. Jurisdiction and Authority of Commission in Respect to Carriers.

Utilities Commission is not confined to immediate scope of pleadings but may enlarge scope of inquiry when parties are not taken by surprise; findings and exercise of judgment in regard to public convenience and necessity are primarily addressed to Utilities Commission and not the courts. *Utilities Comm. v. Coach Co.*, 43.

UTILITIES COMMISSION—*Continued.*

§ 6. Hearings and Orders with Respect to Rates.

Where telephone company transfers certain of its exchanges to subsidiary after the termination of the hearing for increased rates, the Utilities Commission should not dismiss the action but should determine the question on the basis of the conditions at the time of the filing of the petition, or it may make the subsidiary a party to the action. *Utilities Commission v. Telephone Co.*, 369.

§ 9. Appeal and Review.

Order of the Utilities Commission is presumed *prima facie* just and reasonable, and the courts will not interfere therewith if order is based upon findings of fact. *Utilities Comm. v. Coach Co.*, 43. But where an order is not predicated upon a finding of all of the essential facts, the cause must be remanded. *Utilities Comm. v. Membership Corp.*, 59.

VENIRE

§ 3. Actions Against Executors and Administrators.

An action by beneficiaries of a testamentary trust alleging mismanagement of the successor trustee, challenging its account and seeking to recover from it as trustee losses sustained by reason of the asserted mismanagement, is properly brought in the county in which the will was probated, G.S. 1-78, G.S. 28-53, and the trustee's motion to remove to the county in which it maintains its principal office, should not be allowed. *Lichtenfels v. Bank*, 146.

A national bank, by qualifying as a testamentary trustee, waives any right to have an action for an accounting instituted against it in the county in which the will was probated removed to the county in which it maintains its principal office. *Ibid.*

WATERS AND WATER COURSES

§ 1. Surface Waters.

Lower lying parcels of land are servient to those on higher levels and the owner of each is required to receive and allow passage of the natural flow of surface water from the higher land and may not obstruct or interrupt the flow of surface water to the detriment or injury of the upper estates. The "common-enemy doctrine" has not been recognized in this State. *Midgett v. Highway Comm.*, 241.

The principles which apply to surface waters from inland streams apply with equal force to overflow water from the ocean. *Ibid.*

WILLS

§ 21. Competency and Relevancy of Evidence on Issue of Mental Capacity.

In response to a request for his opinion as to whether testator at the time of the execution of the will possessed sufficient mental capacity to know what property he had, who his relatives were, and whether he was capable of understanding the consequences of the disposition of his property by will, caveator as a witness replied that testator really did not know what he was doing at that time, that he was sick and weak. *Held:* The answer was improperly stricken even though it was not responsive to the question, since the answer

WILLS—*Continued.*

also contains relevant and competent matter bearing upon the issue of the mental capacity of testator. *In re Will of Taylor*, 232.

§ 27. General Rules of Construction.

A will speaks as of the death of testator. *Trust Co. v. Dodson*, 22; *Trust Co. v. McKee*, 416.

A will and codicil thereto must be construed together to ascertain the intent of the testator as expressed in the language of the instrument interpreted, in case of ambiguity, in the light of the conditions existing at the time the will was made and at the time the codicil was made. *Trust Co. v. Dodson*, 22.

The intent of a testator is to be ascertained, if possible, from a consideration of his will from its four corners, and such intent should be given effect unless contrary to some rule of law or at variance with public policy. *Worsley v. Worsley*, 259; *In re Will of Wilson*, 482.

In construing a will every word and clause will be given effect if possible, and apparent conflicts reconciled, and irreconcilable repugnancies resolved by giving effect to the general prevailing purpose of testator. *Worsley v. Worsley*, 259.

There is a presumption that a will was intended to dispose of all of testatrix' property without leaving a residue to pass under the laws governing intestacy. *In re Will of Wilson*, 482.

It must be presumed that each word used by testatrix has a meaning and the court may not reject words which by reasonable interpretation may be given effect. *Ibid.*

§ 28. Construction of Codicils.

A codicil is a supplement to a will and is to be construed with the will as constituting but a single instrument. *Trust Co. v. Dodson*, 22.

§ 31. Dispositive and Precatory Words — "Loan."

The word "loan" when used in the dispositive provisions of a will is to be construed as "give" or "devise" unless it is manifest that the testator intended otherwise. *Chappell v. Chappell*, 737.

§ 32. Rule in Shelley's Case.

Testatrix stated she "wanted" the land in question to go to her brother and at his death to his three sons and his named grandson, with further provision that at their deaths testatrix "wanted" the land to go to their "children & so on." *Held:* The brother took a life estate with remainder to his children and the named grandson in fee under the Rule in *Shelley's* Case, since it is apparent that testatrix used the word "children" in the sense of an indefinite line of succession so as to attract the Rule in *Shelley's* Case and create an estate tail converted into a fee by the statute. *In re Will of Wilson*, 482.

Where the language attracts the Rule in *Shelley's* Case the Rule applies as a rule of property without regard to the intent of testator. *Chappell v. Chappell*, 737.

The words "nearest heirs" means simply "heirs" and the words do not take the case out of the Rule in *Shelley's* Case. *Ibid.*

Provisions of a will that "I loan" to testator's son "his lifetime and then to his widow her lifetime or during her widowhood and then to the nearest

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heirs," devise the son a life estate in possession with a fee simple in expectancy under the Rule in *Shelley's* Case, and upon the death of the son, the heirs of the son own the land in fee subject to the life estate of the son's widow. *Ibid.*

§ 33. Fees, Life Estates and Remainders.

As a general rule, where there is a devise of realty in fee or a bequest of personalty unconditionally, a subsequent clause in the will expressing a wish, desire, or direction, for the disposition of the property after the death of the devisee or legatee will not limit the devise or bequest to a life estate, the statutory presumption being applicable to both personal and real property. *Worsley v. Worsley*, 259.

Under language of this will right of legatee to use or dispose of personalty was limited to her lifetime. *Ibid.*

§ 34. Time of Vesting of Estate and Whether Estate Is Vested or Contingent.

A bequest of the income from stock for life to designated beneficiaries with provision that upon the death or marriage of both of the said life beneficiaries the stock, in a designated number of shares, should go to named beneficiaries, transfers to the ultimate beneficiaries a present fixed right of future enjoyment. *Trust Co. v. Dodson*, 22.

§ 38. Annuities and Income.

Testatrix bequeathed all of the income from the remainder of the estate to two designated beneficiaries with provision that, upon the death or marriage of either, the survivor should be entitled to the whole of the income not exceeding a stipulated amount per year. Stock constituting a part of the remainder of the estate was thereafter bequeathed by specific bequest to named beneficiaries. *Held:* The entire income was given the designated beneficiaries during the term of their joint lives or nonmarriage and the specific legatees were entitled to no part thereof, but upon the death of one of the life beneficiaries the income in excess of $1200 per year did not vest in the other and the estate of the survivor is not entitled thereto, but the specific beneficiaries are entitled to that part of the excess over $1200 per year that was derived from the stock specifically bequeathed to them. *Trust Co. v. Dodson*, 22.

§ 42. "Issue," "Heirs" and "Children."

A bequest of a specified number of shares of stock to each of the children of testatrix' sister is subject to be opened up to make room for any children thereafter born to testatrix' sister. *Trust Co. v. Dodson*, 22.

The word "children" is ordinarily a word of purchase and not of limitation and means immediate offspring, but the word must be construed as "heirs" or "heirs of the body" when such meaning is clearly intended from the content of the instrument. *In re Will of Wilson*, 482.

§ 56. Description of Amount or Share.

Testatrix, owning two tracts of land, devised the smaller by its name to her son, stating that it contained 100 acres, and also devised to him 10 acres to be cut from the larger tract, and devised the "remaining 110 acres" of the named larger tract to her daughter. The smaller tract actually contained 74.5 acres and the larger contained 118 acres. *Held:* The discrepancy in acreage is

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not controlling and each devisee took the named tract devised to him respectively, subject to the 10 acre adjustment. *Wagoner v. Evans*, 419.

§ 57. **General and Specific Legacies.**

A specific legacy, is a bequest of a particular chattel, or money in a particular place, or a particular corporate stock or particular bond or other obligation for the payment of money, so that the thing bequeathed is, by the terms of the will, distinguishable from all others of the same kind; a demonstrative legacy is a bequest of fungible goods payable out of or charged upon a particular fund, and not so described as to be distinguishable from others of the same kind. *Trust Co. v. Dodson*, 22.

From a consideration of the will and the codicil thereto, construed together as a whole, it *is held* that the bequests to designated legatees of a specified number of shares of stock in a tobacco company were specific and not demonstrative bequests and the specific legatees are entitled to all stock dividends and stock splits accruing after the death of testatrix. *Ibid.*

§ 60. **Dissent of Spouse and Effect Thereof.**

A childless widow who dissents from the will of her husband who is survived also by one or more lineal descendants by a former marriage, takes her statutory share of the estate computed after the deduction of the Federal estate taxes. *Tolson v. Young*, 506.

Adjudication that the fact that the widow had qualified as executrix did not estop her from resigning and filing a dissent to the will within six months of probate upheld, it being made to appear that at the time of qualifying she was in a state of mental and physical exhaustion and that she was an elderly woman of limited education and experience in business matters. *Joyce v. Joyce*, 757.

§ 63. **Whether Beneficiary Is Put to His Election.**

The mere fact of the qualification of the widow as executrix under the will does not constitute an election when the widow is not under the necessity of making an election. *Bank v. Barbee*, 106.

Where testator devises property held by the entireties to his children under the mistaken belief that he was the sole owner of the property, and devises and bequeaths other property to his widow, his widow is not put to her election. *Ibid.*

§ 64. **After-Born Children.**

Testator had three children, one living at the time of the execution of the will, one born some four days thereafter, and the third was born almost three years thereafter. Testator died more than eleven years after the birth of the third child. The will left all of testator's property to his wife without making any provision for testator's children and there was nothing in the will itself to show that testator's failure to make provision for the children was intentional. *Held:* The two afterborn children are entitled to share in testator's estate as though he had died intestate. *Trust Co. v. McKee*, 416.

§ 70. **Property Out of Which Inheritance and Estate Taxes and Costs Should Be Paid.**

In an action to construe a will it will be presumed, unless it appears to the contrary from the record, that the order of the court that all costs of the ac-

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tion including reasonable counsel fees and costs of administration be paid from the accumulated income of the estate, if sufficient, was entered in the exercise of the court's discretion, and the order will not be disturbed in the absence of a showing of abuse. *Trust Co. v. Dodson,* 22.

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G.S.

1-22. Death suspends running of statute until qualification of administrator, and creditor has one year from that date. *Prentzas v. Prentzas*, 101.

1-69; 1-123. Plaintiff may sue two defendants in alternative when one or the other is liable. *Conger v. Insurance Co.*, 112.

1-70. A class may be represented by a member thereof. *Cocke v. Duke University*, 1.

1-78; 28-53. Action against personal representative for mismanagement and accounting is properly brought in county in which will was probated. *Lichtenfels v. Bank*, 146.

1-98.2; 1-98.4; 1-104. Service on nonresident under G.S. 1-104 cannot confer jurisdiction of the person and in order to warrant service under that statute it must appear that the requirements of G.S. 1-98.4 have been met and that the cause is within the purview of G.S. 1-98.2. *Trucking Co. v. Haponski*, 514.

1-98.2(1), (6); G.S. 1-104(a). Personal service outside of State does not give court jurisdiction over the person; action for breach of contract to rebuild church organ is solely *ex contractu* and does not come within statutory provisions for service on nonresident. *Church v. Miller*, 331.

1-99.2(c). Where defendant's residence remains unknown, clerk is not required to mail defendant copy of notice of service by publication. *Stokes v. Stokes*, 203.

1-122(2). Cause of action consists of facts alleged. *Copple v. Warner*, 727.

1-127(6); 1-128. Demurrer failing to specify grounds of objection may be disregarded. *Insurance Co. v. Blythe Brothers Co.*, 69.

1-131. Upon sustaining demurrer plaintiff may move to amend. *Stegall v. Oil Co.*, 459; *Nodine v. Mortgage Corp.*, 302.

1-144. Motion is not a pleading and is not required to be verified. *Williams v. Denning*, 539.

1-151. Demurrer admits factual averments but not conclusions of law. *Stegall v. Oil Co.*, 459.

1-153. First wife seeking support of children of marriage may not attack validity of husband's second marriage and his legal obligation to support children of that marriage. *Fuchs v. Fuchs*, 635.

1-180. Charge which fails to apply law to the facts in evidence is insufficient. *Parlier v. Barnes*, 341.
Court is required to charge statutory as well as common law. *Greene v. Harmon*, 344.
Court may not intimate controverted fact had or had not been established. *S. v. Mitchell*, 236.
Charge held for error as tending to impeach credibility of witness. *Highway Comm. v. Oil Co.*, 131.

GENERAL STATUTES CONSTRUED—*Continued.*

1-189. Action held to involve long account within meaning of reference statute. *Cooperative Exchange v. Scott,* 81.

1-271; 1-277. Only parties aggrieved may appeal. *Coburn v. Timber Corp.,* 173; *Gaskins v. Fertilizer Co.,* 190.

1-279; 1-280. In absence of appeal entry and notice, Supreme Court obtains no jurisdiction. *Walter Corp. v. Gilliam,* 211.

1-282; 1-283. Statutes are mandatory. *Twiford v. Harrison,* 217.

1-283; 1-284. In those instances requiring case on appeal, case on appeal must be settled as required by law; where appeal is on the record proper it must be certified by the clerk of Superior Court. *Walter Corp. v. Gilliam,* 211.

1-289. Trial court may dismiss appeal on failure of appellant to file stay bond ordered as a condition precedent. *Walter Corp. v. Gilliam,* 211.

1, Art. 29A. Court has discretionary power to order either public or private sale of lands. *Wadsworth v. Wadsworth,* 702.

1-339.36(a); 1-339.27(a). Private sale under order of court is subject to upset bids, and upon filing of upset bid the sale becomes a public sale, but reports of intermediate bids as sales by commissioner authorized to sell to highest bidder at private sale is irregularity. *Wadsworth v. Wadsworth,* 702.

1-507.6; 1-507.7. Creditor must file and prove claim against partnership or be barred, and any partner may challenge the validity of any claim filed. *Brewer v. Elks,* 470.

1-538.1. Parent is not liable for negligent operation of automobile by child merely by reason of relationship, there being no evidence that child was reckless to the knowledge of the parent. *Smith v. Simpson,* 601.

1-540. Acceptance of sum less than the amount demanded is accord and satisfaction. *Prentzas v. Prentzas,* 101.

7-63. Superior Court has general legal and equity jurisdiction. *Cocke v. Duke University,* 1.

7-115; 128-16. Justice of peace held not entitled to recover costs upon final judgment in his favor in proceeding for removal. *Swain v. Creasman,* 163.

7, Art. 35. Judge of county civil court, after enlarging time for service of case on appeal, may not thereafter again enlarge the time. *Machine Co. v. Dixon,* 732.

8-40. Where signature to release is established by experts, it is competent in evidence. *Kaperonis v. Highway Comm.,* 587.

8-47. Interest at 6 per cent must be used in computing present cash value of widow's dower. *Brenkworth v. Lanier,* 279.

GENERAL STATUTES CONSTRUED—*Continued.*

9-27. Absence of endorsement indicating that witnesses were duly examined is not fatal. *S. v. Mitchell,* 235.

14-2; 14-54; 14-55. Punishment for possession of instruments of housebreaking may not exceed ten years. *S. v. Blackmon,* 352.

14-5; 14-7. Crimes of accessory before the fact and accessory after the fact are distinct. *S. v. McIntosh,* 749.

14-7; 14-87. Acquittal of charge of accessory after the fact will not support plea of former jeopardy in a subsequent prosecution for the principle crime. *S. v. McIntosh,* 749.

14-17. Homicide committed in perpetration of felony is murder in the first degree. *S. v. Crawford,* 548.

14-18. Sentence within statutory limit is not cruel or unusual punishment. *S. v. Brooks,* 186.

14-21. Carnal knowledge of child under twelve is rape regardless of consent. *S. v. Crawford,* 548.

14-33; 15-169. Nonsuit of prosecution for assault with intent to commit rape does not entitle defendant to his discharge, since defendant may be put on trial for assault on a female. *S. v. Gammons,* 754.

14-178. Carnal knowledge of adopted daughter will not support prosecution for incest. *S. v. Rogers,* 406.

18-2; 18-48; 18-50. Evidence of violation of statutes held sufficient for jury. *S. v. Mitchell,* 235.

20-16(a); 20-23. Delivery of sum in cash to official to obtain release from restraint and failure to recover such sum is insufficient alone to show judicial forfeiture of bail authorizing revovcation of license. *In re Donnelly,* 375.

20-129; 20-134. It is negligence to permit disabled bus to stand on highway at night without lights or warning. *Dezern v. Board of Education,* 535.

20-129(e); 20-38(ff). Absence of front bicycle light held not proximate cause or contributing cause of collision with bicycle from its rear by car. *Oxendine v. Lowry,* 109.

20-141(b). Motorist traveling within statutory speed limit will not be held contributorily negligent as a matter of law in hitting rear of vehicle standing on highway without lights. *Beasley v. Williams,* 651.

20-141(c). Motorist must decrease speed below statutory maximum when approaching an intersection or when special hazard exists. *Keller v. Mills, Inc.,* 571.

20-149(b). Violation of statute constitutes negligence *per se. Boykin v. Bissette,* 295.

GENERAL STATUTES CONSTRUED—*Continued.*

20-154(b). Where there are electric traffic control signals at intersection, statute is not applicable. *White v. Cothran,* 510.

20-155. Electrical traffic control signals will be given effect without introduction of ordinance in evidence. *White v. Phelps,* 445.

20-166.1(b), 20-279.4; 20-279.5. Motorist may not recover from insurer for false representation that driver did not have insurance in force. *Robinson v. Casualty Co.,* 284.

20-174(a). Pedestrian crossing in middle of block at place not marked as crosswalk must yield right of way to motorist. *Jenkins v. Thomas,* 768.

20-174(d). Pedestrian must walk on left side of road facing traffic. *Simpson v. Wood,* 157.

20-279.21(b)(2); 20-279.21(g). Statute does not require assigned risk policy to cover any vehicle except one described in the policy, and as to insurance of additional vehicles the Act does not apply and failure to give notice precludes recovery. *Woodruff v. Insurance Co.,* 723.

24-2. Differential in time and cash price is not usury. *Bank v. Merrimon,* 335.

26-120.53. Utilities Commission is not confined to immediate scope of pleadings but may enlarge the inquiry upon notice. *Utilities Comm. v. Coach Co.,* 43.

28-118; 28-122; 28-147. Personal representative may be compelled to account or court may compel an accounting by contempt proceedings. *Lichtenfels v. Bank,* 146.

28-173; 1-53(4). Limitation on action for wrongful death is statute of limitation, and where action is instituted by person adjudged to be entitled to appointment, issuance of letters thereafter relates back to time of order and cause is not barred. *Graves v. Welborn,* 688.

30-1. Qualification as executrix does not preclude widow from thereafter dissenting from the will. *Joyce v. Joyce,* 757.

30-3(b). Dissenting widow held entitled to share of estate computed after deduction of Federal estate taxes. *Tolson v. Young,* 506.

31-5.5. Afterborn children are entitled to share in testator's estate even though he made no provision for child born prior to execution of will. *Trust Co. v. McKee,* 416.

31-38. Statutory presumption of absolute gift is applicable to personalty. *Worsley v. Worsley,* 259.

41-1. Devise held to create estate tail under Rule in *Shelley's* Case converted into fee by statute. *In re Will of Wilson,* 482.

41-10.1. Controversy between individual and State as to extent of easement granted to the individual by the State may be determined under the Declaratory Judgment Act. *Shingleton v. State,* 451.

GENERAL STATUTES CONSTRUED—*Continued.*

40-12; 115-85. Owner of land may maintain action as for "taking" to recover depreciation resulting from construction of highway so that ocean waters periodically flood land. *Midgett v. Highway Comm.*, 241.

47-24. Highway easement obtained prior to June 1, 1959 need not be recorded. *Kaperonis v. Highway Comm.*, 587.

48-23(a). Adopted child is not included within class to take remainder after life estate. *Allen v. Allen*, 431.

50-3. Provision that summons be returnable to county in which plaintiff or defendant resides relates to venue and is not jurisdictional. *Stokes v. Stokes*. 203.

50-16. Decree for permanent alimony legalizes separation so that action for divorce on grounds of separation will lie two years thereafter. *Wilson v. Wilson*, 347.
Order for subsistence *pendente lite* may be modified at any time without finding of a change of condition. *Rock v. Rock*, 223.

52-12. Where deed of separation providing for conveyance is acknowledged as required by statute, fact that deed itself is not so acknowledged is immaterial. *Hutchins v. Hutchins*, 628.

55-33(c); 55-33(d). Statutes have no application to action against person who is not a director at the time the action is instituted. *Trucking Co. v. Haponski*, 514.

55-143. Applies to service of process on foreign corporation only when it has domesticated here. *R. R. v. Hunt & Sons, Inc.*, 717.

55-144. Applies when cause of action against foreign corporation arises out of business conducted in this State and not to transitory cause arising in another State. *R. R. v. Hunt & Sons, Inc.*, 717.

55-144; 55-146. Evidence held to support finding that foreign corporation was doing business in the State so as to warrant service of process by service on Secretary of State. *Farmer v. Ferris*, 619.

58-3; 62-121.26. Provisions of insurance contract that action be commenced within specified time are not applicable to the surety provisions of the contract. *Insurance Co. v. Gibbs*, 682.

62-26.3; 62-26.10. Commission held to have failed to find facts essential to support order approving sale of power facilities. *Utilities Comm. v. Membership Corp.*, 59.

62-26.5; 62-26.10; 62-121.48; 62-121.64(a). Contract between carriers with regard to their respective services to the public may be approved by the Utilities Commission when public interests are protected. *Utilities Comm. v. Coach Co.*, 43.

62-30; 62-72. Sale by telephone company of some of its exchanges after action is instituted does not require dismissal of action to fix rates. *Utilities Comm. v. Telephone Co.*, 369.

GENERAL STATUTES CONSTRUED—*Continued.*

62-96. Public service corporation may not be allowed to abandon service to public unless it establishes that service is no longer needed or that it will be unable to realize sufficient revenue to meets its expenses. *Utilities Comm. v. Membership Corp.*, 59.

62-121.44; 62-121.48(3). Held: There was no evidence that agreement between carriers would not promote harmony, and order revoking the agreement is reversed. *Utilities Comm. v. Coach Co.*, 43.

62-121.52(7). Utilities Commission may grant two carriers authority to traverse same segment of highway. *Utilities Comm. v. Coach Co.*, 43.

75.1. Contract between carriers with regard to their respective services to the public when approved by the Utilities Commission is not void under anti-monopoly statute. *Utilities Comm. v. Coach Co.*, 43.

97-2(6). Where evidence supports finding that employee died from angina and also that he died from accidental injury to head, award of compensation will be upheld. *Taylor v. Twin City Clubs*, 435.
Back injury held not to have arisen by accident. *Byrd v. Cooperative*, 215.

105-4; 105-6. Step grandchildren of testatrix who are the daughters of testatrix' stepchildren who predeceased testatrix fall within class A and not class C. *Ingram v. Johnson*, 697.

108-11. Expiration of term as county commissioner does not terminate term as member of board of public welfare. *Pitts v. Williams*, 168.

136-19. Is not applicable in action to recover damages from flooding of land. *Midgett v. Highway Comm.*, 241.
Injury to personalty from flooding resulting from construction of highway is not a "taking." *Midgett v. Highway Comm.*, 241.

136-20. Does not require railroad to widen solely at its own expense its crossing sequent to widening of highway. *Highway Comm. v. R. R.*, 274.

136-108. Trial by court in condemnation proceedings is constitutional. *Kaperonis v. Highway Comm.*, 587.

136-119. Cost may be taxed against plaintiffs when it is adjudicated that there had been no taking of their property. *Kaperonis v. Highway Comm.*, 587.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED

Art.

I, §14. Punishment for possession of instruments of housebreaking may not exceed ten years. *S. v. Blackmon*, 352.
Sentence within statutory limit is not cruel or unusual punishment. *S. v. Brooks*, 186.

I, §17. Denial of motion for continuance held not to deprive defendant of any constitutional right. *S. v. Patton*, 359.
Evidence held to support finding that foreign corporation was doing business in the State so as to warrant service of process by service on Secretary of State. *Farmer v. Ferris*, 619.

I, §19. Right to jury trial relates to those instances in which right existed at time Constitution was adopted. *Kaperonis v. Highway Comm.*, 587.

CONSTITUTION OF UNITED STATES, SECTIONS OF, CONSTRUED

Fourteenth Amendment. Right to jury trial relates to those instances in which right existed at time Constitution was adopted. *Kaperonis v. Highway Comm.*, 587.

Evidence held to support finding that foreign corporation was doing business in the State so as to warrant service of process by service on Secretary of State. *Farmer v. Ferris*, 619.