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NORTH CAROLINA REPORTS

VOL. 228

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1947

SPRING TERM, 1948

REPORTED BY

JOHN M. STRONG

RALEIGH
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1948

CITATION OF REPORTS

Rule 46 of the Supreme Court is as follows:

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

1 and 2 Martin, Taylor & Conf.	as	1	N. C.	9 Iredell Law	as	31	N. C.
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1 " Eq.	"	16	"	2 " "	"	47	"
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3 & 4 " "	"	20	"	6 " "	"	51	"
1 Dev. & Bat. Eq.	"	21	"	7 " "	"	52	"
2 " "	"	22	"	8 " "	"	53	"
1 Iredell Law	"	23	"	1 " Eq.	"	54	"
2 " "	"	24	"	2 " "	"	55	"
3 " "	"	25	"	3 " "	"	56	"
4 " "	"	26	"	4 " "	"	57	"
5 " "	"	27	"	5 " "	"	58	"
6 " "	"	28	"	6 " "	"	59	"
7 " "	"	29	"	1 and 2 Winston	"	60	"
8 " "	"	30	"	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

FALL TERM, 1947—SPRING TERM, 1948.

CHIEF JUSTICE:

WALTER P. STACY.

ASSOCIATE JUSTICES:

WILLIAM A. DEVIN,
M. V. BARNHILL,
J. WALLACE WINBORNE,
A. A. F. SEAWELL,
EMERY B. DENNY,
S. J. ERVIN, JR.*

ATTORNEY-GENERAL:

HARRY McMULLAN.

ASSISTANT ATTORNEYS-GENERAL:

T. W. BRUTON,
H. J. RHODES,
RALPH MOODY,
JAMES E. TUCKER,
PEYTON B. ABBOTT.

SUPREME COURT REPORTER:

JOHN M. STRONG.

CLERK OF THE SUPREME COURT:

ADRIAN J. NEWTON.

MARSHAL AND LIBRARIAN:

DILLARD S. GARDNER.

---

*Appointed 3 February, 1948, to succeed Michael Schenck, resigned.

JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

EASTERN DIVISION

Name	*District*	*Address*
CHESTER MORRIS	First	Currituck.
WALTER J. BONE	Second	Nashville.
R. HUNT PARKER	Third	Roanoke Rapids.
CLAWSON L. WILLIAMS	Fourth	Sanford.
J. PAUL FRIZZELLE	Fifth	Snow Hill.
HENRY L. STEVENS, JR.	Sixth	Warsaw.
W. C. HARRIS	Seventh	Raleigh.
JOHN J. BURNEY	Eighth	Wilmington.
Q. K. NIMOCKS, JR.	Ninth	Fayetteville.
LEO CARR	Tenth	Burlington.

SPECIAL JUDGES

W. H. S. BURGWYN	Woodland.
LUTHER HAMILTON	Morehead City.
PAUL B. EDMUNDSON	Goldsboro

WESTERN DIVISION

JOHN H. CLEMENT	Eleventh	Winston-Salem.
H. HOYLE SINK	Twelfth	Greensboro.
F. DONALD PHILLIPS[1]	Thirteenth	Rockingham.
WILLIAM H. BOBBITT	Fourteenth	Charlotte.
FRANK M. ARMSTRONG	Fifteenth	Troy.
WILSON WARLICK	Sixteenth	Newton.
J. A. ROUSSEAU	Seventeenth	North Wilkesboro.
J. WILL PLESS, JR.	Eighteenth	Marion.
ZEB V. NETTLES	Nineteenth	Asheville.
DAN K. MOORE[2]	Twentieth	Waynesville.
ALLEN H. GWYN	Twenty-first	Reidsville.

SPECIAL JUDGES

GEORGE B. PATTON	Franklin
CHARLES L. COGGIN	Salisbury
GEORGE A. SHUFORD	Asheville

EMERGENCY JUDGES

HENRY A. GRADY	New Bern.
G. V. COWPER	Kinston.
MICHAEL SCHENCK	Hendersonville.
FELIX E. ALLEY, SR.	Waynesville.

[1]Appointed 10 November, 1947, to succeed William G. Pittman, resigned.
[2]Appointed 10 February, to succeed Felix E. Alley, Sr., resigned.

SOLICITORS

EASTERN DIVISION

Name	*District*	*Address*
JOHN W. GRAHAM	First	Edenton.
GEORGE M. FOUNTAIN	Second	Tarboro.
ERNEST R. TYLER	Third	Roxobel.
W. JACK HOOKS	Fourth	Kenly.
W. J. BUNDY[1]	Fifth	Greenville.
J. ABNER BARKER	Sixth	Roseboro.
WILLIAM Y. BICKETT	Seventh	Raleigh.
CLIFTON L. MOORE	Eighth	Burgaw.
F. ERTEL CARLYLE	Ninth	Lumberton.
WILLIAM H. MURDOCK	Tenth	Durham.

WESTERN DIVISION

WALTER E. JOHNSTON, JR.	Eleventh	Winston-Salem.
CHARLES T. HAGAN, JR.	Twelfth	Greensboro.
M. G. BOYETTE	Thirteenth	Carthage.
BASIL L. WHITENER	Fourteenth	Gastonia.
JOHN R. MCLAUGHLIN	Fifteenth	Statesville.
JAMES C. FATHING	Sixteenth	Lenoir.
AVALON E. HALL	Seventeenth	Yadkinville.
C. O. RIDINGS	Eighteenth	Forest City.
W. K. MCLEAN	Nineteenth	Asheville.
THADDEUS D. BRYSON, JR.[2]	Twentieth	Bryson City.
R. J. SCOTT	Twenty-first	Danbury.

[1]Appointed 28 February, 1948, to succeed D. M. Clark, deceased.

[2]Appointed 5 March, 1948, to succeed Baxter C. Jones, deceased, who was appointed 10 February, 1948, to succeed Dan K. Moore, resigned. Mr. Moore succeeded John M. Queen, 1 January, 1947.

SUPERIOR COURTS, SPRING TERM, 1948

The numerals in parentheses following the date of a term indicate the number of weeks during which the term may be held.

THIS CALENDAR IS UNOFFICIAL

EASTERN DIVISION

FIRST JUDICIAL DISTRICT
Judge Bone

Beaufort—Jan. 12* (2); Feb. 16† (2); Mar. 15* (A); Apr. 5†; May 3† (2); June 21.
Camden—Mar. 8.
Chowan—Mar. 29; Apr. 26†.
Currituck—Mar. 1.
Dare—May 24.
Gates—Mar. 22.
Hyde—May 17.
Pasquotank—Jan. 5†; Feb. 9†; Feb. 16* (A); Mar. 15†; May 3† (A) (2); May 31*; June 7† (2).
Perquimans—Jan. 12† (A); Apr. 12.
Tyrrell—Feb. 2†; Apr. 19.

SECOND JUDICIAL DISTRICT
Judge Parker

Edgecombe—Jan. 19; Mar. 1; Mar. 29† (2); May 31 (2).
Martin—Mar. 15 (2); Apr. 12† (A) (2); June 14.
Nash—Jan. 26; Feb. 16† (2); Mar. 8; Apr 19† (2); May 24.
Washington—Jan. 5 (2); Apr. 12†.
Wilson—Feb. 2†; Feb. 9*; May 10*; May 17†; June 21†.

THIRD JUDICIAL DISTRICT
Judge Williams

Bertie—Feb. 9 (2); May 3 (2).
Halifax—Jan 26 (2); Mar. 15† (2); Apr. 26; May 31† (2).
Hertford—Feb. 23; Apr. 12 (2).
Northampton—Mar. 29 (2).
Vance—Jan. 5*; Mar. 1*; Mar. 8†; June 14*; June 21†.
Warren—Jan. 12*; Jan. 19†; May 17*; May 24†.

FOURTH JUDICIAL DISTRICT
Judge Frizzelle

Chatham—Jan. 12; Mar. 1†; Mar. 15†; May 10.
Harnett—Jan. 5*; Feb. 2† (2); Mar. 15* (A); Mar. 29† (A) (2); May 3†; May 17*; June 7† (2).
Johnston—Jan. 5† (2); Feb. 9 (A); Feb. 16† (2); Mar. 1 (A); Mar. 8; Apr. 12 (A); Apr. 19† (2); June 21*.
Lee—Jan. 26† (A) (2); Mar. 22*; Mar. 29†; June 14† (A).
Wayne—Jan. 19; Jan. 26†; Feb. 2† (A); Mar. 1† (A) (2); Apr. 5; Apr. 12†; Apr. 19† (A); May 24; May 31†; June 7† (A).

FIFTH JUDICIAL DISTRICT
Judge Stevens

Carteret—June 7 (2).
Craven—Jan. 5*; Apr. 26† (2); Feb. 9; Apr. 5; May 10†; May 31*.
Greene—Feb. 23 (2); June 21.
Jones—Mar. 29.
Pamlico—Apr. 26 (2).
Pitt—Jan. 12†; Jan. 19; Feb. 16†; Mar. 15†; Mar. 22; Apr. 12 (2); May 3† (A); May 17† (2).

SIXTH JUDICIAL DISTRICT
Judge Harris

Duplin—Jan. 5* (2); Jan. 26*; Mar. 8† (2); Apr. 5† (2).
Lenoir—Jan. 19*; Feb. 16† (2); Apr. 19; May 10† (2); June 7† (2); June 21.*
Onslow—Mar. 1; May 24 (2).
Sampson—Feb. 2 (2); Mar. 22† (2); Apr. 26† (2); June 7† (A) (2).

SEVENTH JUDICIAL DISTRICT
Judge Burney

Franklin—Jan. 19† (2); Feb. 9*; Apr. 12*; Apr. 26† (2).
Wake—Jan. 5*; Jan. 12†; Jan. 19† (A) (2); Feb. 16† (2); Mar. 1* (2); Mar. 15† (2); Mar. 29*; Apr. 12† (A); Apr. 19†; Apr. 26† (A); May 3* (A); May 10† (3); May 31* (2); June 14† (2).

EIGHTH JUDICIAL DISTRICT
Judge Nimocks

Brunswick—Jan. 19; Mar. 29†; May 17.
Columbus—Jan. 26* (2); Feb. 16† (2); May 3*; June 14 (2).
New Hanover—Jan. 12*; Feb. 2† (A); Feb. 9†; Mar. 8 (2); Apr. 5† (2); May 10*; May 24† (2); June 7*.
Pender—Jan. 5; Mar. 22†; Apr. 26.

NINTH JUDICIAL DISTRICT
Judge Carr

Bladen—Jan. 5; Mar. 15*; Apr. 26†.
Cumberland—Jan. 12*; Feb. 9† (2); Mar. 1* (A); Mar. 8*; Mar. 22† (2); Apr. 26* (A); May 3† (2); May 31*.
Hoke—Jan. 19; Apr. 19.
Robeson—Jan. 17† (A) (2); Jan. 26* (2); Feb. 23† (2); Mar. 15* (A); Apr. 5* (2); Apr. 19† (A); May 3† (A) (2); May 17† (2); June 7†; June 14*.

TENTH JUDICIAL DISTRICT
Judge Morris

Alamance—Jan. 26† (A); Feb. 23*; Mar. 29†; May 10* (A); May 24† (2).
Durham—Jan. 5*; Jan. 12† (2); Jan. 26† (A); Feb. 16*; Feb. 23† (A); Mar. 1† (2); Mar. 15† (A); Mar. 22*; Mar. 29* (A); Apr. 5† (A) (3); Apr. 26† (2); May 17*; May 24† (A) (3); June 21*.
Granville—Feb. 2 (2); Apr. 5 (2).
Orange—Mar. 15; May 10†; June 7; June 14†.
Person—Jan. 26; Feb. 2† (A); Apr. 19.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT
Judge Bobbitt

Ashe—Apr. 12*; May 24† (2).
Alleghany—Apr. 26.
Forsyth—Jan. 5* (2); Jan. 12† (A); Jan. 19† (2); Feb. 2* (2); Feb. 9† (A); Feb. 16† (2); Mar. 1* (2); Mar. 8† (A); Mar. 15† (2); Mar. 29* (2); Apr. 12 (A); Apr. 19; Apr. 26 (A); May 10* (2); May 24† (A) (2); June 7* (2); June 14† (A) (2).

TWELFTH JUDICIAL DISTRICT
Judge Armstrong

Davidson—Jan. 26; Feb. 16† (2); Apr. 5† (A) (2); May 3; May 24† (A) (2); June 21.
Guilford—Greensboro Division: Jan. 5*; Jan. 12† (2); Feb. 2* (2); Feb. 16† (A) (2); Mar. 1*; Mar. 22† (A); Mar. 29† (2); Apr. 12† (2); May 17*; May 31† (2); June 14*.
Guilford—High Point Division: Jan. 12* (A); Feb. 9† (A); Mar. 8*; Mar. 15† (2); Apr. 26*; May 10† (A) (2); May 24*.

THIRTEENTH JUDICIAL DISTRICT
Judge Warlick

Anson—Jan. 12*; Mar. 1†; Apr. 12 (2); June 7†.
Moore—Jan. 19*; Feb. 9†; May 17*; May 24†.
Richmond—Jan. 5*; Feb. 2† (A); Mar. 15†; Apr. 5*; May 24† (A); June 14†.
Scotland—Mar. 8; Apr. 26†.
Stanly—Feb. 2†; Feb. 9† (A); Mar. 29; May 10†.
Union—Feb. 16 (2); May 3.

FOURTEENTH JUDICIAL DISTRICT
Judge Rousseau

Gaston—Jan. 12*; Jan. 19† (2); Mar. 8* (A); Mar. 15† (2); Apr. 19*; May 17† (A) (2); May 31*.
Mecklenburg—Jan. 5*; Jan. 5† (A) (2); Jan. 19† (A) (2); Jan. 19* (A) (2); Feb. 2† (3); Feb. 2† (A) (2); Feb. 16† (A) (2); Feb. 23*; Mar. 1† (2); Mar. 1† (A) (2); Mar. 15† (A) (2); Mar. 15* (A) (2); Mar. 29† (2); Mar. 29† (A) (2); Apr. 12* (A); Apr. 12† Apr. 19† (A); Apr. 26† (2); Apr. 26† (A) (2); May 10*; May 10† (A) (2); May 17† (2); May 24† (A) (2); June 7*; June 7† (A) (2); June 14†; June 21* (2).

FIFTEENTH JUDICIAL DISTRICT
Judge Pless

Alexander—Feb. 2 (A) (2).
Cabarrus—Jan. 5 (2); Feb. 23†; Mar. 1† (A); Apr. 19 (2); June 7† (2).
Iredell—Jan. 26 (2); Mar. 8†; May 17 (2).
Montgomery—Jan. 19*; Apr. 5† (2).
Randolph—Jan. 26† (A) (2); Mar. 15† (2); Mar. 29*; June 21*.
Rowan—Feb. 9 (2); Mar. 1†; Mar. 8† (A); May 3 (2).

SIXTEENTH JUDICIAL DISTRICT
Judge Nettles

Burke—Feb. 16; Mar. 8 (2); May 31 (3).
Caldwell—Jan. 5† (A) (2); Feb. 23 (2); May 3 (A); May 17† (2).
Catawba—Jan. 12† (2); Feb. 2 (2); Apr. 5† (2); May 3† (2).
Cleveland—Jan. 5; Mar. 22 (2); May 17† (A) (2).
Lincoln—Jan. 19 (A); Jan. 26†.
Watauga—Apr. 19 (2); June 7† (A) (2).

SEVENTEENTH JUDICIAL DISTRICT
Judge Alley

Avery—Apr. 12 (2).
Davie—Mar. 22; May 24†.
Mitchell—Mar. 29 (2).
Wilkes—Jan. 12† (3); Mar. 1 (3); Apr. 26† (2); May 31 (2).
Yadkin—Feb 2 (3).

EIGHTEENTH JUDICIAL DISTRICT
Judge Clement

Henderson—Jan. 5† (2); Mar. 1 (2); Apr. 26† (2); May 24† (2).
McDowell—Jan. 12* (A); Feb. 9† (2); June 7 (2).
Polk—Jan. 26 (2).
Rutherford—Feb. 23†; Apr. 12† (2); May 10 (2); June 21† (2).
Transylvania—Mar. 29 (2).
Yancey—Jan. 19†; Mar. 15 (2).

NINETEENTH JUDICIAL DISTRICT
Judge Sink

Buncombe—Jan. 5† (2); Jan. 12 (A) (2); Jan. 19*; Jan. 26; Feb. 2† (2); Feb. 16*; Feb. 16 (A) (2); Mar. 1† (2); Mar. 15*; Mar. 15 (A) (2); Mar. 29† (2); Apr. 12*; Apr. 12 (A) (2); Apr. 26; May 3† (2); May 17*; May 17 (A) (2); May 31† (2); June 14*; June 14 (A) (2).
Madison—Jan. 26† (A); Feb. 23; Apr. 19; May 24; June 21.

TWENTIETH JUDICIAL DISTRICT
Judge Phillips

Cherokee—Jan. 19† (2); Mar. 29 (2); June 14† (2).
Clay—Apr. 26.
Graham—Jan. 5† (A) (2); Mar. 15 (2); May 31† (2).
Haywood—Jan. 5† (2); Feb. 2 (2); May 3† (2).
Jackson—Feb. 16 (2); May 17 (2); June 7† (A).
Macon—Apr. 12 (2).
Swain—Jan. 12† (A) (2); Mar. 1 (2).

TWENTY-FIRST JUDICIAL DISTRICT
Judge Gwyn

Caswell—Mar. 15 (2).
Rockingham—Jan. 19* (2); Mar. 1†; Mar. 8*; Apr. 12†; May 3† (2); May 17* (2); June 7† (2).
Stokes—Jan. 5* (A); Mar. 29*; Apr. 5†; June 21*.
Surry—Jan. 5 (2); Feb. 9; Feb. 16 (2); Apr. 19 (2); May 31.

*For criminal cases.
†For civil cases.
‡For jail and civil cases.
(A) Special or Emergency Judge to be assigned.

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

Eastern District—DON GILLIAM, *Judge*, Wilson.
Middle District—JOHNSON J. HAYES, *Judge*, Greensboro.
Western District—EDWIN YATES WEBB, *Judge*, Shelby, retired.

EASTERN DISTRICT

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

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

Fayetteville, third Monday in March and September. MRS. LORA C. BRITT, Deputy Clerk.

Elizabeth City, fourth Monday in March and September. SADIE A. HOOPER, Deputy Clerk, Elizabeth City.

Washington, first Monday after the fourth Monday in March and September. GEO. TAYLOR, Deputy Clerk, Washington.

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

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

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

OFFICERS

JOHN HALL MANNING, U. S. Attorney, Raleigh, N. C.
JOHN B. MCMULLAN, Elizabeth City, HOWARD H. HUBBARD, Clinton, Assistant United States Attorneys.
F. S. WORTHY, United States Marshal, Raleigh.
A. HAND JAMES, Clerk United States District Court, Raleigh.

MIDDLE DISTRICT

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

Durham, fourth Monday in September and first Monday in February. HENRY REYNOLDS, Clerk, Greensboro.

Greensboro, first Monday in June and December. HENRY REYNOLDS, Clerk; MYRTLE D. COBB, Chief Deputy; LILLIAN HARKRADER, Deputy Clerk; P. H. BEESON, Deputy Clerk; MAUDE B. GRUBB, Deputy Clerk.

Rockingham, first Monday in March and September. HENRY REYNOLDS, Clerk, Greensboro.

Salisbury, third Monday in April and October. HENRY REYNOLDS, Clerk, Greensboro.

Winston-Salem, first Monday in May and November. HENRY REYNOLDS, Clerk, Greensboro; ELLA SHORE, Deputy Clerk.

Wilkesboro, third Monday in May and November. HENRY REYNOLDS, Clerk, Greensboro; C. H. COWLES, Deputy Clerk.

OFFICERS

BRYCE R. HOLT, United States District Attorney, Greensboro.
ROBT. S. MCNEILL, Assistant United States Attorney, Winston-Salem.
MISS EDITH HAWORTH, Assistant United States Attorney, Greensboro.
JOHN D. MCCONNELL, Assistant United States Attorney, Greensboro.
EDNEY RIDGE, United States Marshal, Greensboro.
HENRY REYNOLDS, Clerk United States District Court, Greensboro.

WESTERN DISTRICT

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

Asheville, second Monday in May and November. OSCAR L. MCLURD, Clerk; WILLIAM A. LYTLE, Chief Deputy Clerk; VERNE E. BARTLETT, Deputy Clerk; MISS NOREEN WARREN, Deputy Clerk.

Charlotte, first Monday in April and October. FAN BARNETT, Deputy Clerk, Charlotte.

Statesville, fourth Monday in April and October. ANNIE ADERHOLDT, Deputy Clerk.

Shelby, fourth Monday in September and third Monday in March. OSCAR L. MCLURD, Clerk, Asheville.

Bryson City, fourth Monday in May and November. OSCAR L. MCLURD, Clerk.

OFFICERS

DAVID E. HENDERSON, United States Attorney, Charlotte.
THOS. A. UZZELL, JR., Assistant United States Attorney, Asheville.
FRANCIS H. FAIRLEY, Assistant United States Attorney, Charlotte.
CHARLES R. PRICE, United States Marshal, Asheville.
OSCAR L. MCLURD, Clerk United States District Court, Asheville.

LICENSED ATTORNEYS

SPRING TERM, 1948.

I, Edward L. Cannon, Secretary of the Board of Law Examiners of the State of North Carolina, do certify that the following named persons have duly passed examinations of the Board of Law Examiners as of the 5th day of March, 1948:

AYCOCK, WILLIAM BRANTLEY.....Selma.
BARRINGTON, JOE HILL, JR. .....Lumberton.
BATTEN, SPURGEON CARLYLE.....Selma.
BLAND, WEDIGAN POWELL.....Goldsboro.
BRITSON, RICHARDSON EARL.....Chapel Hill.
BROCK, WALTER EDGAR.....Scotland Neck.
BURKE, GEORGE LEONARD, JR. .....Spencer.
BURTON, WILLIAM HASSELL, JR. .....Mebane.
CAMERON, ORTON JASPER.....Carthage.
CARLTON, GRAHAM MAXWELL.....Salisbury.
CHAMBLEE, FREDERICK GARLAND.....Spring Hope.
CHAMBLEE, WILLIAM HORACE.....Asheville.
DEES, WILLIAM ARCHIE, JR. .....Goldsboro.
ELLIS, THOMAS FRANCIS.....Charlotte.
FARLOW, JAMES RALTO.....High Point.
GARRISON, THOMAS STANLEY, JR. .....Asheville.
GAVIN, WILEY EDWIN.....Sanford.
HALL, FORREST CHALMERS.....Burlington.
HICKMAN, MARCUS TOBIAS.....Hudson.
KENNERLY, CHARLES ODELL, JR. .....Lexington.
KING, OSCAR RODALPH, JR. .....Wilmington.
MCALLISTER, JOHN ALTON.....Raleigh.
MCLELLAND, DAVID MARSH.....Statesville.
MCLENDON, LENNOX POLK, JR. .....Greensboro.
MARTIN, HARRY CORPENING.....Blowing Rock.
MATHENY, WOODROW.....Forest City.
MEYLAND, AUGUST LEGER, JR. .....Wilmington.
MINOR, JOHN MICHAEL.....Winston-Salem.
MORRISETTE, CALVIN BLACKWELL, JR. .....Elizabeth City.
NEWSOME, GEORGE HASSELL.....Tarboro.
PHILLIPS, JAMES DICKSON, JR. .....Laurinburg.
PICKARD, MORRIS GLENN.....Haw River.
POOLE, JOHN GIBBS, JR. .....Charlotte.
RAY, JOHN FRANK.....Walnut Cove.
ROBERTS, LANDON HAYNES.....Marshall.
RUFF, THOMAS CHALMERS.....Cleveland.
SEILA, CLAUDE FREDERICK.....Chapel Hill.
SMITH, NORBORNE GEE, JR. .....Goldsboro.
SNEPP, FRANK WARREN, JR. .....Charlotte.
THOMPSON, DRURY BLAIR.....Durham.
TURNAGE, FRED DOUGLAS.....Ayden.
WADDEN, THOMAS ANTONY, JR. .....Chapel Hill.
WALKER, JAMES HUNT.....Raleigh.
WILLIAMS, LARRY LIVINGSTON.....Waynesville.
WINDES, WILLIAM SIDNEY.....Raleigh.
WOLTZ, HOWARD OSLER, JR. .....Mount Airy.

BY COMITY:

WELLING, RICHARD MARSHALL.....Charlotte from Virginia.
PINKNEY, JAMES FAULKNER.....Davidson from Colorado
DAVIS, EARL GAYLORD.....Enka from New York.

(SEAL)

EDWARD L. CANNON, *Secretary,*
Board of Law Examiners.

CASES REPORTED

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1947

HELEN MILLS WEBB AND B. W. WEBB v. GUY HUTCHINS.

(Filed 8 October, 1947.)

1. Automobiles § 18g (2): Evidence § 45—

A patrolman not present at the time of the accident is not competent to give an opinion as to the speed of a car involved in the collision.

2. Automobiles § 13—

The rule that a motorist traveling on his right or seasonably turning thereto has the right to assume that a car approaching from the opposite direction will comply with G. S., 20-148, and turn to its right in time to avoid a collision, does not exculpate a motorist who runs completely off the road to his right, loses control, and hits a car standing still completely off the hard surface on its left side of the highway with its lights on, since the rule merely absolves a motorist from blame if he continues at a reasonable rate of speed in his line of travel in reliance on the assumption, but does not relieve him from the duty of knowing the position of his car on the highway from his own observation.

3. Automobiles § 8d—

The parking of an automobile on its left side of the highway completely off the traveled portion thereof under the circumstances of this case was not in violation of statute.

4. Automobiles § 21—

Plaintiffs were guests in an automobile which had stopped on its left side of the highway completely off the hard surface in order for them to alight. The car was struck by defendant's car approaching from the opposite direction. *Held:* Even conceding that defendant's evidence disclosed negligence on the part of the driver of the car in which plaintiffs were

riding in having his lights focused down the highway so bright as to blind defendant, such negligence would not preclude recovery by plaintiffs unless the sole proximate cause of the injury.

APPEAL by plaintiffs from *Pittman, J.*, at June-July Term, 1947, of RUTHERFORD. New trial.

Civil action to recover damages for personal injuries resulting from the alleged negligent operation of an automobile.

On the night of 20 June 1946, Foy L. Crow and wife, who live about 3½ miles from Spindale, "picked up" plaintiffs, who live on the same highway nearer Spindale, and went to a picture show. On the way back home Crow drove his car to the left of the highway, completely off the hard surface, in front of the Webb home, for the purpose of discharging his guest passengers. After the Webbs alighted they stood and talked to the Crows for about thirty minutes. Defendant approached on his automobile, going toward Spindale. He drove off the highway 39 yards from the Crow car, continued on until he hit a tree near the parked car, crushed the front wheel of his car, "glanced around" the tree to the left, hit the Crow car and knocked it 25 feet, struck Mrs. Webb and threw or carried her 65 feet down the road, and stopped in the road ditch 24 yards beyond the point of impact. After he left the hard surface his wheels cut trenches in the dirt one to two inches deep. After the front wheel was crushed the car plowed up the dirt several inches deep and from 12 to 14 inches wide to the point where the car stopped. Mrs. Webb was seriously injured.

Plaintiffs' evidence tends to show that the Crow car had its headlights dimmed and the car was standing so as to focus the lights away from the road across a field. Defendant testified the lights were focused down the road in the direction from which he was approaching and were sufficiently bright to blind him. This evidence in respect to the lights and evidence concerning the speed at which defendant was traveling is the only substantially conflicting testimony respecting the actual occurrence appearing in the record.

Defendant testified: "I pulled to the right for I thought he was coming facing me. I was thinking he would get back on his side of the highway. . . . His lights were blinding me when I left the road 39 yards below where his car was parked."

Feme plaintiff seeks to recover compensation for physical injuries and her husband seeks to recover damages for loss of services of his wife and also hospital, medical, and other expenses incurred by him in the necessary treatment of his wife's injuries.

Appropriate issues were submitted to the jury and they answered the issue of negligence in favor of defendant. The court entered judgment on the verdict and plaintiffs appealed.

Hamrick & Hamrick for plaintiff appellants.
Oscar J. Mooneyham and J. Paul Head for defendant appellee.

BARNHILL, J. The plaintiffs assign as error the refusal of the court below to permit their witness, a patrolman who was not present at the time of the accident, to give his opinion of the speed of defendant's car. The assignment is without merit. *Tyndall v. Hines Co.*, 226 N. C., 620.

The court instructed the jury in part as follows:

"In this case, gentlemen of the jury, the defendant Hutchins, as he drove along this highway and as he saw these lights, the law says he had the right to assume that that car was in motion and it was on its right side of the road. Any motorist traveling the highways of North Carolina has the right to assume that the man he is meeting, or that the man passing him, is going to drive his car in a careful and prudent manner and to follow the rules of the road, as any prudent man would do in driving a motor vehicle on the highways of the State of North Carolina."

Thus the court stated, in effect, that even though the Crow car was standing on its left, and defendant's right, hand side of the road, completely off the hard surface or traveled portion of the highway, with its lights focused across the field and not down the road, defendant had a right to assume it was in motion on its right hand side of the road. In this there was error prejudicial to the plaintiffs.

In undertaking to sustain this charge the defendant relies on a statement in 5 A. J., 752, as follows:

"It has also been held, in this connection, that a driver of an automobile on a public highway at night, who sees in front of him the headlights of another car facing him, has a right to assume to a reasonable extent that such car is in motion and will be operated in conformity with the law of the road; he cannot be charged with contributory negligence as a matter of law in failing to stop or to discover that the other car is stalled."

This statement is bottomed on the decision in *Whitworth v. Riley*, 269 P. 350 (Okla.), 59 A. L. R., 584. It was there held that where a motorist stops his car, in the nighttime, on his left of the center of a highway with its headlights on and leaves it thus standing without taking any precaution to indicate to drivers going in the opposite direction, by a proper signal or warning, that his car is in a dangerous position, and that oncoming drivers cannot pass to their right, and that a clear passageway is available to their left of the center of the highway, is guilty of negligence and the oncoming motorist has a right to assume, in the absence of such warning, from the fact that the headlights are on, that the stalled car is in motion and will be operated in conformity with the law.

This rule has not been adopted in this jurisdiction. Even if we concede that in a proper case it would be followed here, it has no application to the facts in this case as they appear in this record. There, the defendant's car was standing on the traveled portion of the highway, in the line of travel of oncoming cars, so that an approaching motorist continuing on his right hand side of the road would probably collide therewith. Here, the Crow car was completely off the hard surface and the defendant, had he proceeded on his right side thereof, could have passed in safety. Indeed, the uncontradicted evidence tends to show that a number of other cars did so pass.

Furthermore, that rule was applied in an action between the two motorists. Here the plaintiffs were bystanders who may not be held responsible for any contributory negligence of Crow. Even if applicable to him, the doctrine of concurring negligence would be controlling here.

A motorist who is operating his vehicle on, or who seasonably turns to, his right of the center of the road when meeting an oncoming car, as required by G. S., 20-148, has a right to assume that the other driver will likewise turn to his right so that the two vehicles may pass each other in safety. *Brown v. Products Co.*, 222 N. C., 626, 24 S. E. (2d), 334; *Reeves v. Staley*, 220 N. C., 573, 18 S. E. (2d), 239; *Hoke v. Greyhound Corp.*, 227 N. C., 412.

Even so, one who operates a motor vehicle upon a public highway is under the duty to ascertain his own position on the highway from his own observation. The rule does not justify an assumption on his part, from the fact the other car is apparently to his right, that he himself must be on his left side of the road, and does not excuse his conduct in turning completely off the highway. It merely holds him guiltless if he fails to stop or turn off onto the dirt shoulder of the road, but continues at a reasonable rate of speed in his line of travel.

There is no statute or rule in this State which prohibited the parking of Crow's automobile on its left side of the highway, completely off the traveled portion thereof. If its lights were focused down the highway and were so bright they blinded the defendant, he may be guilty of an act of negligence, but, as to these plaintiffs, this would not exculpate the defendant for his negligence, if any, unless it was the sole proximate cause of the resulting injury to plaintiffs. This is a question for the jury.

The indicated error in the charge entitles plaintiffs to a

New trial.

AMANDA F. LAYDEN (UNMARRIED); RUTH LAYDEN IVEY AND HUSBAND, REDDEN IVEY; MARGARET LAYDEN, WIFE OF EDWARD LAYDEN, AND VIRGINIA LAYDEN, BY HER NEXT FRIEND, AMANDA F. LAYDEN; LLOYD LAYDEN (UNMARRIED); AND GERTRUDE LAYDEN JONES AND HUSBAND, OLIVER JONES, v. R. L. LAYDEN, H. H. LAYDEN, YVETTE L. CARTWRIGHT, WINBORNE G. LAYDEN, KENNETH C. LAYDEN, EDWIN M. LAYDEN AND DELIA P. LAYDEN.

(Filed 8 October, 1947.)

1. Quieting Title § 2—

Where, in an action to quiet title, plaintiffs introduce evidence tending to show title in themselves and tending to show that the purported deed held by defendants is void, the rendition of judgment as of nonsuit is error.

2. Mortgages § 30a—

The law does not recognize partial foreclosure, and where more than one tract of land is included in a mortgage or deed of trust, all lying in the same county, a foreclosure of one tract, either by action or exercise of the power of sale, extinguishes the mortgage or deed of trust and terminates the relationship of mortgagor and mortgagee or trustor and *cestui que trust.*

3. Mortgages § 39e (1)—

Plaintiffs instituted this suit to quiet title. Defendants, claiming under a trustee's deed to their ancestor, pleaded G. S., 1-47 (4), as a bar, upon their contention that their ancestor was a mortgagee or *cestui* in possession for more than ten years prior to the institution of the action. It appeared that the tracts in dispute were included with other tracts in the deed of trust, and that one of such other tracts had theretofore been foreclosed. *Held:* Upon the foreclosure of one of the tracts under the deed of trust it was extinguished, and therefore defendant's ancestor could not have been mortgagee or *cestui* in possession under a purported second foreclosure, and the statute does not apply.

4. Adverse Possession § 13c—

Where a trustee's deed under a foreclosure had more than seven years prior to the institution of the action is asserted as color of title, but it appears that the deed was not executed until less than four years prior to the institution of the action, claim of adverse possession under color of title must fail. G. S., 1-38.

APPEAL by plaintiffs from *Morris, J.,* at April Term, 1947, of PERQUIMANS.

Civil action to remove cloud upon title, instituted 12 September, 1946.

Amanda M. F. Layden was the owner of the two tracts of land involved in this action. She devised both tracts to her son, Charles T. Layden, for life and then to his heirs. Her will was duly probated in Perquimans County in 1901. She had only two children, Charles T. and Columbus. Charles T. never married, but Columbus married and had children, who

are the plaintiffs in this action and claim said lands as the only heirs at law of Charles T. Layden.

The defendants are the children of R. T. Layden, who died in 1945, and claim the lands under a Trustee's deed to R. T. Layden and by adverse possession.

It is admitted that the plaintiffs and the defendants claim from a common source, to wit: Amanda M. F. Layden.

The additional facts pertinent to this appeal are as follows:

1. On 1 October, 1919, Charles T. Layden executed a deed of trust on four tracts of land, including the two tracts involved herein, and designated as tracts 3 and 4, to W. F. C. Edwards, Trustee, to secure the payment of a series of notes aggregating $3,000.00, payable to R. T. Layden, the last note maturing 1 October, 1925.

2. In August, 1920, Charles T. Layden conveyed tract No. 1, described in the aforesaid deed of trust, to C. C. Colson. Colson executed a mortgage deed to Charles T. Layden securing notes aggregating $5,500.00. R. T. Layden purported to release the land conveyed from the deed of trust and in lieu thereof accepted an assignment of the notes and mortgage deed. Thereafter, on 22 March, 1922, Colson conveyed the land back to Charles T. Layden, subject to the aforesaid mortgage deed. Charles T. Layden died 22 January, 1926.

3. R. T. Layden qualified as administrator of the estate of Charles T. Layden, 28 January, 1926. The administrator advertised and foreclosed the Colson mortgage deed and had W. F. C. Edwards, Trustee, in the deed of trust, to advertise for sale the property described therein. Both sales were held on 15 May, 1926. The property described in the mortgage deed was purchased by L. N. Hollowell for $2,700.00, and only tract No. 2 was sold by the Trustee, which tract was bought by L. N. Hollowell for $600.00. Reports were duly filed showing a total of $3,117.65 was credited on the notes of Charles T. Layden.

4. On 17 January, 1927, R. T. Layden filed for registration the deed from R. T. Layden, administrator of Charles T. Layden, to L. N. Hollowell, the deed from W. F. C. Edwards, Trustee, to L. N. Hollowell, together with a deed from L. N. Hollowell and wife to R. T. Layden, conveying both the foreclosed tracts. Hollowell testified in the trial below that he bought both tracts of land for R. T. Layden at his request. These tracts are not involved in this action.

5. R. T. Layden as administrator of Charles T. Layden, filed his final account as such administrator on 28 January, 1928.

6. W. F. C. Edwards, Trustee, purports to have advertised a second time under the power of sale contained in the deed of trust, executed 1 October, 1919, tracts of land three and four, as described therein, being the lands now in controversy, for sale on 7 April, 1928, when and where

R. T. Layden is purported to have become the last and highest bidder for said lands in the sum of $1,000.00. According to the evidence, no report was made of the sale and the purchase money was not paid to the Trustee, there is no evidence showing the purchase money was ever paid, and the deed for the property was not executed and delivered to R. T. Layden by the Trustee until 1 February, 1943.

7. The defendants plead the possession of R. T. Layden, as mortgagee for more than ten years prior to the institution of this action, as a bar to the action, as provided in G. S., 1-47 (4). They also plead possession since the foreclosure sale in 1928, and adverse possession under the foreclosure sale for more than seven years, under color of title, as a bar to the action, as provided in G. S., 1-38.

The defendants moved for judgment as of nonsuit at the close of plaintiffs' evidence, the motion was denied. The motion was renewed at the close of all the evidence and allowed. The plaintiffs appeal, assigning error.

W. A. Worth for plaintiffs.

W. H. Oakey and Wilson & Wilson for defendants.

DENNY, J. The plaintiffs and the defendants are claiming title from a common source. The plaintiffs having introduced evidence tending to show title in themselves, and having offered evidence tending to show that the purported deed to the *locus in quo,* held by the defendants, is void, they were entitled to go to the jury on the issues raised by the pleadings. Hence, the judgment as of nonsuit was erroneously entered.

The defendants' sole claim of title to the lands involved herein is based on the following grounds: (1) R. T. Layden was in possession of the premises for more than ten years prior to the institution of this action as mortgagee, and that such possession is a bar to plaintiffs' action under the provisions of G. S., 1-47 (4); and (2) That these defendants and R. T. Layden, under whom they claim, have been in possession of these lands since the foreclosure sale in 1928; and that such possession has been adverse and under color of title for more than seven years prior to the institution of this action. G. S., 1-38.

The appellees concede in their brief that prior to the enactment of Section 1, Chap. 16, of 1943 Session Laws, now a part of G. S., 45-26, unless a mortgagee was in possession, the foreclosure sale and the execution and delivery of the deed pursuant thereto, in order to be valid, must have been completed within ten years from the date the debt matured. *Spain v. Hines,* 214 N. C., 432, 200 S. E., 25. However, the appellees contend that the mortgagor and those who claim under him, were not in possession for more than ten years prior to the institution of this action,

and that the case of *Ownbey v. Parkway Properties, Inc.*, 222 N. C., 54, 21 S. E. (2d), 900, is controlling. We do not think either case is controlling on this record.

In the deed of trust executed by Charles T. Layden to W. F. C. Edwards, Trustee, to secure the indebtedness of $3,000.00, to R. T. Layden, there is no provision contained therein which authorized the Trustee to conduct more than one foreclosure sale thereunder. And when, on 15 May, 1926, the foreclosure sale was conducted pursuant to the power contained in the deed of trust, and a deed executed to the purchaser pursuant to such sale, the power of sale was executed and was thereafter *functus officio*. The law does not recognize partial foreclosure. Wiltsie on Mortgage Foreclosure (5th Ed.), Section 832, p. 1349. "The mortgage presents the phenomenon of only one debt, with only one pledge to secure it. The debt may be split into bonds, or it may be payable in a series of notes, but in a broad sense it remains true that there is one debt, which arose out of one transaction. In like manner, there is only one pledge, although there may be many parcels of land, and many types of security. It follows that a foreclosure must be of the entire security; and, no matter how many parcels of land there may be, all should be included in the suit. To do otherwise is to 'split an entire case,' and that fault is penalized, in our jurisprudence, by refusal to hear the deferred portion in a later suit. It follows that a foreclosure upon one of two parcels will preclude a later foreclosure upon the other. The only exception is where the land lies in different States." Glenn on Mortgages, Sec. 88, p. 533. We see no reason why the same principle of law should not apply to foreclosure under a power of sale. As to foreclosure of land lying in two or more counties in this jurisdiction, see G. S., 45-27.

In the case of *Bank of America Natl. Ass'n v. Dames*, 239 N. Y. S., 558, 135 Misc. Rep., 391, the Court said: "A continuing lien against any part of the mortgaged premises after a sale is had is not known nor can it be recognized by our Courts." It is the general rule that there can be only one foreclosure of a mortgage or deed of trust. *Irons v. American Natl. Bank*, 178 Ga., 160, 172 S. E., 629; *Strickland v. Lowry Natl. Bank*, 140 Ga., 653, 79 S. E., 539. "The rule is that a mortgagee may not foreclose his mortgage by piecemeal." 87 Mont., 198, 286 P., 402, citing *Marcarel v. Raffour*, 51 Cal., 242; *Tacoma, etc., Co. v. Safety Ins. Co.*, 123 Wash., 481, 212 P., 726; *Hall v. Arnott*, 80 Cal., 348, 22 P., 200; *Commercial Bank v. Kershner*, 120 Cal., 495, 52 P., 848.

It often occurs that a mortgagee elects to sell only so much of the security pledged as may be necessary to satisfy his debt, even though he is not so restricted by the mortgage or deed of trust. Such an election releases the remainder of the pledged property from the lien of the foreclosed instrument. And where a party elects to sell only a part of the

security, pursuant to the power of sale contained in his mortgage or deed of trust, he cannot thereafter assert any right under such power, even though the secured debt may not have been satisfied in full.

Applying the above principle of law to the facts in this case, we hold that R. T. Layden was not and could not have been a mortgagee in possession after the execution and delivery of the deed, made pursuant to the foreclosure sale held on 15 May, 1926. The relation of mortgagor and mortgagee was terminated upon the consummation of that sale. Hence, the purported sale on 7 April, 1928, was a nullity.

Likewise the claim of title by adverse possession under color of title for seven years prior to the institution of this action, cannot be sustained. The deed from W. F. C. Edwards, Trustee, to R. T. Layden was not executed until 1 February, 1943, and this action was instituted 12 September, 1946. G. S., 1-38; *Berry v. Coppersmith,* 212 N. C., 50, 193 S. E., 3.

The judgment of the court below is

Reversed.

MRS. INEZ BEST v. HENRY BEST.

(Filed 8 October, 1947.)

1. Divorce § 14—

An action for alimony without divorce, G. S., 50-16, lies in favor of the wife if the husband (1) shall separate himself from his wife and fail to provide her and the children of the marriage with necessary subsistence or (2) if he shall be a drunkard or spendthrift or (3) if he be guilty of misconduct or acts which would be grounds for divorce either absolute or from bed and board.

2. Divorce § 5d—

Allegations in a complaint that defendant had been a habitual drunkard during the prior three years is sufficient to state a cause of action for alimony without divorce under the term "shall be a drunkard" within the meaning of G. S., 50-16, and is also sufficient to state a cause of action for divorce from bed and board under G. S., 50-7 (5).

3. Same—

Where the complaint in an action for alimony without divorce sufficiently alleges a cause of action on the ground that defendant is a drunkard, the fact that the causes alleged on the grounds of cruelty and intolerable treatment, G. S., 50-7 (3) (4), are fatally defective in failing to allege with sufficient particularity the circumstances and that defendant's acts were without adequate provocation on her part, is not ground for demurrer, the result being only that plaintiff may not rely upon the defective causes without amendment in the face of timely objection by defendant.

4. Divorce § 12—

The amount of allowance for reasonable subsistence and counsel fees *pendente lite* in an action for alimony without divorce, G. S., 50-16, is within the sound discretion of the judge hearing the motion and having jurisdiction thereof.

APPEAL by defendant from *Edmundson, Special Judge,* presiding at April Term, 1947, of JOHNSTON.

Civil action for alimony without divorce, heard upon motion of plaintiff for an allowance for subsistence, pending trial and final determination of the issues involved in the action, and for counsel fees. G. S., 50-16, formerly C. S., 1667, as amended.

Plaintiff alleges in her complaint, briefly stated, these pertinent facts: That plaintiff and defendant are both residents of Johnston County, North Carolina, "living and residing in said county, near the town of Princeton"; that they "were married in the year 1915, and have subsequently lived together as husband and wife"; that they have four children, two of whom are minors; that "plaintiff at all times since her marriage to the defendant has been a faithful and dutiful wife and has contributed her time and energies in attempting to establish a home for herself and family, and has done all possible to help her husband maintain a home and prosper financially"; that defendant "for a number of years has been addicted to the use of whiskey and other alcoholic beverages and during the last three years, he has been an habitual drunkard," and "when under the influence of whiskey, which has been on numerous occasions and almost continually, he has been abusive to the plaintiff, offering her such violence that her life has become intolerable and her condition in the home burdensome and she is unable to live with him and she has been made to fear for her life and safety to such an extent that she can no longer live with the defendant in safety; that he has on more than one occasion threatened her life"; "that on or about 7 October, 1946, the defendant violently assaulted this affiant, breaking her nose, and otherwise seriously and permanently injuring her"; that "in the month of February, 1947, the defendant again assaulted the plaintiff by striking her with his hand"; "that on March 20, 1947, the defendant while in a drunken condition, cursed, threatened and abused the plaintiff and destroyed and damaged certain property in her home"; "that on account of the things and matters before alleged the plaintiff's condition in life has been made miserable and burdensome, and she stands in great fear of the defendant and she can no longer live and reside with him without serious injury to her health, body and mind"; and "that the plaintiff is without means of support, has no money with which to support herself or to enable counsel to prosecute this action, and she is dependent for support upon the estate, real and personal, of her husband."

Plaintiff alleges other matters pertaining to property owned by the defendant.

Plaintiff also by amendment to her complaint alleges in brief that as result of the assault on her about 7 October, 1946, she incurred expense of $67.50 for medical treatment; and that she is in need of an operation which the defendant failed and refused to pay for or permit plaintiff to undergo while they were residing together as husband and wife.

Upon these allegations plaintiff prays for a subsistence for herself and her minor children; that a home be sequestered and set aside for her use and for the use of her minor children; for counsel fees; for an injunction restraining the defendant from waste of the estate; and for reimbursement for the medical expense, and provision for the operation.

The defendant, answering, admits the marriage, but in material aspects denies the charges made against him by plaintiff, and avers that the plaintiff is not without fault in various particulars, and on the hearing below offered affidavits tending to support his averments.

The record discloses that on the hearing before the judge of the Superior Court evidence was offered by affidavit and by oral testimony.

From judgment providing for subsistence and counsel fees pending the trial of the action, defendant appeals to Supreme Court and assigns error.

Abell, Shepard & Wood for plaintiff, appellee.

Lyon & Lyon for defendant, appellant.

And in this Court defendant demurs *ore tenus* to the complaint for that:

1. The complaint does not state facts sufficient to constitute a cause of action against the defendant, in that:

(a) The plaintiff has failed to set forth in detail and minuteness the circumstances of the alleged acts of cruelty on the part of the defendant; and for that the alleged acts upon which the plaintiff seeks to obtain alimony without divorce are set forth in general terms and not specifically stated with particularity.

(b) In that the plaintiff has failed to aver that the alleged acts of cruelty on the part of defendant were without adequate provocation on her part, and to state what her conduct was at the time of the alleged assaults.

(c) In that the plaintiff does not aver that her conduct did not contribute to the wrongs and abuses of which she complains, as is required by law.

2. The court did not acquire jurisdiction of the defendant, and of the appellee's alleged cause of action, for that no complaint, valid and sufficient in law, has been filed by the plaintiff.

WINBORNE, J. The demurrer *ore tenus* entered in this Court challenges the sufficiency of the allegations in the complaint, in the respects above indicated, to state a cause of action for alimony without divorce under the provisions of G. S., 50-16, formerly C. S., 1667, as amended. Hence, it is appropriate to consider first the question thus raised. After doing so, we are of opinion and hold that the complaint is sufficient to withstand the challenge.

The statute, G. S., 50-16, provides that the wife may institute an action in the Superior Court of the county in which the cause of action arose to have a reasonable subsistence and counsel fees allotted and paid or secured to her from the estate or earnings of her husband, pending the trial and after final determination of the issues involved in such action, in these cases: (1) If the husband shall separate himself from his wife and fail to provide her and the children of the marriage with the necessary subsistence according to his means and condition in life; or (2) if he shall be a drunkard or spendthrift; or (3) if he be guilty of any misconduct or acts that would be or constitute cause for divorce, either absolute or from bed and board.

Applying these provisions of the statute: The present complaint does not purport to state a cause of action for separation and failure to support; nor does it allege any ground for absolute divorce. It does contain allegation that "during the last three years" defendant "has been an habitual drunkard." This allegation would seem to be broad enough to include the term "shall be a drunkard," appearing in the statute, G. S., 50-16, and sufficient to state a cause of action in that respect. Moreover, it would seem sufficient to state a cause of action within the meaning of the statute prescribing as ground for divorce from bed and board, G. S., 50-7 (5), that if either party "becomes an habitual drunkard."

When a wife bases her action for alimony without divorce upon the grounds that her husband has been guilty of cruel treatment of her and of offering indignities to her person within the meaning of the statute pertaining to divorce from bed and board, G. S., 50-7 (3) and (4), she "must meet the requisite" of this statute, *Pollard v. Pollard,* 221 N. C., 46, 19 S. E. (2d), 1, and not only set out with particularity the acts on the part of her husband and upon which she relies, but she is also required to allege, and consequently to prove, that such acts were without adequate provocation on her part. *White v. White,* 84 N. C., 340; *Jackson v. Jackson,* 105 N. C., 433, 11 S. E., 173; *O'Connor v. O'Connor,* 109 N. C., 139, 13 S. E., 887; *Ladd v. Ladd,* 121 N. C., 118, 28 S. E.,

190; *Martin v. Martin,* 130 N. C., 27, 40 S. E., 822; *Green v. Green,* 131 N. C., 533, 42 S. E., 954; *Dowdy v. Dowdy,* 154 N. C., 556, 70 S. E., 917; *Carnes v. Carnes,* 204 N. C., 636, 169 S. E., 222; *Pollard v. Pollard, supra; Howell v. Howell,* 223 N. C., 62, 25 S. E. (2d), 169; *Pearce v. Pearce,* 225 N. C., 571, 35 S. E. (2d), 636; *Brooks v. Brooks,* 226 N. C., 280, 37 S. E. (2d), 909.

In the case of *O'Connor v. O'Connor, supra,* opinion by *Avery, J.,* this Court stated: "But when the wife demands only a divorce *a mensa et thoro,* on the ground that the husband, by personal violence, has made her life intolerable and her condition burdensome, she must state specifically in her complaint, what, if anything, was said or done by her just before or at the time her husband struck her, or threatened her, or charged her with incontinency; or she must, in some way, negative, by explicitly setting forth what her conduct was, the idea that any act or word on her part was calculated to arouse sudden passion on the part of the husband, or put him on the defensive." Cases in approval of the principle are there cited.

In *Martin v. Martin, supra, Clark, J.,* writing for the Court, it is held that "The complaint . . . is insufficient as a complaint for divorce from bed and board, in that it does not specifically state the circumstances of the alleged acts of cruelty, give time and place, and state what was plaintiff's own conduct, and that such acts were without provocation on her part."

In *Howell v. Howell, supra,* this headnote epitomizes the ruling of this Court in opinion by *Denny, J.,* "In an action for alimony without divorce, C. S., 1667 (now G. S., 50-16), as in an action for divorce *a mensa et thoro* by the wife, she must not only set out with some particularity the acts of cruelty upon the part of the husband, but she must aver, and consequently offer proof, that such acts were without adequate provocation on her part. The omission of such allegation is fatal . . ." To like effect is *Pearce v. Pearce, supra,* opinion by *Barnhill, J.*

And the case of *Brooks v. Brooks, supra,* is strikingly similar to the one in hand. There as here the complaint alleged sufficiently other grounds for divorce, independently of those of cruelty and indignities,—it being contended that the latter were insufficiently pleaded, and hence the complaint failed to state a cause of action. After saying that "ignoring all other available statutory grounds for relief, the established standards of pleading and practice, as found in our decisions, might support appellant's view," and holding that on other ground the complaint does state a cause of action, *Seawell, J.,* writing for the Court, disposes of the contention in this manner: "The practical result of its partial invalidity would be that the plaintiff on the trial, and upon timely objection, cannot, without amendment, rely on the causes of action pointed out, which

have been heretofore held by numerous decisions of this Court to be fatally defective." This exposition of the law as to the practical effect of the partial insufficiency of the complaint there is applicable to the partial insufficiency of the complaint here.

Defendant also excepts to the several portions, and to the signing of the judgment in which allowance and provision for subsistence, and the payment of counsel fees, pending the trial, is made. In this connection the statute, G. S., 50-16, provides that pending the trial of an action for alimony without divorce the wife may make application to the resident judge of the Superior Court, or the judge holding the Superior Courts of the district in which the action is brought, for an allowance for such subsistence and counsel fees, and that it shall be lawful for the judge to cause the husband to secure so much of his estate or to pay so much of his earnings, or both, as may be proper, according to his condition and circumstances, for the benefit of his said wife and the children of the marriage, having regard also to the separate estate of the wife. In applying these provisions of the statute this Court has uniformly held that the amount allowed to the wife for the reasonable subsistence and for counsel fees in her proceeding against her husband is within the sound discretion of the judge hearing the same and having jurisdiction thereof. *Cram v. Cram,* 116 N. C., 288, 21 S. E., 197; *Anderson v. Anderson,* 183 N. C., 139, 110 S. E., 863; *Holloway v. Holloway,* 214 N. C., 662, 200 S. E., 436; *Wright v. Wright,* 216 N. C., 693, 6 S. E. (2d), 555.

In the *Wright case, supra, Barnhill, J.,* goes into full discussion of the subject. Hence, such recent elaboration on the subject renders further treatment of it now unnecessary. While defendant strenuously argues that the effect of the judgment below amounts to a premature administration upon his estate, we fail to find in the record abuse of that discretion vested by law in the judge who heard the matter. At any rate, if perchance plaintiff should prevail in final determination of the action, the judge before whom the action is then pending may take into consideration these allowances, in making further allowances, as may be proper, according to the husband's condition and circumstances, having due regard also to the separate estate, if any, of the wife.

The judgment below is

Affirmed.

STATE v. CLING MINTON.

(Filed 8 October, 1947.)

1. Homicide § 22—

Ordinarily, uncommunicated threats are not admissible in homicide cases, but where defendant offers evidence of self-defense, and testimony of threats made by deceased against him shortly before the fatal occurrence tend to throw light on the occurrence and have an explanatory effect on the plea of self-defense, such uncommunicated threats are competent and the exclusion of testimony thereof is reversible error.

2. Homicide § 27f—

Defendant's evidence tended to show an assault made upon him at his place of business operated in his residence. *Held:* An instruction on the right of self-defense predicated solely upon a felonious assault and omitting to charge upon defendant's right to stand his ground in the case of a nonfelonious assault, is reversible error.

3. Homicide §§ 19, 27b—

Testimony by defendant that he shot deceased does not support an instruction that there was an admission that defendant killed deceased with a deadly weapon.

DEFENDANT'S appeal from *Sink, J.*, at March Term, 1947, of WILKES.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

Trivette, Holshouser & Mitchell and T. R. Bryan, and Wm. H. McElwee for defendant, appellant.

SEAWELL, J. The defendant, Cling Minton, was tried on an indictment charging him with the murder of Atwell Parsons, was convicted of manslaughter and from a sentence of 12 to 15 years in State's Prison appealed to this Court, assigning some 80 items of error on the trial, only a few of which it is found necessary to discuss.

The defendant's place of business, where the shooting took place, included a skating rink, a couple of slot machines and a beer counter. The upstairs was used as a residence. The State's evidence is briefly to the effect that at the time of the killing everything was peaceful, and suggests little or no motive for the shooting. Parsons, it was said, was standing about six feet in front of Minton, the defendant, unarmed, with his arms hanging down when defendant shot him in the belly. He died of this wound shortly afterward in the hospital.

The defendant's testimony, however, tended to show that it was after 12 o'clock and Mrs. Minton had asked all those in the store to leave so that they might close up for the night because her baby was sick up-

stairs. Defendant's evidence also tends to show that the defendant made a like request, and repeated it, which request was presently unheeded.

Claude Minton testified that he and Carroll Lowe entered the place after June Ferguson, Atwell Parsons, Roland Walsh, Raymond Parsons, Fred Bumgarner, and Johnny Land had already gotten there. Minton told his assistant, Dock Parsons, to sell no more beer. Mrs. Minton came back into the store room and said, "You all go ahead, we have got to close up." "Atwell Parsons, the deceased, spoke up and said, 'By G——, he was not going no place until he had another round of beers apiece.'" Witness got up and motioned to the Lowe boy to go. "I started, got to the end of the counter. Johnny Land run over and grabbed me and commenced hitting me in the head . . . knocking me backwards, I was walking backward to keep the licks off me. Roland Walsh, he run in, said, 'G—— damn him, let me get hold of him.'" They were knocking and dragging the witness Minton, had him on his knees when he heard the shot fired. Of the defendant, witness stated: "He (meaning Minton) told him to leave, told them twice that I know of."

Carroll Lowe, who had accompanied Claude Minton to the place, testified that when Mrs. Minton spoke of the sick child, Cling Minton said, "Boys, drink your beer, we have got to close up." Claude got up and started putting on his coat; walked by the stove and Johnny Land jumped up and hit him, Roland Walsh joining in the fight. Atwell Parsons came out of the booth by jumping over the top and ran at Cling Minton,—"Made a dive for him with hands extended." He heard Atwell say, "S. O. B." about the time he hit the floor and ran at Cling. He ran up in about two feet of Minton while the latter was backing up. Minton then shot Atwell. Atwell had run from the rear to the front, about 20 feet, toward Minton.

Mrs. Minton testified that when Claude Minton started to leave Johnny Land sprang upon him, followed by Roland Walsh, and both were hitting and dragging him, beating him almost down to his knees. Atwell Parsons sprang out of his booth, lunging toward Minton and saying, "G—— damn you." Minton went backing away and Parsons continued to advance upon him, cursing him until Minton had got into the corner when the pistol shot was fired.

The defendant testified, amongst other things that when the fight upon Claude Minton got under way Atwell Parsons, the deceased, was coming at him out of the booth and that he (Minton) backed up. Parsons said, "You G—— damn s. o. b., I've got what it takes for you." And when he fired the shot the gun barrel was right up against Parsons. "My gun was lying there at the cash register on the counter. I was backing up into the corner of the counter and the wall." "He had come out of the booth 'on his muscles,' bounced over the top of the table onto the front,

and came rushing." "I shot the deceased to keep him from killing me." The defendant testified that when he shot Parsons the latter was within two feet of him.

In this situation the defendant contends that the trial judge committed two errors, both prejudicial to consideration by the jury of his right of self-defense: The exclusion of recent uncommunicated threats which, if submitted, would have strengthened his plea by giving an objective corroboration of his peril, and his testimony relating thereto; and failure to charge clearly the law of self-defense in the case of non-felonious assault on a person in his own home or on his own premises.

The appellant contends that the outwardly crazy and motiveless occurrences of the fatal hour had a motivation which, if the excluded evidence had been admitted, would have brought them into the perspective and relation incident to reason and planning, however sinister the pattern.

The excluded evidence was substantially that Atwell Parsons, the deceased, and Raymond Parsons, Roland Walsh, June Ferguson and Johnny Land (compare this with the list of State witnesses), were just outside the door of Cling Minton's place. The witness Triplett heard Atwell Parsons say, "Let's go in and get Cling Minton and kill the G—— damn s. o. b." In about "a minute" Atwell Parsons, Raymond Parsons, Roland Walsh, June Ferguson, and Johnny Land all went in; and the shooting occurred some time later.

Generally speaking, uncommunicated threats are not admissible in homicide cases. See Stansbury, North Carolina Evidence, Sec. 162, p. 342. But there are exceptions to the rule which must be considered in the light of the facts of the particular case. Such exceptions occur where the evidence has an explanatory bearing on the plea of self-defense. The statement of the rule in *S. v. Baldwin,* 155 N. C., 494, 495, 71 S. E., 212, is as specific as the nature of the case admits, and omitting matter not relevant to the present situation, is applicable here: "It is now generally recognized that in trials for homicide uncommunicated threats are admissible . . . where they tend to throw light on the occurrence and aid the jury to a correct interpretation of the same, and there is testimony *ultra* sufficient to carry the case to the jury tending to show that the killing may have been done from a principle of self-preservation," citing *Turpin's case,* 77 N. C., 473; *S. v. McIver,* 125 N. C., 645, 34 S. E., 439; Hornigan & Thompson Self-defense, 927; *Stokes' case,* 53 N. Y.; *Holler v. State,* Ind., 57; *Cornelius v. Commonwealth,* 54 Ky., 539.

Under the circumstances of this case the exclusion of the evidence was error.

In his charge to the jury on the matter of self-defense, His Honor, amongst other things, instructed them: "One feloniously assaulted, how-

ever, on his own premises may stand his ground and not retreat and may order therefrom another for any reason he may deem necessary." The appellant excepts to this charge because in effect it instructs the jury that although the defendant was in his own home he was under the duty to retreat although the assault was not felonious; *S. v. Roddey,* 219 N. C., 532, 14 S. E. (2d), 526; *S. v. Bryson,* 200 N. C., 50, 156 S. E., 143. The instruction did not fully present defendant's right of self-defense when assaulted in his own home and must, therefore, be held for error.

Also, basing his instructions upon the argument of counsel and the testimony of the defendant as to the shooting, the trial court assumed that there was an admission as to the killing with a deadly weapon notwithstanding the fact that it was merely a matter of evidence. *S. v. Ellison,* 226 N. C., 628; *S. v. Baker,* 222 N. C., 428, 23 S. E. (2d), 340; *S. v. Anderson,* 222 N. C., 148, 22 S. E. (2d), 271; *S. v. DeGraffenreid,* 223 N. C., 461, 27 S. E. (2d), 130; *S. v. Redman,* 217 N. C., 483, 8 S. E. (2d), 623; *S. v. Gregory,* 203 N. C., 528, 166 S. E., 387.

The more recent case of *Ellison, supra,* deals particularly with this matter and we think the charge is in violation of the principles there set down.

For the errors indicated, the defendant is entitled to a new trial and it is so ordered.

Error: New trial.

STATE v. H. E. REAVIS.

(Filed 8 October, 1947.)

1. Courts §§ 3c, 11—

Where a Recorder's Court and the Superior Court have concurrent jurisdiction, the court first taking cognizance of the offense has jurisdiction thereof to the exclusion of the other. G. S., 7-64.

2. Intoxicating Liquor § 8—

The jurisdiction to declare forfeiture of a vehicle used in the transportation of intoxicating liquor is in the court which has jurisdiction of the offense charged against the person operating the vehicle. G. S., 18-6.

3. Same—

Defendant was tried in the Recorder's Court upon a warrant charging the illegal transportation of intoxicating liquor. The State accepted a plea of guilty of unlawful possession, and the judgment, after imposing a suspended sentence, ordered that the vehicle used by defendant be returned to him. No appeal was taken. Thereafter the sheriff filed a petition in the Superior Court to confiscate the vehicle. *Held:* The Superior Court was without jurisdiction of the petition and judgment of confiscation and sale is reversed.

STATE *v.* REAVIS.

APPEAL by defendant from *Sink, J.*, at March Term, 1947, of DAVIE.

Proceeding in Superior Court upon petition of sheriff of Davie County for confiscation of an automobile of defendant for that intoxicating liquor was found in it,—heard upon notice to show cause, G. S., 18-6.

From the record on this appeal, these appear to be the facts: Defendant H. E. Reavis was tried in the Recorder's Court of Cooleemee, Jerusalem Township, Davie County, upon warrant charging the illegal transportation of intoxicating liquors, and the following judgment was entered upon the judgment docket of said court:

"The defendant enters a plea of guilty of unlawful possession of one gallon non-tax-paid liquor. After hearing and considering evidence in this case the State accepts this plea and the following judgment is rendered: That the defendant be confined in the common jail of Davie County for a period of six months and assigned to work on the roads . . . This judgment suspended for a period of two years upon the following conditions: First, that he not be guilty of violating any of the State prohibition laws. Second, that he pay a fine of $300.00. Third, that he pay the cost of this action. It is an order of this court that H. E. Reavis retain a Buick automobile now held in storage by R. P. Foster, Sheriff. This March 1, 1947. W. S. Gales, Judge of Recorder's Court."

No appeal was taken from this judgment. Under same date the Recorder issued to the sheriff a written order, directing that he release the car upon payment of cost of storage. The sheriff declined to obey the order.

Thereafter, under date of 4 March, 1947, R. Paul Foster, as sheriff of Davie County, filed a petition, under oath, to the Honorable H. Hoyle Sink, Judge presiding and holding the courts of the 17th Judicial District of North Carolina, in which he set forth in pertinent part, briefly stated: That on or about 15 February, 1947, he and his deputies seized a 1940 model Buick automobile, driven by one Howell Reavis and transporting one gallon of non-tax-paid liquor; that thereupon the automobile was seized and Reavis was arrested for violating the prohibition laws; that on 1 March, 1947, Reavis was tried in the Recorder's Court of Jerusalem Township, Davie County, North Carolina, by Recorder W. S. Gales, and on such trial Reavis entered a plea of guilty of violating the prohibition laws; that Reavis bears reputation of dealing in liquor, and for using said automobile for transporting liquor and for a taxi; and that he, the sheriff, is now holding the said automobile and desires to have the same confiscated and sold according to law.

Thereupon, the Judge aforesaid ordered that H. E. Reavis, the owner of said automobile, be and appear before him on 17 March, 1947, in the Superior Court of Davie County, and "show cause, if any he has, why the aforementioned Buick automobile should not be condemned and confis-

cated according to law"—which order was duly served. Upon hearing defendant, through his counsel, demurred *ore tenus* to the jurisdiction of the Superior Court to hear and pass upon the question presented on the petition for that it had been finally adjudicated in a court of competent jurisdiction, the said Recorder's Court, and the automobile released to defendant, by order of that court, which order is pleaded as *res judicata*.

The Judge reserved his ruling and proceeded to hear oral testimony of the Judge of the Recorder's Court, offered by the State, as to what transpired in the Recorder's Court, and the circumstances under which the judgment of record in that court was rendered. Upon cross-examination of the Judge of Recorder's Court as such witness he testified that in the plea of defendant an oral request was made in open court for the release of the automobile—and that order of release was made a part of the judgment entered in the book, and the judgment entered upon the records of the Recorder's Court, as hereinabove quoted, was read in evidence, as was the written order to the sheriff to release the automobile. And in the course of the testimony the Recorder testified that as he had no one to help him, judgments were announced in open court, and that he wrote up the minutes at night at home.

At the conclusion of the introduction of evidence, the Judge held, in so far as the automobile referred to in the petition is concerned, briefly stated: 1. That under the facts found and "under the statutes of North Carolina, the law automatically confiscates said automobile." 2. "That regardless of the manner and form of the judgment or purported judgment of the Recorder in an attempt to release said automobile to the alleged owner Reavis, . . . the said Recorder was without jurisdiction of the subject matter involved, to wit: The automobile, and that it was a matter within the jurisdiction of the Superior Court, and, therefore, any order or attempted order on the part of the Recorder was void."

Thereupon, the Judge held that Reavis is not entitled to the possession of the automobile, and ordered same advertised for sale and sold as prescribed for vehicles seized in the transportation of illegal liquors, and directed the sheriff of Davie County to proceed with the sale.

Defendant appeals therefrom to the Supreme Court and assigns error.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

Allen & Henderson and F. D. B. Harding for defendant, appellant.

WINBORNE, J. This is the pivotal question on this appeal: "Did the Superior Court of Davie County have jurisdiction over the automobile of defendant seized by the sheriff of that county in connection with a violation of the prohibition law of which the Recorder's Court for the

District of Cooleemee had theretofore assumed jurisdiction." The answer is "No."

The General Assembly of North Carolina in the Act, Public-Local Laws 1911, Chapter 713, Section 5, creating the "Recorder's Court for the District of Cooleemee," granted to that court "concurrent jurisdiction with courts of justices of the peace in all criminal offenses committed within Jerusalem Township," and "exclusive jurisdiction to hear and determine all other criminal offenses committed within said township below the grade of felony, as is now defined by law,"—declaring "all such offenses committed within said township . . . to be petty misdemeanors." It was provided, however, in said act, "that in all criminal offenses where said court has been given jurisdiction by the act, and no prosecution has been commenced within six months from the commission thereof, the Superior Court of Davie County may proceed to try the same, as though this court did not exist."

However, the General Assembly, by Chapter 299 of Public Laws 1919, and subsequent amendments, and now G. S., 7-64, has provided that in all cases in which by statute original jurisdiction of criminal actions has been taken from the Superior Court and vested exclusively in courts of inferior jurisdiction, such exclusive jurisdiction is divested, and jurisdiction of such actions shall be concurrent and exercised by the court first taking cognizance thereof, and that appeals from all judgments of such inferior courts to the Superior Courts shall be as heretofore.

Applying the provisions of these statutes to the factual situation in hand: The record shows that the offense charged against defendant Reavis was committed "on or about the 15th day of February, 1947," and defendant was arrested, and on 1 March, 1947, tried in the Recorder's Court for the District of Cooleemee, and from the judgment rendered on that date no appeal to Superior Court has been taken. Moreover, the record fails to show that at any time has any indictment been had in Superior Court of Davie County against defendant for the offense charged. Hence, the Recorder's Court, under the express provisions of G. S., 7-64, having first taken cognizance of the offense, had jurisdiction of it to the exclusion of the Superior Court.

Furthermore, the statute, G. S., 18-6, pertaining to the seizure of vehicles engaged in illegal transportation of intoxicating liquors, provides that "whenever intoxicating liquor transported or possessed illegally shall be seized by an officer, he shall take possession of the vehicle and team or automobile . . . and shall arrest any person in charge thereof"; and that "such officer shall at once proceed against the person arrested under the provisions of this article in any court of competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond . . . which . . . shall be

approved by the officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court." It is clear from these provisions that the vehicle is under the jurisdiction of the court which has jurisdiction of the offense charged against the person.

Hence, irrespective of any irregularity there may be in the proceedings in the Recorder's Court for the District of Cooleemee, and notwithstanding the oral testimony in attack upon the written record of that court, the Superior Court was without jurisdiction to render the judgment from which this appeal is taken,—and the judgment is

Reversed.

STATE v. EUGENE WARREN AND ODELL BROWN.

(Filed 8 October, 1947.)

1. Larceny § 7—

In a prosecution for larceny and receiving, evidence that a defendant, with another, was in the company of the prosecuting witness in a field where the three drank liquor, that thereafter the prosecuting witness went to sleep and that when he awoke a large sum of money which he had on his person was gone, with further evidence that defendant's shoe tracks led from the place where prosecuting witness slept and that a sum of money somewhat less than the amount the prosecuting witness had lost, but in the same denominations, was found in defendant's house and that a paper which had been in the prosecuting witness' billfold was found on his premises, *is held* sufficient to overrule defendant's motion to nonsuit.

2. Same—

In a prosecution for larceny and receiving, evidence tending only to show that a defendant was in the company of the prosecuting witness on the night prior to the time the money was stolen, and that after defendant had been jailed he was told that all he would have to do to get out of trouble would be to give the prosecuting witness so much money, to which defendant replied "go get my daddy and B," the prosecuting witness, *is held* insufficient to be submitted to the jury.

3. Criminal Law § 31e—

Testimony that when arrested defendant had shoes worn so as to make a peculiar mark on the ground and that these shoes fitted the tracks at the scene of the crime, is competent.

4. Criminal Law § 53e—

In the absence of a request, it is not error for the court to fail to define circumstantial evidence and to instruct the jury how to evaluate such evidence, the general charge as to the burden and *quantum* of proof required being without error.

5. Same: Criminal Law § 52a—

The intensity of proof required of the State, whether relying on circumstantial or direct evidence, is to prove defendant's guilt to a moral certainty or beyond a reasonable doubt, but when aptly requested to do so, the court must charge that circumstantial evidence must produce in the minds of the jurors a moral certainty of defendant's guilt and exclude every other reasonable hypothesis.

APPEAL by defendants from *Clement, J.*, at August Term, 1947, of WILKES.

Criminal prosecution tried upon indictment charging larceny and receiving from the person.

The State offered evidence tending to show that on the evening of 15 July, 1946, Roby Broyhill had $1,700.00, twenty $50.00 bills, one $100.00 bill, and thirty $20.00 bills, and a paper with some figures on it, in a billfold in his pocket. He had been hauling beans to some point in Tennessee and got home at 6:00 or 7:00 p.m. Later he went to a store near the Town of North Wilkesboro. He left this store around 11:00 o'clock. He then went to Clarence Benton's place. The defendants and others were there. About an hour and a half later Broyhill started home. He was overtaken by these defendants. Broyhill and the defendants left the highway a distance of about 125 feet and all three of them took a drink of liquor. They sat down and talked. Later they walked into a cornfield some 500 feet from the highway where they sat down and all three of them took another drink. Broyhill went to sleep. Next morning he discovered his money was gone. Brown's shoe tracks were identified, leading from the place where Broyhill slept. Tracks made by three or four different persons were also identified. Later $450.00 were found in a cap hanging on the wall in Brown's home. The money consisted of seven $50.00 bills and five $20.00 bills. The paper that Broyhill had in his billfold on the night of 15 July, 1946, was also found near Brown's spring. The money and paper were introduced in evidence.

The only evidence against the defendant Warren, other than his presence with Broyhill on the night of 15 July, 1946, is a conversation between the witness Sprinkle and Warren following his arrest and incarceration. Sprinkle testified that at the suggestion of Broyhill he went to the jail and had the following conversation with Warren: "I told him Broyhill said if he would find his money he would take up the papers. Warren said: 'Will you get him to take up the papers if I get the money?' I said, 'If you have got the money get it and you can get out of this trouble.' He said 'Get get my Daddy and Broyhill.'" On cross-examination Sprinkle testified that Broyhill named four different people who might have his money. That he said he had taken his purse out in Benton's place. "It was all Broyhill's idea for me to go in the jail and

talk to Warren. He wanted me to go and see if I could get his money back. The way I told him was if he wanted to get out of the trouble. If he would give him so much money, he would take up the warrant."

Verdict: Each defendant guilty as charged in the bill of indictment. From the judgment imposed, the defendants appeal, assigning errors.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

Trivette, Holshouser & Mitchell for defendants.

DENNY, J. The first assignment of error to be considered is based on the exception to the refusal of his Honor to sustain the defendants' motion for judgment as of nonsuit. The ruling of the court below in this respect as to the defendant Brown, will be upheld. However, we do not think the evidence as disclosed by the record is sufficient to sustain a verdict of guilty as to the defendant Warren.

There is no evidence tending to establish the guilt of the defendant Warren other than his presence with Broyhill and Brown on the night of 15 July, 1946, unless the conversation which took place in the jail between the witness Sprinkle and Warren may be interpreted as a confession of guilt. We do not think this conversation should be so construed. This view is supported by Sprinkle's testimony on cross-examination. Sprinkle informed Warren that all he would have to do to get out of trouble would be to give Broyhill so much money. It cannot be fairly inferred as a confession of guilt when such a proposal was made for him to reply "Go get my Daddy and Broyhill." The motion for judgment as of nonsuit should have been allowed as to the defendant Warren.

The defendant Brown assigns as error the admission of evidence tending to show that one of the shoes worn by him when he was arrested had a sole worn down to the canvass, that the shoe made a peculiar mark on the ground, and that this shoe fit perfectly into tracks found in the cornfield where Broyhill slept on the night of 15 July, 1946. This evidence was competent and the assignment of error cannot be sustained. *S. v. Walker,* 226 N. C., 458, 38 S. E. (2d), 531; *S. v. Mays,* 225 N. C., 486, 35 S. E. (2d), 494; *S. v. McLeod,* 198 N. C., 649, 152 S. E., 895.

This defendant also assigns as error the failure of the trial Judge to define circumstantial evidence and to instruct the jury how to appraise or evaluate such testimony. In the absence of a request to do so, the failure of the court to instruct the jury regarding circumstantial evidence, or as to what such evidence should show, will not be held for reversible error, if the charge is correct in all other respects as to the burden and measure of proof. *S. v. Shook,* 224 N. C., 728, 32 S. E. (2d), 392. However, when the trial Judge does charge the jury regarding

circumstantial evidence no set formula is required, but an instruction substantially as given in *S. v. Stiwinter,* 211 N. C., 278, 189 S. E., 868, and approved in *S. v. Miller,* 220 N. C., 660, 18 S. E. (2d), 143, is required. There the Court said: "When the State relies upon circumstantial evidence for a conviction, the circumstances and evidence must be such as to produce in the mind of the jurors a moral certainty of the defendant's guilt, and exclude any other reasonable hypothesis. . . . See, also, *S. v. Madden,* 212 N. C., 56, 192 S. E., 859, where *Barnhill, J.,* fully discusses the subject. See, also, 23 C. J., 149, 150, 153."

It makes no difference whether the State is relying on circumstantial or direct evidence, or both, the evidence must produce in the mind of the jurors a moral certainty of the defendant's guilt, otherwise the State has not proven his guilt beyond a reasonable doubt.

The charge of his Honor in the trial below is free from prejudicial error.

We have examined the other assignments of error and they are without merit.

We find no error in the trial below as to the defendant Odell Brown.

The judgment as to Eugene Warren is reversed.

On Brown's appeal—No error.

On Warren's appeal—Reversed.

STEVE SPARKS, ADMINISTRATOR OF THE ESTATE OF JIMMIE RAY BUCHANAN, v. BROWN WILLIS.

(Filed 8 October, 1947.)

1. Trial § 22c—

When the entire evidence, giving plaintiff the benefit of every reasonable intendment and every reasonable inference therefrom, is sufficient to be submitted to the jury, the fact that the testimony of some of plaintiff's witnesses, standing alone, would seem to negate plaintiff's cause of action, does not justify nonsuit.

2. Automobiles § 18h (2)—Whether driver failed to keep proper lookout and control of car in vicinity of child held for jury.

The evidence tended to show that a child six years old ran into the street from defendant's right, that defendant applied the brakes of his truck 60 feet before the collision, turned his truck which had been traveling on its right side of the highway, to the left, and that the back wheels of the truck crushed the child some four or five feet from the driver's left of the highway. After the collision, the truck continued across the ditch on its left side of the highway and plowed through a hedge for a distance of 36 feet before coming to rest. There was evidence that the accident

occurred in a business or residential district, that the day was clear and that the driver did not sound his horn. G. S., 20-174 (e). Plaintiff's evidence did not show that the child ran into the street from concealment. *Held:* The granting of defendant's motion to nonsuit was error.

3. Automobiles § 17—

The driver of a motor vehicle who sees, or by the exercise of due care should see, a child on or near the traveled portion of a street, is under duty to use proper care in respect to the speed and control of his vehicle and maintain a vigilant lookout and give timely warning to avoid injury, recognizing the likelihood of the child's running into the street in obedience to childish impulse.

4. Automobiles § 8j—

The rule that a driver confronted with a sudden emergency is not held to the same degree of care as in ordinary circumstances but only to that degree of care which an ordinarily prudent person would use under similar circumstances, is not available to one who by his own negligence has brought about or contributed to the emergency.

APPEAL by plaintiff from *Clement, J.*, at July Term, 1947, of MITCHELL. Reversed.

This was an action to recover damages for the wrongful death of plaintiff's intestate, alleged to have been caused by the negligence of the defendant in the operation of a motor truck. At the close of plaintiff's evidence, the defendant's motion for judgment of nonsuit was allowed, and from judgment dismissing the action plaintiff appealed.

Proctor & Dameron, W. C. Berry, and McBee & McBee for plaintiff, appellant.

Williams, Cocke & Williams for defendant, appellee.

DEVIN, J. The only question presented by this appeal is whether the plaintiff has offered sufficient evidence of actionable negligence on the part of the defendant to carry the case to the jury.

The plaintiff's intestate, a child six years of age, was crushed to death under the rear wheels of a heavily loaded motor truck driven by the defendant. The fatal accident occurred on a street within the corporate limits of the Town of Spruce Pine. The street was paved, 18 feet wide, and extended in an east and west direction. The truck was proceeding east, and the child came from the south side of the street and was running diagonally north across the street when he came in contact with the truck. His body after he was run over lay four or five feet from the north side of the street. The tire marks on the pavement indicated the brakes on the truck were applied at a point 60 feet west of the place of collision; that the truck then ran sharply to its left, and after striking

the child, continued on across the ditch on the north side of the street, and plowed through a hedge for a distance of 36 feet before coming to rest. There was evidence that the truck before the accident was on its right side of the street, and traveling at a speed 25 to 30 miles per hour, upgrade, on a dry pavement, and that the day was clear. There was some evidence that the place where the accident occurred was within a business district, as defined by G. S., 20-38 (a), or at least within a residential district, G. S., 20-38 (w) 1. Under the statute then in force (1946) speed of a motor vehicle in excess of 20 miles per hour in a business district, or 25 miles per hour in a residential district would constitute *prima facie* evidence that the speed was unreasonable and unlawful. G. S., 20-141.

The evidence was that the child came from the south side of the street, probably from a garage, and was running across the street, apparently unconscious of the approach of the truck. One of the two witnesses who saw the child before he was killed observed him about the middle of the street, and the other saw him one-third of the way across, and both said that as the truck cut to its left the child ran into the truck and fell under the rear wheels. There was evidence that the horn was not sounded.

Though there were several automobiles parked on the south side of the street, they appear to have been parked off the street and west of the garage, nor did it appear from plaintiff's evidence that the child ran from behind either of these automobiles, or was concealed by them. Contributory negligence was not pleaded.

The plaintiff contends this testimony afforded some evidence of negligence on the part of the defendant in that he failed to keep proper lookout in traveling a public street, and drove his truck at an unreasonable speed, not only as shown by the testimony of the witnesses, but also as indicated by the momentum of the truck after the brakes were applied. He contends that the reasonable inference should be drawn from the testimony offered that the defendant saw the child on the street apparently oblivious of the approach of the truck, or in the exercise of due care should have seen him, in time to have taken measures to avoid the injury by slowing down and sounding his horn, as required by G. S., 20-174 (e), and that instead he turned his truck to the left across the street in the very direction in which the child was running.

While there was evidence from witnesses offered by plaintiff which, standing alone, would seem to exculpate the defendant from the imputation of negligence, and all the circumstances are not clear, yet considering the entire evidence under the rule that plaintiff is entitled on the motion to nonsuit "to every reasonable intendment and every reasonable inference therefrom" in his favor (*Moore v. Powell,* 205 N. C., 636, 172 S. E., 188), we reach the conclusion that there is here sufficient evidence to

withstand the defendant's motion and to entitle the plaintiff to have his case submitted to the jury.

It has been frequently declared by this Court to be the duty of one driving a motor vehicle on a public street who sees, or by the exercise of due care should see, a child on the traveled portion of the street or apparently intending to cross, to use proper care with respect to speed and control of his vehicle, the maintenance of vigilant lookout and the giving of timely warning, to avoid injury, recognizing the likelihood of the child's running across the street in obedience to childish impulses and without circumspection. *Yokeley v. Kearns,* 223 N. C., 196, 25 S. E. (2d), 602; *Smith v. Miller,* 209 N. C., 170, 86 S. E., 1036; *S. v. Gray,* 180 N. C., 697 (710), 104 S. E., 647.

True, the evidence would indicate that the defendant was confronted with a sudden emergency, and the general rule is that one confronted with a sudden emergency is not held by the law to the same degree of care as in ordinary circumstances, but only to that degree of care which an ordinarily prudent person would use under similar circumstances. *Hoke v. Greyhound Corp.,* 227 N. C., 412, 42 S. E. (2d), 593. "The standard of conduct required in an emergency as elsewhere is that of the prudent man." *Ingle v. Cassady,* 208 N. C., 497, 181 S. E., 562. "But," said *Justice Winborne* in *Hoke v. Greyhound Corp., supra,* "the principle is not available to one who by his own negligence has brought about or contributed to the emergency."

There was error in allowing defendant's motion for nonsuit, and the judgment dismissing the action is

Reversed.

STATE v. JOHN HORACE CORRELL.

(Filed 8 October, 1947.)

1. Homicide § 27f—Instruction held error in failing to charge upon defendant's evidence that he had abandoned fight and so notified adversary.

The State's evidence tended to show an altercation between defendant and deceased at deceased's place of business, that defendant struck deceased, whereupon deceased ordered defendant out of his place, and that defendant declined to leave, and both men obtained pistols. Defendant's evidence tended to show that after deceased procured his pistol defendant insisted no offense was intended, that both he and his companion assured deceased they would leave and were in the act of doing so when deceased advanced in an angry manner declaring his intention to shoot to kill, and that thereupon defendant shot deceased. An instruction stating the general principle of withdrawal and the State's contention that defendant was at fault and was the aggressor up to the time of the slaying, without

submitting defendant's contention that his evidence tended to show that he had in good faith abandoned the quarrel and so notified his adversary, *is held* reversible error.

2. Criminal Law § 53k—

Where the court gives the State's contentions on a particular aspect of the case it is reversible error for the court to fail to give defendant's contentions arising upon his evidence upon the same aspect.

APPEAL by defendant from *Sink, J.*, at March Term, 1947, of WILKES.

Criminal prosecution on indictment charging the defendant with the murder of one Charles Baker.

When the case was called for trial, the solicitor announced that he would not prosecute on the capital charge, but would ask for a verdict of murder in the second degree, or manslaughter, as the evidence might disclose. The defendant entered a plea of not guilty.

There is evidence tending to show that on the evening of 27 December, 1946, the defendant in company with one Faye Fields drove from Caldwell County in his brother's automobile to a night club in Wilkes County. This night club, known as 40 & 8 Club, was operated by Charles Baker and his brother. After having dinner and several drinks, the defendant and his companion started home, but discovered that the automobile in which they were traveling had a run-down battery. Charles Baker and a colored boy, Thomas Graham, undertook to push the car with Baker's pickup truck, but soon discovered the car would not run under its own power. All four of them then returned to the night club. Additional drinks were suggested; Baker and Correll, who were quite good friends, engaged in a game of high dice, beginning at $5 and winding up at $80 a shot. They fell to quarreling over the game, hot words ensued, and the evidence is in sharp conflict as to what transpired thereafter. Apparently each thought the other had taken too many drinks.

The State's evidence tends to show that Correll struck Baker in the face; whereupon Baker ordered him out of his place, but Correll declined to leave. Both men obtained guns or pistols. Correll fired the one and only shot, which proved to be fatal.

The defendant's evidence tends to show that both Correll and his companion, Faye Fields, remonstrated with Baker when he got his pistol, insisted that no offense was intended, and that Correll was not angry with him. They assured him they would leave and were in the act of doing so (Correll had just "finished putting Miss Fields' coat on"), when Baker advanced in an angry manner, declared his intention to shoot to kill, aimed at Correll and was trying to get Faye Fields from between them when Correll says he "throwed up his hand, shut his eyes, and pulled the trigger." Baker was hit in the forehead and died almost

instantly. Correll says, "I fired that shot because I was afraid—absolutely afraid he was going to kill me."

Verdict: Guilty of manslaughter.

Judgment: Imprisonment in the State's Prison for not less than 3 nor more than 7 years.

Defendant appeals, assigning errors.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

Fate Beal and Jones, Bowers & Pritchard for defendant.

STACY, C. J. The case turns on the adequacy and correctness of the following instruction to the jury: "If the jury shall find beyond a reasonable doubt that Charles Baker came to his death as a result of a pistol shot fired by the defendant, Johnny Correll, it is necessary, in order for the prisoner to show self-defense, the killing with a deadly weapon being proven beyond a reasonable doubt, or admitted by him, he must show absence of fault on his part, and that the killing was done while he was under actual fear or had reasonable grounds to fear that his life was in danger, or that he was in danger of great bodily harm, and that it was necessary, or that it reasonably appeared to him to be necessary, to kill his assailant to save his own life, or to protect himself from great bodily harm."

Immediately following this instruction, the court continued: "The State of North Carolina contends and insists under all the facts in this case that the defendant, Johnny Correll, was not without fault himself, but on the contrary was the aggressor and was so up until the time of the slaying of Charles Baker." At no time did the court submit to the jury for its consideration, the evidence of the defendant tending to show that he had in good faith abandoned the quarrel and had so notified his assailant, albeit the general principle of withdrawal was called to their attention.

The objection to the above instruction is, that it took from the defendant his perfect right of self-defense and overlooked the evidence which notified Baker that the defendant had in good faith quit the quarrel and was preparing to leave the club with his companion. 26 Am. Jur., 248. In this respect, the defendant says the charge contains an "aching void" as to his right to protect himself under the circumstances as they appeared to him at the time. *S. v. Pollard,* 168 N. C., 116, 83 S. E., 167. We are constrained to hold the exception well taken in the light of the pertinent decisions heretofore rendered in this jurisdiction. *S. v. Garland,* 138 N. C., 675, 50 S. E., 853; *S. v. Baldwin,* 184 N. C., 789, 114 S. E., 837; *S. v. Crisp,* 170 N. C., 785, 87 S. E., 511 (discusses differ-

ence between perfect and imperfect right of self-defense); *S. v. Kennedy,* 169 N. C., 326, 85 S. E., 42.

Speaking directly to the question here under consideration, *Hoke, J.,* in delivering the opinion of the Court in the last cited case, dealt with the matter in the following manner: "It may be well to note that the term 'quitting the combat,' within the meaning of these decisions, does not always and necessarily require that a defendant should physically withdraw therefrom. If the counter attack is of such a character that he cannot do this consistently with safety of life or limb, such a course is not required; but before the right of perfect self-defense can be restored to one who has wrongfully brought on a difficulty, and particularly where he has done so by committing a battery, he is required to abandon the combat in good faith and signify this in some way to his adversary. The principle here and the basic reason for it is very well stated in case of *Stoffer v. The State,* 15 Ohio St., 47: 'There is every reason for saying that the conduct of the accused relied upon to sustain such a defense must have been so marked in the matter of time, place, and circumstance as not only to clearly evince the withdrawal of the accused in good faith from the combat, but also as fairly to advise his adversary that his danger has passed and to make his conduct thereafter the pursuit of vengeance rather than measure taken to repel the original assault.'"

There is evidence on the present record which called for the application of this principle. The failure to make such application, in the light of the instruction given, constitutes error which entitles the defendant to another hearing. G. S., 1-180. Having given the State's contention that the defendant was the aggressor "up until the time of the slaying," it was but meet that the contrary contention of the defendant should have been given. And so the law is written. *Messick v. Hickory,* 211 N. C., 531, 191 S. E., 43. "When the judge assumes to charge, and correctly charges the law upon one phase of the evidence, the charge is incomplete unless embracing the law as applicable to the respective contentions of each party." Second Headnote, *Jarrett v. Trunk Co.,* 144 N. C., 299, 56 S. E., 937. In this respect, the case of *S. v. Fairley,* 227 N. C., 134, 41 S. E. (2d), 88, appears to be directly in point, and would seem to be controlling here.

For the deficiency in the charge, as indicated, a new trial will be awarded.

New trial.

W. E. DAVIS v. COCA-COLA BOTTLING COMPANY OF ASHEVILLE.

(Filed 8 October, 1947.)

1. Foods § 6c—

The doctrine of *res ipsa loquitur* does not apply to the bursting of a bottle of Coca-Cola, and standing alone, it is insufficient to make out a case of actionable negligence.

2. Same—

Evidence that plaintiff was injured by the internal explosion or bursting of a bottle of Coca-Cola and that other bottles prepared by the same manufacturer within a reasonable proximity in time had in like manner unaccountably exploded, *is held* sufficient to make out a case of actionable negligence.

3. Foods § 6b: Evidence § 26—

In an action to recover for injury sustained from the internal explosion of a bottle of Coca-Cola, evidence that other bottles prepared by defendant under substantially similar conditions had exploded, is competent when accompanied by proof of substantially similar circumstances and reasonable proximity in time.

BARNHILL, J., dissenting.

APPEAL by defendant from *Pless, J.*, at May Term, 1947, of HENDERSON. No error.

This was an action to recover damages for an injury to plaintiff's hand caused by the bursting of two bottles of Coca-Cola sold to him by the defendant.

The plaintiff testified that at the time of his injury he was proprietor of a restaurant in Hendersonville, and regularly during the summer of 1944 purchased from the defendant bottled Coca-Cola, delivered from its plant in cases of 24 bottles, to be sold customers in his place of business. About 14 August, 1944, in removing some of these bottles from a case to be placed in a large icebox or cooler he picked up two bottles in his right hand, and as he was putting them in the cooler, both bottles suddenly burst or exploded, the glass cutting his hand and wrist and causing serious injury. The two bottles had not touched anything before they burst, and seemed to "burst all to pieces." The cases of Coca-Cola when delivered were first placed by defendant's driver in an adjoining room, whence they were removed to the front room and bottles taken therefrom and put in the icebox. On this occasion four or five cases had been stacked up by defendant's driver, and the plaintiff removed the two cases on top and was putting the bottles from them in the icebox when the explosion occurred.

Another witness testified that he worked in plaintiff's restaurant during the summer of 1944, and observed that several of these Coca-Cola bottles purchased from defendant burst; that on one occasion as he was putting bottles of Coca-Cola from a case into the icebox, and had raised up and turned, a bottle burst. He testified he handled the bottles carefully, taking up one or two at a time, and laying them in the icebox. Three or four exploded during that summer in similar manner.

Another witness testified he was employed by plaintiff in his restaurant at the time; that three or four days after plaintiff was injured witness placed a number of bottles of Coca-Cola in the icebox and shortly thereafter heard an explosion and found a bottle had burst. The broken bottle was lying on the top of the other bottles.

It was admitted that defendant was engaged in the manufacture, bottling and sale of Coca-Cola "at all times mentioned herein," and, according to defendant's witness, with the same machinery and in same manner, particularly "between May 1st and August 30th, 1944."

Defendant's evidence tended to show that the bottles were of uniform size and shape, and were carefully inspected before filling; that the bottling operation was carried on by defendant in a careful manner and with approved machinery and in accord with the best methods; that the carbonated water was infused by machinery to the regulated pressure of 48 pounds to the square inch; that it would require from 440 to 700 pounds pressure to cause an internal explosion in a Coca-Cola bottle; and that the description of the breaking and its effect on the bottle (caps and bottoms intact) as testified, would indicate the breaking of the bottles was due to some other or outside cause and not to defective bottles or overcharge.

On issues submitted to the jury there was verdict that plaintiff was injured by the negligence of the defendant, and that he had suffered damage in the sum of $500. From judgment on the verdict, defendant appealed.

Monroe M. Redden and J. E. Shipman for plaintiff, appellee.
Williams, Cocke & Williams for defendant, appellant.

DEVIN, J. Plaintiff's action for damages for the injury caused by the bursting of bottles containing Coca-Cola which had been bottled and sold by the defendant was based on allegations of negligence, and defendant's appeal presents only the question whether sufficient evidence of negligence on the part of the defendant was offered to carry the case to the jury. Error is assigned in the denial of defendant's motion for judgment of nonsuit.

It is well settled in this jurisdiction that proof of injury caused by the explosion of a bottle containing a carbonated beverage, alone, would not be sufficient to make out a case of actionable negligence. The doctrine of *res ipsa loquitur* does not apply. *Dail v. Taylor,* 151 N. C., 284, 65 S. E., 1101; *Cashwell v. Bottling Works,* 174 N. C., 324, 93 S. E., 901; *Lamb v. Boyles,* 192 N. C., 542, 135 S. E., 464; *Perry v. Bottling Co.,* 196 N. C., 175, 145 S. E., 14.

But in cases where compensation is sought for injury caused by such explosion, the rule established by this Court is that when it is made to appear that other bottles filled by the same bottler, under similar circumstances, about the same time, have exploded, there is afforded some evidence of negligence sufficient to be submitted to the jury, as it would thus form the basis for the permissible inference that the bottler had not exercised that degree of care required of him under the circumstances. *Enloe v. Bottling Co.,* 208 N. C., 305, 180 S. E., 582; *Grant v. Bottling Co.,* 176 N. C., 256, 97 S. E., 27; *Cashwell v. Bottling Works, supra; Fitzgerald v. R. R.,* 141 N. C., 530, 54 S. E., 391. And this court has been careful, before permitting plaintiff's case to be submitted to the jury, to require that plaintiff offer evidence of other instances of bottles filled by defendant exploding under "substantially similar circumstances and reasonable proximity in time." *Ashkenazi v. Bottling Co.,* 217 N. C., 552, 8 S. E. (2d), 818. As tending to show actionable negligence on the part of the defendant, it is competent for plaintiff to show that products produced by the defendant under substantially similar conditions and sold by it at about the same time contained the same defects, such similar instances being allowed to be offered as some evidence of defendant's negligence at time of plaintiff's injury "when accompanied by proof of substantially similar circumstances and reasonable proximity in time." *Tickle v. Hobgood,* 216 N. C., 221, 4 S. E. (2d), 444; *McLeod v. Bottling Co.,* 212 N. C., 671, 194 S. E., 82; *Enloe v. Bottling Co.,* 208 N. C., 305, 180 S. E., 582; *Broadway v. Grimes,* 204 N. C., 623, 169 S. E., 194.

Under the rule laid down by this Court and uniformly followed in the cases cited, we conclude that the plaintiff has offered sufficient evidence to require submission of his case to the jury, and that defendant's motion for judgment of nonsuit was properly denied.

No error.

BARNHILL, J., dissenting: I am compelled to enter my dissent for the reason, in my opinion, there is no evidence in the record tending to show that the Coca-Cola handled by plaintiff at the time he was injured and that in the possession of the other witnesses who gave evidence of other instances of bursting bottles was manufactured or bottled at or about

the same time. This is an essential link in the circumstantial evidence tending to establish negligence on the part of defendant under the "other instances" doctrine. In the absence of such proof I vote to sustain the exception to the refusal of the court to dismiss as in case of nonsuit.

ERNIE R. MASSENGILL AND D. H. WEBB v. ALICE R. LEE.

(Filed 8 October, 1947.)

1. Injunctions § 4f—

Where an action to try title is pending, a judge of the Superior Court has judicial power to issue an order restraining a party to the action from further action or proceeding to obtain possession against a tenant of the adverse party. G. S., 1-493.

2. Sheriffs § 6a—

Execution of a judgment against defendant in summary ejectment to remove her from the land was issued and delivered to the sheriff. The sheriff failed to serve the execution because of an intervening order restraining the plaintiff from further prosecuting the summary ejectment, issued in a prior pending action to try title. *Held:* Motion to amerce the sheriff for failure to serve the execution was properly denied, since the sheriff had shown sufficient cause for failing to serve the execution. G. S., 162-14.

3. Injunctions § 12—

Where a temporary restraining order is issued by a judge having judicial power to issue the order, the remedy, if the order is erroneous, is by motion to dissolve or by appeal, and not by defiance.

APPEAL by plaintiff Massengill from *Harris, J.*, at April Term, 1947, of JOHNSTON. Affirmed.

This was a motion to amerce the Sheriff of Johnston County for failure to serve an execution issued from the court of a Justice of the Peace. From denial of the motion by the Justice of the Peace, plaintiff Massengill appealed to the Superior Court. In the Superior Court the Presiding Judge, on the facts found, denied the motion for judgment for the prescribed penalty, and the plaintiff Massengill appealed to the Supreme Court.

Leon G. Stevens for plaintiff Massengill.

Hooks & Mitchiner and Wellons, Martin & Wellons for C. L. Denning, Sheriff.

DEVIN, J. The findings of fact made by Judge Harris were based upon the record and the evidence offered, and we think are sufficient to support the order denying appellant's motion for judgment absolute against the Sheriff for the penalty prescribed by G. S., 162-14.

The pertinent facts were these: 10 December, 1945, the plaintiffs instituted summary ejectment proceedings in the court of a justice of the peace against defendant Alice R. Lee to remove her from a 20-acre tract of land. Judgment was rendered in favor of plaintiff Massengill for the possession of the land 18 December, 1945. Alice R. Lee gave notice of appeal but was unable to give the required $500 bond. At this time there was pending in the Superior Court of Johnston County a civil action entitled "Joseph R. Moore and others, *vs.* Ernie R. Massengill and D. H. Webb and others." This was an action to try the title to the described 20-acre tract of land upon allegation of title thereto in Moore and want of any title in Massengill and Webb. 18 December, 1945, on affidavit of Moore that defendant Alice R. Lee was in possession of the land with permission of Moore, and that Massengill and Webb were wrongfully attempting to gain possession of the land before the rights of the parties could be determined, Judge Harris issued a temporary restraining order restraining Ernie R. Massengill and D. H. Webb and their attorneys and agents from any other action or proceeding in attempting to take possession of said land or remove any person therefrom until the further order of the court. This restraining order was delivered to the Sheriff of Johnston County and by him personally served on the plaintiff Massengill, 21 December, 1945. 22 December, 1945, the plaintiff Massengill applied to the Justice of the Peace for execution against defendant Alice R. Lee to remove her from the land. This execution was issued and delivered to the Sheriff, who, knowing of the issuance of the restraining order, sought the advice of Judge Harris and was advised by him that service of the execution would be in violation of the restraining order. The Sheriff thereupon made return of the execution as not served on account of the restraining order of Judge Harris. Subsequently Alice R. Lee moved off the land and the restraining order was dissolved without prejudice. Nearly a year later, on 6 December, 1946, plaintiff Massengill made motion in the Justice's Court for amercement of the Sheriff for failure to serve the execution. This motion was denied by the Justice and on movent's appeal therefrom to the Superior Court, the Judge Presiding, Judge Harris, found the facts substantially as above set out and adjudged that the motion for judgment absolute against the Sheriff for the penalty prescribed by the statute be denied.

Plaintiff appellant based his motion for judgment against the Sheriff upon the view that Judge Harris was not holding court in Johnston County at the time of issuing the restraining order, and that the restrain-

ing order issued by him was void as attempting to restrain the action of a different court in a different action, citing *Childs v. Martin,* 69 N. C., 126. But the restraining order here was issued from the Superior Court by a judge thereof against Massengill and Webb who were parties to the action in which it was issued, and in respect to the subject matter of that action, to preserve the *status quo.* Whether the restraining order was properly issued or not, it could not be ignored by plaintiff Massengill. Judge Harris, on proper showing and in accordance with the statutes, had the judicial power to issue the restraining order (G. S., 1-493; *Hamilton v. Icard,* 112 N. C., 589, 17 S. E., 519), but if the order was erroneously issued, the remedy was by motion to dissolve, or appeal, or by action on the injunction bond, and not by open defiance. *Nobles v. Roberson,* 212 N. C., 334, 193 S. E., 420. The Sheriff, having knowledge of the terms of the order, had "sufficient cause" (G. S., 162-14), as held by the court below, to decline to serve an execution procured by the plaintiff in violation of the order restraining him from doing what he was thereby attempting to do.

The ruling of Judge Harris in denying the motion to amerce the Sheriff must be

Affirmed.

STATE v. SANFORD E. SNEAD.

(Filed 8 October, 1947.)

1. Criminal Law § 77d—

The record imports verity and the Supreme Court is bound thereby.

2. Same: Homicide § 16: Criminal Law § 28—

Defendant's plea of not guilty puts the credibility of the State's evidence in issue, and where the defendant does not go upon the stand but the State introduces testimony of an alleged confession made by defendant that he killed deceased with a deadly weapon, it is error for the court to assume that the testimony is true and instruct the jury that the burden is upon defendant to rebut the presumption arising from a killing with a deadly weapon, without predicating such instruction upon a finding by the jury of the requisite facts.

APPEAL by defendant from *Edmundson, Special Judge,* at March Criminal Term, 1947, of HARNETT.

Criminal prosecution on indictment charging the defendant with the murder of one Ada Massey.

When the case was called for trial, the solicitor announced that he would not prosecute on the capital charge, but would ask for a verdict

of murder in the second degree or manslaughter as the evidence might disclose. The defendant thereupon entered a plea of not guilty.

The record reveals that on 26 May, 1946, about the hour of 6:00 a.m., the lifeless body of Ada Massey was found by a public officer on Broad Street in the Town of Dunn, near the Paste Board Inn. There was a deep stab wound on the left side of her chest, which apparently had been inflicted with some sharp instrument. The wound extended to the apex of the heart. A pair of scissors lay on the ground three or four inches from the dead woman's hand. The defendant had been in company with the deceased the night before. He was later heard to say, "I killed Ada."

In an alleged confession, admitted over objection, the defendant is quoted as saying: "I called Ada out (of the Paste Board Inn), and when she came out she came out with a pair of scissors in her hands and started running me. . . . She struck at me with the scissors and I cut her under the left arm; she gasped, let out a scream, and fell. . . . I cut her with the red-handle knife."

The defendant offered no testimony. In the court's charge to the jury, reference is made to witnesses for the defendant. However, the defendant himself did not take the witness stand.

Verdict: Guilty of murder in the second degree.

Judgment: Imprisonment in the State's Prison "to serve a term of 15 to 20 years."

The defendant appeals, assigning errors.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

J. R. Young and Charles Ross for defendant.

STACY, C. J. We are constrained to hold the following instruction for error: "If you are not satisfied beyond a reasonable doubt that the defendant is guilty of murder in the second degree, as the Court will instruct you what constitutes murder in the second degree, you would consider whether from all the facts in this case, both the State and the defendant, the defendant has offered such evidence as would reduce the crime with which he is charged to that of manslaughter. And in that case, gentlemen of the jury, the burden is upon the defendant to satisfy you from the evidence introduced by himself, or the evidence introduced by the State, or lack of evidence, that there was no malice in the killing, and thereby mitigate or reduce the crime charged to that of manslaughter."

In this instruction, the court seems to have overlooked, for the moment, the defendant's plea of not guilty, which called in question the State's

evidence and required a finding by the jury that the defendant intentionally killed the deceased with a deadly weapon before the presumption of an unlawful homicide with malice could apply, *S. v. Floyd,* 226 N. C., 571, 39 S. E. (2d), 598, and place upon the defendant the burden of rebutting such presumption—in part, if he would reduce or mitigate the offense to manslaughter, and altogether if he would gain an acquittal. *S. v. Ellison,* 226 N. C., 628, 39 S. E. (2d), 824; *S. v. Burrage,* 223 N. C., 129, 25 S. E. (2d), 393; *S. v. Benson,* 183 N. C., 795, 111 S. E., 869.

There was no admission on the hearing that the defendant slew the deceased with a deadly weapon, yet he was required to handle the laboring oar in the absence of a finding by the jury that he was "guilty of murder in the second degree." This was an inadvertence, or else some error has crept into the transcript. In either event, a new trial seems necessary. We must take the record as we find it. *Abernethy v. Burns,* 210 N. C., 636, 188 S. E., 97. It is not now subject to change or correction. *S. v. Moore,* 210 N. C., 686, 188 S. E., 421. It imports verity, and we are bound by it. *S. v. Dee,* 214 N. C., 509, 199 S. E., 730; *S. v. Brown,* 207 N. C., 156, 176 S. E., 260.

The evidence of what the defendant is alleged to have said about the killing was challenged on the hearing, and the court was in error in assuming this evidence to be true. The plea of traverse put its credibility in issue. *S. v. Stone,* 224 N. C., 848, 32 S. E. (2d), 651; *S. v. Peterson,* 225 N. C., 540, 35 S. E. (2d), 645; *S. v. Davis,* 223 N. C., 381, 26 S. E. (2d), 869; *S. v. Singleton,* 183 N. C., 738, 110 S. E., 846.

For error in the charge, as indicated, a new trial will be awarded.

New trial.

STATE v. WORTH WEAVER.

(Filed 8 October, 1947.)

1. Criminal Law § 52a—

A motion to nonsuit, made for the first time at the conclusion of all the evidence, does not present the sufficiency of the evidence for review, it being incumbent upon the defendant to move for nonsuit at the close of the State's evidence, note exception if overruled, and, if he introduce evidence, to renew the motion at the close of all the evidence, and note exception if overruled, and assign error based on the latter exception. G. S., 15-173.

2. Homicide § 27e—

A new trial is awarded in this case for that according to the record the court used the word "murder" rather than the word "manslaughter" in its charge upon the offense of manslaughter.

3. Criminal Law § 77d—

The Supreme Court is bound by the record.

APPEAL by defendant from *Burgwyn, Special Judge,* at Special Term, February, 1947, of HARNETT.

Criminal prosecution tried upon indictment charging the defendant with the felonious slaying of one Roy L. King.

Verdict: Guilty of manslaughter. Judgment: Imprisonment in the State's Prison for a term of not less than seven nor more than fifteen years. The defendant appeals, assigning errors.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

Neill McK. Salmon for defendant.

DENNY, J. The defendant excepts to the refusal of the court below to grant his motion for judgment as of nonsuit. While we think the evidence offered in the trial below is ample to sustain his Honor's ruling, were it otherwise, the ruling is not presented for review on this appeal. It does not appear from the record that the defendant moved for judgment as of nonsuit at the close of the State's evidence. The defendant offered evidence and at the close of all the evidence the record states the defendant renewed his motion for judgment as of nonsuit, which was denied and exception noted.

A motion for judgment as of nonsuit, under G. S., 15-173, must be made at the close of the State's evidence, exception noted, if overruled, and, if the defendant introduces evidence the motion to dismiss should be renewed at the close of all the evidence, exception again noted, if overruled; and upon appeal from the refusal to dismiss, the assignment of error should be based upon the latter exception. *S. v. Bittings,* 206 N. C., 798, 175 S. E., 299; *S. v. Ormond,* 211 N. C., 437, 191 S. E., 22; *S. v. Perry,* 226 N. C., 530, 39 S. E. (2d), 460.

Among the defendant's other assignments of error are the following portions of his Honor's charge:

(1) "Now, generally speaking, murder is the unlawful killing of a human being without malice, and without premeditation and deliberation, and is of two kinds, voluntary and involuntary, depending on whether the killing is intentional or not intentional. Voluntary murder is intentional homicide in sudden passion or heat of blood upon provocation and not with malice aforethought or with premeditation or deliberation. Involuntary murder you are not concerned with. The most common instance of involuntary murder is upon anger suddenly aroused by provocation which the law does not consider justification and the killing

being done before passion subsides. In such case, it is the anger so aroused which is held to misplace malice and reduces the unlawful homicide to manslaughter."

(2) "The State contends that you should be satisfied not beyond a reasonable doubt, but that you should at least be satisfied that he did it in anger and without justification and should find him guilty of manslaughter."

(3) "The State contends, on the other hand, that you should receive with a grain of salt the testimony of Lonnie Moore."

(4) "The defendant contends that Lonnie Moore, the main witness for the State, should not be believed because of contradictory evidence. Defendant also contends that the jury should not believe the evidence of Spivey, who was an uncle of this boy, and the Carroll boys, who were influenced by him."

It appears from the record that while Lonnie Moore was subpoenaed by the State, he was the only witness who testified for the defendant.

In fairness to the able Judge who tried this case, we think it apparent that errors have crept into the record. The appeal is presented on an agreed case. The trial Judge has had no opportunity to review it. Therefore, we deem a discussion of these assignments of error would serve no useful purpose. Nevertheless, we are bound by the record, and there must be a new trial. *S. v. Wyont,* 218 N. C., 505, 11 S. E. (2d), 473; *S. v. Morgan,* 225 N. C., 549, 35 S. E. (2d), 621; *S. v. Johnson,* 227 N. C., 587, 42 S. E. (2d), 685; *S. v. Snead, ante,* 37.

New trial.

MASON P. THOMAS, PETITIONER, v. JAMES A. BAKER, PAUL W. BAKER, ETHEL V. BAKER, DOROTHY B. BILLINGS, JANE GRIMES THOMAS, J. C. GREGSON AND NYDIA H. BRAY, RESPONDENTS.

(Filed 8 October, 1947.)

Corporations § 5b—

Where, in a summary proceeding under G. S., 55-114, the court enters judgment continuing corporate officers in their respective offices, such order necessarily carries with it authorization and direction that they should continue to exercise the same functions and receive the same emoluments as prior to controversy, but the corporation as such is not a proper party and the jurisdiction of the Superior Court to grant relief against the wrongful interference with the officers in the performance of their duties or the wrongful refusal of an officer to perform the duties of his office cannot be invoked in such proceeding.

APPEAL by petitioner from *Williams, J.,* at Chambers in Sanford, N. C., 20 May, 1947, CHATHAM.

Proceeding under G. S. 55-114 here on appeal at the Spring Term 1947, *Thomas v. Baker,* 227 N. C., 226. When it came on for judgment on the opinion certified from this Court, petitioner tendered judgment including a finding "that the services of counsel and auditors are reasonably necessary to the proper and normal operation of the business of the Hadley-Peoples Manufacturing Company"; that petitioner, acting under the authority vested in him, has employed counsel and auditors who have not been paid for their services, and petitioner has not received the salary due him; and adjudicating in part the authority of the president, particularly in respect to his power to employ counsel, auditors, and other personnel, and to direct the disposition of corporate funds in discharge of obligations incurred in the normal and regular operation and management of the corporation business.

The court declined to sign the tendered judgment. It instead entered judgment modifying the former judgment of the Superior Court in accord with the opinion of this Court. Petitioner excepted and appealed.

Brooks, McLendon, Brim & Holderness for appellant petitioner.
Tillett & Campbell for respondent appellee.

BARNHILL, J. When for any cause there is a dispute with reference to the election of officers or directors of a corporation which threatens the orderly operation of the corporate affairs, G. S. 55-114 makes provision for a summary proceeding to avoid temporary corporate paralysis. When its provisions are invoked, the court's jurisdiction is confined within a very narrow compass. It may (1) order a new election, or (2) declare the result of an election already had, or (3) "continue the directors or officers, as the case may be, until a new election shall be held."

The corporation as such is not a proper party and the court has no authority to enter any order or decree concerning any of the internal affairs of the corporation or directing the manner in which it shall function. *Thomas v. Baker,* 227 N. C., 226.

Pending settlement of the controversy the court may continue the present officers in their respective offices. This it has done. And this "necessarily carries with it authorization and direction that they should continue to exercise the same functions and receive the same emoluments which pertained to their respective offices immediately prior to the controversy which resulted in the stalemate." *Thomas v. Baker, supra.* But it may not spell out those duties or direct the manner of their performance. The court, for the time being, provides the official family; the pertinent statutes, corporate charter, bylaws, and minutes define the authority to be exercised by each member thereof.

If the defendant Baker is wrongfully interfering with the officers in the discharge of their duties, or the treasurer refuses to perform his duties as such, as alleged by petitioner, the Superior Court has full power, in a proper action, to grant adequate relief. But here, in this proceeding, the court has gone as far as the statute permits.

The judgment below is

Affirmed.

ENOCH DUNN v. LUCINDA BREWER ET AL.

(Filed 8 October, 1947.)

1. Wills § 4: Frauds, Statute of § 10—

A parol contract to devise realty in consideration of personal services rendered and to be rendered, is unenforceable against a plea of the statute of frauds.

2. Executors and Administrators § 15d—

Recovery cannot be had upon *assumpsit* or *quantum meruit* for personal services rendered in reliance upon an oral contract to devise when the action is instituted more than three years after the death of the promissor and the statute of limitations is pleaded in bar. G. S., 1-52.

APPEAL by plaintiff from *Carr, J.*, at March Term, 1947, of CHATHAM.

Civil action to recover for services rendered by plaintiff to E. B. Brewer and wife, Lucinda Brewer, under oral contract made in 1930 whereby plaintiff was to move on to the lands of E. B. Brewer, provide for him and his wife so long as they should live, and at his death, all the property of E. B. Brewer was to become the property of the plaintiff in satisfaction of services rendered and to be rendered.

It is alleged and in evidence that plaintiff has performed his part of the contract; that E. B. Brewer died in 1936, devising his property to his wife for her life, remainder to Willie A. Phillips, and without leaving plaintiff any of his property; that plaintiff has continued to perform his part of the contract. Wherefore, plaintiff brings this action to protect his rights and to subject the lands of the deceased to the payment and satisfaction of his claim. Summons was issued herein on 2 May, 1946.

The defendants answered, denied the allegations of contract as set out in the complaint, and pleaded the statute of frauds and the statutes of limitation.

At the March Term, 1947, Chatham Superior Court, the death of Lucinda Brewer was suggested and her administrator was brought in as a party defendant.

Plaintiff was allowed recovery against the estate of Lucinda Brewer for services rendered during the three years next immediately preceding her death, but he was not allowed to take anything against the estate of E. B. Brewer or against the defendant, Willie A. Phillips.

From the judgment entered, the plaintiff appeals, assigning errors.

H. F. Seawell for plaintiff, appellant.

Wade Barber for defendants, appellees.

STACY, C. J. The appeal poses the question whether the plaintiff is entitled to judgment against the estate of E. B. Brewer. The trial court answered in the negative, and we approve. Plaintiff is discontent with his limited recovery against the estate of Lucinda Brewer.

Recovery was properly denied on plaintiff's alleged contract as against the estate of E. B. Brewer, because it rests in parol and is not subject to specific enforcement. *Coley v. Dalrymple,* 225 N. C., 67, 33 S. E. (2d), 477; *Neal v. Trust Co.,* 224 N. C., 103, 29 S. E. (2d), 206; *Daughtry v. Daughtry,* 223 N. C., 528, 27 S. E. (2d), 446; *Price v. Askins,* 212 N. C., 583, 194 S. E., 284.

Recovery was likewise properly denied as against the estate of E. B. Brewer on *assumpsit* or *quantum meruit,* since the action was instituted more than nine years after the right accrued and the defendants have interposed a plea of the three-years statute of limitations. G. S., 1-52; *Wood v. Wood,* 186 N. C., 559, 120 S. E., 194; *McCurry v. Purgason,* 170 N. C., 463, 87 S. E., 244, Ann. Cas. 1918-A, 907; *Miller v. Lash,* 85 N. C., 52, 39 Am. Rep., 678; McIntosh on Procedure, 161.

There was no error in disallowing the plaintiff's claim as against the estate of E. B. Brewer.

Affirmed.

MRS. KATE H. HALL v. ZEBULON ROBINSON, N. CURTIS ROBINSON, W. ALONZO ROBINSON, INDIVIDUALLY, AND AS PARTNERS, ROBINSON BROTHERS CONTRACTORS, INCORPORATED, A CORPORATION, AND A. T. TISDALE, ALIAS A. L. TISDALE.

(Filed 8 October, 1947.)

1. Appeal and Error §§ 23, 31g—

Where the sole exception is to the judgment as it appears in the record a separate assignment of error is not necessary, and motion to dismiss for failure of appellant to make such assignment of error is without merit.

2. Appeal and Error § 10b—

Where appellant fails to serve case on appeal within the time allowed, appellee's motion to strike the case on appeal from the files is made as a matter of right and must be allowed.

3. Appeal and Error § 31b—

Absence of case on appeal is not ground for dismissal of the appeal, but the Supreme Court will review the record proper. However, if no error appears therein the judgment of the lower court must be affirmed.

DEFENDANT'S appeal from *Gwyn, J.*, at January Term, 1947, of BUNCOMBE.

Williams, Cocke & Williams for plaintiff, appellee.
Guy Weaver for defendants, appellants.

SEAWELL, J. The plaintiff brought this action to have the operation of a woodworking plant belonging to the defendants and adjacent to her residence in a predominantly residential district in Asheville abated, alleging that the noise and dust from the plant was such as to cause her substantial physical discomfort in the enjoyment of her property, and asked for damages.

The verdict and judgment were adverse to defendants and they gave notice of appeal and were given 60 days to serve case on appeal. They took 62. In acceptance of the case the plaintiff's counsel reserved all rights as to a motion to strike or dismiss, and this is confirmed by stipulation of counsel in the record.

The plaintiff's appeal was brought forward here by stipulation of counsel in defendants' record and is argued both orally and by brief.

The plaintiff moved in Superior Court to strike the case on appeal from the files and to dismiss the appeal. The judge found every fact necessary to support the motion fully and completely with the plaintiff and thereupon declined the motion, entering judgment accordingly. There is only one exception—to the judgment as it appears in the record.

While the defendant has made no such motion, attention has been called to the fact that the plaintiff made no separate assignment of error and it has been suggested that the Court might *ex mero motu* dismiss plaintiff's appeal on that ground. This, however, would be contrary to the practice of the Court and established precedent.

It is held in North Carolina, *Bessemer Co. v. Piedmont Hardware Co.*, 171 N. C., 728, 88 S. E., 867, and in *Wallace v. Salisbury*, 147 N. C., 58, 60 S. E., 713, that no separate assignment of error is necessary where there is but a single exception and this is presented by the record, nor where the case is heard below on an agreed statement of facts, nor where

the exception to the judgment is the only one taken—and the appeal itself is an exception thereto. In accord with this rule are *Allen v. Griffin,* 98 N. C., 120, 121, 3 S. E., 837, and *Lytle v. Lytle,* 94 N. C., 522, 523; McIntosh, North Carolina Practice and Procedure, Sec. 679, and cases cited.

Plaintiff's motion to strike defendants' case on appeal from the files is made as a matter of right and involves no discretion of the judge. The facts are undisputed; and the Court is unable to condone the error or deny the relief asked for by the plaintiff.

But the loss of the case on appeal does not require the dismissal of defendants' appeal. They have brought the record proper here and were entitled, if they so desired, to be heard upon that; or, in proper cases the Court will undertake *suo sponte* to review the record proper. However, the objections of the defendants do not lie within the compass of the record proper, but in the *postea,* which they do not present; and we find nothing in the record proper to defeat affirmation of the judgment.

The motion to dismiss defendants' appeal is denied. The judgment of the court below is affirmed. *Lawrence v. Lawrence,* 226 N. C., 221, 222; *Bell v. Nivens,* 225 N. C., 35, 33 S. E. (2d), 66; *Pruitt v. Wood,* 199 N. C., 788, 156 S. E., 126.

Motion to dismiss denied.

Judgment affirmed.

IN THE MATTER OF THE CARE AND CUSTODY OF JAMES DUPREE MCGRAW, AN INFANT.

(Filed 8 October, 1947.)

Habeas Corpus § 3—

Habeas corpus will not lie at the instance of the father of an illegitimate child to obtain its custody and control from its mother. Neither G. S., 17-39, nor G. S., 50-13, is applicable.

PETITIONER'S appeal from *Pless, J.,* 19 July, 1947, POLK Superior Court.

M. R. McCown for petitioner, appellant.

W. Y. Wilkins, Jr., for respondent, appellee.

SEAWELL, J. The petitioner, Willie Spurlin, claiming to be the father of the illegitimate child whose custody is in controversy, sued out *habeas corpus* to take that custody from the mother. While he alleges facts which would support the jurisdiction of the juvenile court—see G. S.,

110-23, *et seq.*—he rests his cause of action on the superior right of the father to the custody of his child; and in his appeal from an adverse ruling of the Superior Court, asks adoption of that theory here.

Outside of the statutes which make the writ of *habeas corpus* available to determine the custody of a child between husband and wife when living separate and apart from each other (G. S., 17-39), or when divorced (G. S., 50-13), and for other special statutory purposes, the use of the writ has been to determine and relieve against illegal restraint; and perhaps upon this principle the use has been enlarged to cover contests between the father (the wife and mother being dead) and grandparents for the custody of his children (*In re Hamilton,* 182 N. C., 44, 108 S. E., 305; *In re TenHoopen,* 202 N. C., 223, 162 S. E., 619), in recognition of the father's superior right to the custody of the child; and perhaps other cases where the *prima facie* right of the legitimate parents to the custody of the child has been interfered with by a stranger. In these and similar cases legitimate children were involved. The statutes above cited refer to children born to married persons and have no application to the case at bar.

In *Shelton's case,* 203 N. C., 75, 164 S. E., 332, where the controversy was between the mother of an illegitimate child and parties to an invalid adoption, *Justice Connor,* speaking for the Court, said:

> "It is well settled as the law of this State that the mother of an illegitimate child, if a suitable person, is entitled to the custody of the child, even though there be others who are more suitable," citing *Ashby v. Page,* 106 N. C., 328, 11 S. E., 283.

To the same effect is *In re Jones,* 153 N. C., 312, 69 S. E., 217, in which case *Justice Hoke,* writing the opinion and speaking of the right of legitimate parents, says:

> "In the case of illegitimate children this same *prima facie* right exists, perhaps to a lesser degree, in the mother," citing *Ashby v. Page, supra,* and *Mitchell v. Mitchell,* 67 N. C., 307.

It is easy to see why the policy of the law, in its development from both circumstance and necessity, has not thus far conferred the superior right of custody on the non-legitimate father of a bastard child, at least while the latter remains *nullius filius.* We have not been presented with convincing authority to sustain the jurisdiction of the Superior Court in behalf of the petitioner; and we do not feel that the exigency of decision requires us to discuss that of the Juvenile Court.

The appeal is

Dismissed.

MARY FRANCES DAVIS v. LACY H. DAVIS.

(Filed 15 October, 1947.)

1. Evidence § 32—

In an action to establish a resulting trust, defendant's objection to testimony of a statement made by decedent that she owned the *locus* is untenable when the testimony discloses that defendant was present at the time and made no contrary statement.

2. Appeal and Error § 39e—

The admission of testimony over objection cannot be held prejudicial when testimony of the same import is theretofore or thereafter admitted without objection.

3. Trusts §§ 4c, 5c—

A suit to declare a resulting or constructive trust may be maintained by the sole heir at law of the person wronged.

4. Trusts §§ 4b, 5b—

A resulting or constructive trust is created as of the time title is wrongfully taken in the name of the trustee.

5. Trusts §§ 4c, 5c—

Plaintiff, sole heir at law of intestate, introduced evidence tending to show that intestate, while incapacitated by illness, gave defendant funds to purchase for intestate a certain lot, that defendant, who was intestate's brother-in-law, took title in himself, and, purporting to act as intestate's agent, built a house thereon with funds supplied by intestate, representing to her that title was in her name. *Held:* The evidence, though contradicted by that of defendant, is sufficient to be submitted to the jury, both on the theory of a resulting trust on the principle of following the funds, and on the theory of a constructive trust on the principle that defendant was a trustee *ex maleficio.*

DEFENDANT'S appeal from *Hamilton, Special Judge,* at May Term, 1947, of CRAVEN.

The plaintiff, alleging herself to be the sole heir and distributee of the estates of her father, Isiah Davis, and her mother, Sadie Davis, wife of Isiah, both of whom are now deceased, brought this action to impress a trust upon lands alleged to have been purchased by defendant with the funds of her mother, entrusted to him for purchase in her own behalf, the title to which property, it is alleged, he wrongfully took in his own name. The defendant was brother of Isiah Davis.

It is alleged in the complaint that Sadie Davis was the beneficiary in certain insurance policies on the life of her husband, the proceeds of which were at the death of Isiah Davis received by her and turned over to her brother-in-law, the defendant, for deposit in the bank. That during said time Sadie Davis was sick and unable to attend to her affairs,

and much of the time bedridden; and had to depend upon her brother-in-law for advice and transacting her business affairs; that through the advice of the defendant she turned over to him the money she acquired from her husband's insurance to be invested by him in a certain lot, subject to this controversy, the purchase to be made in her name and the title made to her; that the land was purchased with the funds thus entrusted to the defendant, but that defendant, in violation of his duty to her, took title in his own name.

It is alleged that Sadie Davis was too ill to examine the papers and was unaware of the wrongful action of defendant up to the time of her death; and that the facts were not discovered until some time thereafter. It is further alleged that a store building which had been constructed on an adjoining lot of a third party by Isiah Davis, the right having been recognized by said third party, was removed to the lot in controversy; and that the defendant at the instance of plaintiff's mother, caused to be erected a residence on the said lot; and that during the construction thereof the said Sadie Davis furnished to defendant from time to time funds which were used in the construction of the said residence.

The defendant denied the principal allegations of the complaint; alleged that the money expended for both the lot and the construction of the house were his own private funds; that the removal of the store from the property of Alice Davis to the lot now in controversy was merely permitted by him, and to this building he now asserts no claim.

On the trial the defendant demurred *ore tenus* to the complaint as not stating a cause of action, which demurrer was overruled, and the defendant excepted.

Mary Frances Davis testified that she was the daughter of Isiah Davis and Sadie Davis, with whom she formerly lived. (It is admitted that Mary Frances Davis is the only heir of Isiah Davis and Sadie Davis.) That her father had two insurance policies on his life in the Metropolitan Insurance Company amounting to $680, and the insurance on the life of her brother Samuel; (it is admitted that this money was paid and placed in the bank in the name of Sadie Davis in the amount of $1,150). That at the time of the death of the father, her mother was living on the Alice Davis property across the street from the land in question, upon which Sadie Davis made arrangements to build a home, and that this was purchased by money furnished by Sadie Davis. Witness stated that she and the defendant came to New Bern to see Mr. O'Hara and wife about the place her mother wanted to buy, and that they gave him the money and he told witness to come down to the office so that he could get the deed straightened out. The next day, however, her mother was sick and witness had to stay with her, and Lacy, the defendant, went. That the land was purchased by Lacy Davis from R. O'Hara and wife and this

witness was with him when arrangements for the purchase were made. That Lacy Davis showed the deed to her mother but kept it in his possession in his safe, telling her that the deed was made in her name. Her mother requested Lacy to manage her business.

The witness testified that defendant made arrangements to get lumber, brick, etc., for building a home and her mother gave checks to him for payment on several occasions.

Lacy was helping to build, but all the workmen were paid by Sadie Davis, and within a month from the purchase plaintiff and her mother moved into the new house where they resided until the death of her mother. About a month after the death of Sadie Davis, Lacy Davis and his wife moved in with the plaintiff and while they were living there the premises were damaged by fire and repairs and additions were made to the house. That this addition and repair was paid out of plaintiff's own money which she had received from insurance upon the life of her mother, Sadie Davis.

After rebuilding, the defendant and his wife again returned to the house and continued to reside there until serious trouble with the defendant caused her to leave the home, to which she had not returned.

The witness stated that she was 16 years old when her mother died, and defendant was appointed as her guardian. Lacy Davis paid the burial expenses of plaintiff's mother and filed his final account as guardian in which account he admitted that he owed $453.35; that in the settlement she received $11.20 and had previously received $120.

T. C. Fitzgerald, testifying for plaintiff, stated that he was employed by the Branch Banking & Trust Company, and Assistant Trust Officer since 1930. That he had in his hands the ledger accounts of Frances and Sadie Davis from August, 1940, to July 12, 1941, and of Frances Davis from July 12, 1941, to October 1, 1941, and that both accounts are now closed. The ledger sheets in the accounts of Frances Davis and Sadie Davis, and for Sadie Davis and L. H. Davis were introduced in evidence. The account shows a withdrawal of $225 on the 15th day of October, 1940.

Ollie Lee, testifying for plaintiff, stated that she frequently visited the Davis home and knew that Sadie Davis received money from the insurance companies, Elks Lodge, and the Government, and received from various policies $245, $448, and $100, and that she received from insurance on Samuel $650.

The following question was asked this witness on principal examination:

> Question: "Did you hear Sadie, or did Sadie tell you what she intended to do with the money?"

Question and answer were admitted over defendant's objection and exception.

> Answer: "Witness states that Sadie told her in the presence of Mary Frances and Lacy Davis that she was going to buy a lot and build a house for Mary Frances. That Sadie moved into the house after it was finished, with her daughter Frances and no one else, until she died in July, 1941. That after the death of Sadie, Lacy stayed up there at night with Mary Frances about two months before he and his wife moved in."

Miles Lee, surviving brother of Sadie Davis, testified that Sadie told him that she had collected some money and was going to build a house on the O'Hara place and that Lacy got the deed for her. Sadie Davis told this witness that she wanted Lacy to be guardian for Mary Frances and turned everything over into his hands.

Jarvis Tankard testified that he knew both Isiah and Sadie Davis. At the time of Isiah's death the Davis' were living on the Alice Davis place. At the time of her death Sadie Davis was living with Mary Frances in her new home. She wanted the house so her daughter Mary Frances would not be out of doors. That she told witness that she was building the house for her daughter.

Upon the conclusion of plaintiff's evidence the defendant moved for judgment of nonsuit, which was overruled. Defendant excepted.

Lacy Davis, the defendant, testified that he was appointed by the court as guardian for Mary Frances Davis. That he purchased the lot in controversy from O'Hara and wife, agreeing to pay $215 for it, paying $115 in cash and the balance with a deed of trust to Pearl J. Martin, Trustee; that the cash was paid by his wife in his presence. That he paid for the lot out of his own funds and constructed the residence thereupon the same way, borrowing money in order to do so. That he paid out money for the support of Frances Davis, his ward, under order of court, closed his guardianship and paid the remainder in his hands thereupon.

Defendant offered in evidence the deed of O'Hara and wife to himself, of date October 15, 1940; and therewith certain deeds of trust to Martin, Trustee for O'Hara; to William Dunn, Trustee, Morris Plan Bank, and like instruments purporting to be in connection with borrowing money.

The defendant testified that the lot was purchased, the residence thereon constructed and repaired and enlarged out of his own funds and largely the money borrowed from the Morris Plan Bank; and that neither Sadie nor Mary Frances had ever given him a penny towards the house.

Defendant then offered evidence tending to show the disposition of money in his hands as guardian of plaintiff, covering substantial amounts for other purposes, testifying that the fund was thus absorbed.

Mrs. Lacy Davis, wife of the defendant, testified in corroboration of his statement that the money which went into the purchase of the lot and construction of the house was paid for by defendant principally with loans from the Morris Plan Bank.

Plaintiff, in rebuttal, testified that the first money paid on the lot was $215 which came from the Branch Banking & Trust Company and was her mother's money. This transaction took place at O'Hara's house and witness saw defendant give him the money and get a receipt for the $215. O'Hara told him to come down the next day to get the deed. Witness did not know that defendant had given a mortgage. At the conclusion of all the evidence the defendant demurred to the evidence and moved the court for judgment as of nonsuit, which was denied, and defendant excepted.

The following issue was submitted and answered as indicated:

1. Was the land in question, title to which was taken in the name of the defendant, purchased with money belonging to Sadie Davis, deceased, mother of the only heir at law and next of kin, the plaintiff? Answer: Yes.

There ensued the judgment upon the verdict declaring the plaintiff to be the owner of the premises with the improvements and the appurtenances thereon erected and permanently fixed, and that a writ of possession be issued to dispossess the defendant and put plaintiff in possession of the property. A further paragraph of the judgment declared Lacy H. Davis to be the holder of the title as trustee of and for Mary Frances Davis, "which trusteeship is now terminated, and that the said Mary Frances Davis is the owner in fee of the said described property, together with the improvements thereon." It was ordered that a transcript of the judgment be recorded on the Book of Deeds in the registry of Craven County, and reference to be made thereon upon the margin of the book and page upon which said deed from R. O'Hara and wife to said Lacy H. Davis is now recorded.

The defendant, having made a motion to set aside the verdict because of errors committed upon the trial and having noted his exception to the refusal of said motion, in apt time objected and excepted to the judgment aforesaid, and appealed to this Court, assigning errors.

H. P. Whitehurst and R. O'Hara for plaintiff, appellee.
William Dunn for defendant, appellant.

SEAWELL, J. Defendant's objection to the introduction in evidence of statements made by Mrs. Sadie Davis with regard to her ownership of the property we do not regard as tenable. First, because in one instance the statement was made while the defendant himself was present (and made no contrary statement); and second, because in other instances evidence of a like character was subsequently introduced without objection.

The real controversy in the case and the point upon which decision hinges is whether the evidence taken in its most favorable light for the defendant is sufficient to go to the jury as a basis for the declaration of a resulting trust in favor of plaintiff or that the defendant is trustee *ex maleficio* for the plaintiff, with respect to the lands alleged to have been purchased out of the funds of her mother, Sadie Davis.

It is to be noted that this suit is prosecuted by plaintiff as heir at law of Sadie Davis and not by the original party who sustained the wrong. However, the relation between them is of such a character as to give her the legal right to pursue the fund as the sole interested person, and representative of the rightful grantee. The trust, if it is found to exist, went into effect when title was wrongfully taken in the name of the defendant. *Shields v. Harris,* 190 N. C., 520, 130 S. E., 189; *Norcum v. Savage,* 140 N. C., 472, 473, 53 S. E., 289; *Moorman v. Arthur,* 90 Va., 455, 18 S. E., 869.

While the evidence is contradictory, yet that in behalf of the plaintiff is very direct and specific and tends to show such a relationship as existing between Sadie Davis and her brother-in-law, the defendant, and such a violation of trust on the part of the latter, as would make him either the trustee of a resulting trust on the principle of following the fund, or a trustee *ex maleficio* because of fraud and misconduct with respect to the property purchased by him. *Creech v. Creech,* 222 N. C., 656, 24 S. E. (2d), 642; *Avery v. Stewart,* 136 N. C., 426, 48 S. E., 775; 54 Am. Jur., "Trusts," Sec. 208, n. 4, p. 162; *Id.,* Sec. 218, n. 77, p. 168; *Speight v. Branch Banking & Trust Co.,* 209 N. C., 563, 183 S. E., 734; *Lefkowitz v. Silver,* 182 N. C., 339, 109 S. E., 56, 23 A. L. R., 1419.

If we wish to preserve the distinction and nomenclature obtaining here, it may be noted that the issue submitted relates to the first mentioned class of trust. The motion for judgment as of nonsuit was properly denied.

The record discloses no sound reason for disturbing the result of the trial, and we find therein

No error.

C. G. GRADY, GUARDIAN FOR HENRY A. HODGES, v. J. D. PARKER AND WIFE, AGNES A. PARKER, W. R. DENNING, W. L. LANGDON, ADMINISTRATOR OF WILLIS CALVIN LASSITER, DECEASED, PEEDIN & PETERSON, COLONIAL LIFE INSURANCE COMPANY, F. H. BROOKS, FIRST-CITIZENS BANK & TRUST CO. OF SMITHFIELD, N. C., AND LEON G. STEVENS.

(Filed 15 October, 1947.)

1. Mortgages § 43b—

In an action by a successor guardian against the original guardian to recover funds of the estate which the original guardian had loaned to himself and secured by deed of trust, judgment was entered for the amount and foreclosure of the deed of trust decreed. The trustee in the deed of trust was not a party to the action. *Held:* The decree of foreclosure is invalid, since jurisdiction of the trustee, who has legal title to the *res*, is prerequisite to such order.

2. Same: Parties § 10a—

Where decree of foreclosure of a deed of trust is entered in an action in which the trustee is not a party, the defect cannot be cured by an order entered subsequent to the decree making the trustee a party *nunc pro tunc*.

3. Evidence § 2—

The courts will take judicial knowledge of the terms of the Superior Courts.

4. Mortgages § 33d—

Whether the resident judge during vacation and at chambers could confirm a foreclosure sale of a mortgage or deed of trust without consent of the parties, G. S., 1-218, *quære*.

5. Mortgages § 39e (8)—

Where decree of foreclosure is entered in a suit in which the trustee is not a party and the *cestui* bids in the property at the sale, the foreclosure is void, and the trustor is entitled to redeem the property and to have an accounting of rents and profits against the mortgagee in possession.

DEFENDANT'S appeal from *Harris, J.*, at April Term, 1947, of JOHNSTON.

Certain phases of the case now under review were here on appeal at the Fall Term, 1945, of this Court and will be found reported as *Trust Co. v. Parker,* 225 N. C., 480 (35 S. E. (2d), 489). Reference to the statement of the case as there reported and the opinion by *Mr. Justice Barnhill* is sufficient to show the historical background of the case and to supplement this statement in parts essential to an understanding of the present appeal.

It will be found that the action was originally instituted on February 6, 1935, by one of the successive guardians of an incompetent veteran

against James D. Parker, the original guardian, and his wife, was tried at September Term, 1936, of Johnston County Superior Court, and resulted in a judgment on the $4,000 note given by Parker for funds "loaned" to himself out of the guardianship fund; and an order of foreclosure upon certain property of Parker conveyed to H. V. Rose, Trustee, in a deed of trust securing the "loan." In this action Rose, the trustee, was not made a party, either plaintiff or defendant. Mrs. Parker filed an answer resisting a sale of the property at that time because of the inevitably low price which the property would bring because of the depression. The property, however, was sold under order of the court by W. P. Wellons, Commissioner.

The present controversy concerns only that portion of the real estate known as the "office property" which appears to have been resold under an order entered at November Term, 1938, in which the First-Citizens Bank & Trust Co., a successor guardian, was permitted to bid on the property. A report of this sale followed without any recommendation or statement of the value of the property, and on January 28, 1939, an order of confirmation was made by Hon. Clawson L. Williams, Judge, who purports to make the confirmation as Resident Judge of the Fourth Judicial District, and signs himself as such. At that time, the record discloses, there was no session of Superior Court holden in the County of Johnston.

The record does not disclose that the parties defendant herein had any notice of any motion for a resale of the property, or of the intended confirmation.

At the April Term, 1947, of the Superior Court of Johnston County the successor guardian, having been made a plaintiff in the action, caused the proceeding to be put on the motion docket. At the call of the docket and before the case was heard the defendants demurred *ore tenus* on the ground that the complaint as to the foreclosure of the mortgage did not state a cause of action, for that the mortgagee or trustee in the deed of trust, holder of the legal title, was not, and never had been a party to the action. The demurrer was overruled and the defendants excepted and appealed.

Thereupon the plaintiff, upon unverified petition and without affidavit, moved the court that the original complaint be amended so as to name the mortgagee, H. V. Rose, Trustee, as a party plaintiff therein and that he be allowed to adopt the original complaint *nunc pro tunc*.

The court, over objection of the defendants, entered an order upon the motion making the said Rose, Trustee, a party plaintiff to take effect *nunc pro tunc* at the time of the hearing and order of foreclosure, and from this defendant excepted and appealed.

Lyon & Parker for plaintiff, appellee.

E. A. Parker and Jane A. Parker for defendants, appellants.

SEAWELL, J. The defendants do not challenge the validity of the deed of trust or the present right of enforcement, nor do they dispute the effectiveness of the judgment against Mrs. Parker on the note. They do contend that the order of foreclosure, made while Rose, trustee in the deed of trust, was not a party to the proceeding, was void; and that the order attempting to cure its invalidity by making Rose a party by relation *nunc pro tunc* before the order was made is beyond the present power of the court, and at best could only make the trustee a party for some subsequent action in the premises as might be properly taken; that the order of confirmation was a final order without which no title is vested in the bidder, and under the law then current could not be made out of term and out of the county where the action was pending without consent of parties, which should affirmatively appear of record.

For these reasons they conclude that they are now entitled to redeem the property and to that end have an accounting for rents and profits against the mortgagee in possession.

These challenges to the validity of the foreclosure proceeding are so related that a fatal defect in either the order of foreclosure or the order of confirmation of the same, if it exists, is sufficient to entitle the defendants to the relief they seek. We need only to pass upon the first.

The Court has frequently held that the mortgagee or trustee in a deed of trust, is a "necessary," and "indispensable" party to an action for foreclosure; *Smith v. Bank,* 223 N. C., 249, 25 S. E. (2d), 859; *Alexander v. Bank,* 201 N. C., 449, 160 S. E., 460; *Hughes v. Hodges,* 94 N. C., 56, 60, 61; *Williams v. Teachey,* 85 N. C., 406.

Careful consideration of the bases on which these declarations are made justifies the position that the presence of the trustee as a party,—either plaintiff or defendant,—is jurisdictional with the Court, and without it no valid judgment of foreclosure can be had. The nature, purpose and importance of the trust confided to him, the fact that the foreclosure is a proceeding *in rem,* and that the legal title to the *res* is in the trustee and cannot be divested in a proceeding to which he is not a party,—these are amongst the considerations which lead to the conclusion that the court dealing with such a proceeding must first acquire jurisdiction of the trustee as such before entering a valid order of foreclosure. We do not consider it material whether he stands north or south of the *versus.*

There is no statutory or other authority under which the court could be justified in its attempt to cure this invalidity by an order making the trustee, by relation, a party *nunc pro tunc* to the proceeding, so as to

place him in that position prior to the rendition of the challenged judgment. At best any effect the order might have would be to make him presently a party for such action as might be permissible subsequent to the order. As a curative attempt it was *non coram judice.*

Confirmation of the resale of the office property here in controversy purports to have been made by Hon. Clawson L. Williams as Resident Judge of the Fourth Judicial District. The Court will take judicial knowledge that no session of Johnston Superior Court was being held at that time, although we do not see that this fact is disputed. It is contended that under the law as it then existed, confirmation, unless by consent of parties, could only be made at a regular term of the Superior Court, could not be made out of term or out of the county where the suit was pending except by consent of parties,—and neither notice nor consent appears in the instant case. Defendants cite *May v. Insurance Co.,* 172 N. C., 795, 90 S. E., 890; *Bynum v. Powe,* 97 N. C., 374, 378, 2 S. E., 170; *Laundry v. Underwood,* 220 N. C., 152, 16 S. E. (2d), 703; *Brown v. Mitchell,* 207 N. C., 132, 134, 176 S. E., 258; *Bank v. Peregoy,* 147 N. C., 293, 296, 61 S. E., 68; *Godwin v. Monds,* 101 N. C., 354, 7 S. E., 793.

In view of the conclusion which we have reached we do not deem it necessary to decide the question whether G. S., 1-218, is broad enough to give jurisdiction to the resident judge during vacation and at chambers to confirm a foreclosure sale without consent of parties. We may say that barring the provision that a commissioner's sale may be confirmed after 10 days where there is no objection and no raised bid, there is nothing in the statute, reasonably construed, that may be given that effect,—and jurisdiction by an inference not altogether necessary,—is not favored. Under the old practice it was considered necessary to allow 20 days to elapse before moving for confirmation of the commissioner's sale under order of the Superior Court, and this sometimes prevented confirmation at the ensuing term. In view of the fact, however, that other titles might be disturbed by any present ruling, we refrain from passing upon the question until it becomes necessary.

We are clearly of the opinion, however, that the original order of foreclosure is void for the reasons stated and its invalidity was not cured by the present attempt to make the trustee a party *nunc pro tunc.* The defendants are entitled to the relief they have asked.

The judgment and order of the lower court overruling the defendants' demurrer is reversed. The cause is remanded to the Superior Court of Johnston County for judgment in accordance with this opinion.

Reversed and remanded.

J. MARVIN JOHNSON, AUDITOR OF JOHNSTON COUNTY, AND J. NARVIN CREECH, TREASURER OF JOHNSTON COUNTY, v. H. B. MARROW, SECRETARY, AND W. H. CALL, CHAIRMAN, RESPECTIVELY OF THE BOARD OF EDUCATION OF JOHNSTON COUNTY.

(Filed 15 October, 1947.)

1. Counties § 31—

In the absence of a refusal of the Board of Commissioners of a county to institute an action in its behalf, the action must be instituted in the name of the county or on relation of the county. G. S., 155-18, G. S., 153-2 (1).

2. Counties § 9½—

Ordinarily the County Treasurer is the proper custodian of all sinking fund securities, including school sinking funds and securities held for the retirement of term bonds where the county has assumed the payment of such bonds, G. S., 115-240, but the General Assembly may designate or change the custodian of sinking fund securities. Chap. 19, Session Laws of 1947, makes the Board of Education of Johnston County custodian of school sinking funds of the county.

3. Counties § 11—

Although the General Assembly cannot authorize a diversion of a county's sinking funds which are necessary to pay outstanding sinking fund bonds, it can direct the expenditure of surplus unencumbered sinking funds, provided the expenditure is for a public purpose. Constitution of N. C., Art. II, Sec. 30.

4. Counties §§ 9½, 10, 11—Surplus in school sinking fund held for capital improvements is subject to County Fiscal Control Act.

A county had an unencumbered surplus in its school sinking fund, invested in securities, including unmatured serial school bonds of the county. By special act (Chap. 19, Session Laws of 1947) the Board of Education was made custodian of the sinking fund and the surplus was directed to be used only for the construction, alteration, repair or additions to the public schools of the county. *Held:* Such surplus is subject to the County Fiscal Control Act, and the Board of County Commissioners is charged with the duty to determine what expenditures will be made for such purposes, G. S., 115-83, and the surplus should be taken into consideration by it in the preparation and adoption of future budget and the levy of taxes therefor. G. S., 153-114, to G. S., 153-142.

APPEAL by plaintiffs from *Harris, J.*, at April Term, 1947, of JOHNSTON.

Plaintiffs seek a writ of *mandamus* to compel the defendants to surrender certain securities now held by them. By order of court the Board of Education of Johnston County was made a party defendant.

It is alleged that the Auditor of Johnston County was, by order of the Board of Commissioners of Johnston County, designated as co-trustee

with the Treasurer of said county for all stocks and bonds belonging to Johnston County and its various departments of government which the said Treasurer held or to which he was entitled to hold as custodian.

The defendants used school debt service funds obtained for Sinking Fund purposes and retired all the school sinking fund bonds heretofore issued by Johnston County. In addition to retiring the above bonds, the defendants purchased in excess of requirements, securities out of debt service funds at a cost of $131,889.33, having a par value of $145,000.00. Of these securities, $71,500.00 par value thereof are unmatured serial school bonds of Johnston County; $67,500.00 par value thereof are obligations of Johnston County, and the remaining $6,000.00 par value thereof are bonds issued by the Town of Smithfield.

The defendants admit that these securities are not needed to retire any bonds for which the Sinking Fund was set up, but allege that such securities are assets of the Board of Education of Johnston County.

After the institution of this action, 23 January, 1947, the General Assembly enacted Chapter 19, Session Laws of 1947, which was ratified 31 January, 1947. This Act, after reciting certain acts of the Board of Education of Johnston County, further states in the preamble that: "All of the school sinking fund bonds heretofore issued by Johnston County have been fully paid and discharged and the funds and securities now on hand should be made available for the purpose of creating a capital reserve fund to be used in making repairs, alterations and additions to the school buildings in said county." Whereupon the General Assembly enacted the following:

"Section 1. That the Board of Education of Johnston County is hereby authorized and empowered to keep in its control and custody the bonds and securities acquired by it for the school sinking funds of said county, until such time as said securities can be advantageously converted into cash. That said board of education shall continue to keep the said securities in a safety deposit box, subject to the joint control of the chairman and secretary of the said board and such audit as shall be made from time to time by the board of commissioners of said county. That the board of education shall forthwith, upon the sale of said securities or any part thereof, pay into the county treasury of Johnston County the proceeds of such sales. That the said bonds and securities and the funds derived from any sale or sales thereof, when paid into the hands of the Treasurer of Johnston County, shall continue and remain the funds to be used by the Board of Education of Johnston County, upon budgets approved by the board of commissioners of such county and the State Board of Education, for the construction, alteration, repair or addition to the public school buildings of said county, and shall be used for no other purpose. In the event the Board of Commissioners of Johnston

County shall, in the exercise of its discretion, deem it advisable to require the chairman and secretary of the board of education to furnish a bond for the faithful performance of their duties as joint custodians of said bonds and securities, such bond shall be provided and the cost thereof paid from the proceeds of said sinking funds.

"Sec. 2. That all the acts and transactions of the Board of Education of Johnston County, with respect to the handling of the said sinking funds as recited in the preamble to this Act, are hereby ratified and validated."

This cause came on for hearing on the questions of law raised by the pleadings and his Honor held that the plaintiffs do not have the capacity to institute and maintain this action, for that the same is not brought upon the relation of, or by the authority of the Board of Commissioners of Johnston County, and that the writ of *mandamus* does not lie.

The court further held that the above Act passed by the General Assembly of 1947, is constitutional and completely disposes of this cause of action. Thereupon the court dissolved the restraining order heretofore issued herein, denied the writ of *mandamus* and taxed the costs of the action against the plaintiffs.

Plaintiffs appeal, assigning errors.

Leon G. Stevens and Wellons & Canady for plaintiffs.
Abell, Shepard & Wood for defendants.

DENNY, J. The plaintiffs insist the court below committed error in holding they were not the proper officials to institute an action for the custody of the securities involved herein. The plaintiffs are relying on Section 775, The Code (now G. S., 155-18); *Hewlett v. Nutt,* 79 N. C., 263, and *Bray v. Barnard,* 109 N. C., 44, 13 S. E., 729. However, in view of the provisions contained in G. S., 153-2 (1), which authorizes a county "To sue and be sued in the name of the County," we think in the absence of a refusal of the Board of Commissioners to institute such action, it should have been brought on relation of Johnston County or by Johnston County. Where a county is the real party in interest, it must sue and be sued in its name. *Lenoir County v. Crabtree,* 158 N. C., 357, 74 S. E., 105; *Fountain v. Pitt County,* 171 N. C., 113, 87 S. E., 990.

In the absence of a statute to the contrary, ordinarily the County Treasurer is the proper custodian of all county sinking fund securities, including school sinking funds and securities held for the retirement of term bonds, where the county has assumed the payment of such bonds. G. S., 115-240.

However, the Act of the General Assembly referred to above authorizes the Board of Education of Johnston County to keep in its control and

custody the securities in question and to hold them for certain purposes, to wit: "For the construction, alteration, repair or addition to the public school buildings of said County, and . . . for no other purpose." We know of no limitation on the power of the General Assembly to designate or change the custodian of sinking fund securities, or to direct the expenditure of surplus school funds so long as the authorized expenditure is for a public purpose. If school bonds of Johnston County were outstanding and unpaid for which this sinking fund was created, the General Assembly could not authorize a diversion of the funds. Const. of N. C., Art. II, Sec. 30. But it is admitted by the plaintiffs and the defendants that these securities represent an unencumbered school sinking fund surplus.

Without the legislative sanction contained in the special statute passed by the General Assembly of 1947, this surplus would belong to the school debt service fund of Johnston County and the Board of Commissioners of Johnston County would have the right to its exclusive control. *Cabe v. Alderman,* 185 N. C., 158, 116 S. E., 419; *Parker v. Commissioners,* 178 N. C., 92, 100 S. E., 244. However, this Act in no wise divests the Board of Commissioners of Johnston of the right to use this surplus or so much thereof as may be necessary to meet the full budget requirements of Johnston County for the erection, repair and equipment of school buildings, as provided in G. S., 115-83. And this surplus should be taken into consideration by the Board of Commissioners of Johnston County in the preparation and adoption of future budgets and the levy of taxes therefor, as provided in the "County Fiscal Control Act." G. S., 153-114 to 153-142. The law does not contemplate or authorize the accumulation of a surplus such as has been created here and the exemption of such surplus from the salutary provisions of the "County Fiscal Control Act."

While it is stated in the preamble of the 1947 Special Act "The funds and securities now on hand should be made available for the purpose of creating a capital reserve fund to be used in making repairs, alterations and additions to the school buildings in said County," the Act itself directs that the funds shall be used only "For the construction, alteration, repair or addition to the public school buildings of said County." Moreover, under the terms of the Act, the expenditure of these funds is limited to such expenditures as may be authorized in duly adopted budgets.

The Board of Commissioners of Johnston County, and not the Board of Education of Johnston County, is charged with the duty to determine what expenditures shall be made for the erection, repair and equipment of school buildings in said county. G. S., 115-83. And upon the facts disclosed on this record, Johnston County did have a meritorious cause of action against the defendants at the time this proceeding was insti-

tuted; but for the reasons stated herein, the plaintiffs are not entitled to a writ of *mandamus,* and the judgment of the court below is

Affirmed.

STATE v. ED HARVEY.

(Filed 15 October, 1947.)

1. Criminal Law § 28—

Where defendant pleads not guilty, he enters upon the trial with the common law presumption of innocence in his favor, and the burden is on the State to establish his guilt beyond a reasonable doubt.

2. Criminal Law §§ 32a, 52a—

Circumstantial evidence is a recognized and accepted instrumentality in the ascertainment of truth, but in order to justify conviction the facts relied on must be of such a nature and so connected or related as to point unerringly to the defendant's guilt and exclude any other reasonable hypothesis.

3. Same: Homicide § 25—Circumstantial evidence in this case held insufficient to be submitted to the jury.

Evidence tending only to show motive or ill will between defendant and deceased, with testimony of the sole eyewitness that the man who shot and inflicted the mortal wound was of the same size and height of defendant but that he was standing in the dark some distance away and that the witness would not identify him, together with testimony that the rifle of defendant's brother-in-law disappeared but with testimony of the driver who took defendant to the house of his brother-in-law that when defendant came out he could not have had a rifle under his overcoat, without evidence as to the size of the death bullet although the bullet itself was in evidence, *is held* insufficient to be submitted to the jury, since the circumstances, though consistent with guilt, do not exclude defendant's innocence as a reasonable assumption, and defendant's demurrer to the evidence is sustained in the Supreme Court. G. S., 15-173.

APPEAL by defendant from *Edmundson, Special Judge,* at June Term, 1947, of CRAVEN.

Criminal prosecution on indictment charging the defendant with the murder of one Nathaniel (Eddie) Roberts.

The record discloses that on Saturday evening, 26 April, 1947, about 8:00 p.m., the Chief of Police of New Bern was called to the home of Nathaniel (Eddie) Roberts and there found him dead on the floor in the kitchen of his house with a bullet wound in the back of his head, just behind the ear.

Owen Dove, who was at the home of his son next door to where the deceased lived, testified that he saw a man come up the 10-or-15-foot alley

between the two houses, poke a rifle through the porch slats and fire into the Roberts kitchen. "It was dark," but the man "looked to be about the same size and height" of the defendant. The witness had seen the defendant that afternoon and had observed him in the street as he threw a bottle at the wife of the deceased. "I couldn't tell what kind of clothes he had on. . . . The rifle sounded like a .22 . . . In my opinion, it was a .22 . . . I had a chance to see the man, but I couldn't tell who he was." The witness further said that after the shooting, the man he saw with the rifle climbed "over the fence and crossed Broad Street. He was about the same size and height of the man I saw fire the shot and about the same size of the man I saw that afternoon throw the bottle. (Cross-examination) I am not willing to identify any man that I couldn't see his face. There are hundreds of people in town who are the same height and I have seen a lot of people in this town who are the same size."

An investigation by the officers revealed that the defendant was at the home of the deceased, around two o'clock on the day of the shooting, playing cards and gambling for small stakes. He was drinking, and an altercation ensued between him and the wife of the deceased. As he left the house, he threatened to "get his gun and shoot both of us" (the wife of the deceased and David Green). Later that afternoon the defendant and the deceased met at George Downey's Cafe, and some words were passed. It seems the deceased slapped the defendant. They both left the cafe.

Shortly thereafter, the defendant got Elon Hill to take him to where he lived with his brother just over the Jones County line. The defendant went into the house, changed his clothes, and came out in about 25 minutes with an overcoat over his arm. Hill then drove the defendant back to New Bern, arriving there around sundown. Hill says, "He couldn't have had a rifle under that overcoat when I saw it."

The wife of the deceased again saw the defendant in a cafe, near the scene of the shooting, about 9:30 that evening. The defendant was arrested on the following Tuesday. He admitted to the officers that he was in New Bern on the afternoon and night of the shooting. Further than this, he was somewhat equivocal about his movements, but finally said he had lost some money gambling at the home of the deceased and that he had some trouble there. He never admitted going to his brother's home and getting his overcoat in the afternoon. "He always said he went back home at 10:00 o'clock on the bus."

The defendant's sister-in-law, in whose home he lived, testified that a .22 rifle, which her husband had borrowed to kill some hogs mysteriously disappeared about that time, *i.e.*, "when her husband left" to go to Baxter Springs.

The death bullet was identified and offered in evidence, albeit the record is silent as to its size. The death gun was never found.

At the conclusion of the State's evidence—none was offered by the defendant—the solicitor announced that he would not ask for a verdict on the capital charge as the deceased and the defendant had been quarreling on the day in question, but would seek a verdict of murder in the second degree, or manslaughter, as the jury should determine the facts from the evidence.

Verdict: Guilty of manslaughter.

Judgment: Imprisonment in the State's Prison for not less than 15 nor more than 20 years.

The defendant appeals, assigning as error the failure of the court to sustain his demurrer to the evidence and dismiss the action as in case of nonsuit.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

Charles L. Abernethy, Jr., for defendant.

STACY, C. J. The question for decision is whether the evidence suffices to overcome the demurrer and to carry the case to the jury. The trial court answered in the affirmative. We are inclined to a different view.

True it is, the evidence seems to point an accusing finger at the defendant as the perpetrator of the crime, and to excite suspicion, somewhat strongly perhaps, of his guilt, but it apparently leaves too much to surmise or assumption to support a conviction. *S. v. Warren, ante,* 22; *S. v. Oxendine,* 223 N. C., 659, 27 S. E. (2d), 814, and cases cited.

The defendant entered upon the trial with the common-law presumption of innocence in his favor and with the burden on the State to establish his guilt beyond a reasonable doubt. *S. v. Singleton,* 183 N. C., 738, 110 S. E., 846. In other words, the jury was required to be "fully satisfied," "entirely convinced," or "satisfied to a moral certainty," of the defendant's guilt before a verdict could be rendered against him. *S. v. Harris,* 223 N. C., 697, 28 S. E. (2d), 232. The defendant's plea of traverse put in issue the question of his guilt.

The State relies upon circumstantial evidence, which is a recognized and accepted instrumentality in the ascertainment of truth; and, in many instances, quite essential to its establishment. *S. v. Coffey,* 210 N. C., 561, 187 S. E., 754. In such case, however, the defendant being charged with a felony, the rule is, that the facts established or adduced on the hearing must be of such a nature and so connected or related as to point unerringly to the defendant's guilt and exclude any other reasonable

hypothesis. *S. v. Stiwinter,* 211 N. C., 278, 189 S. E., 868; *S. v. Matthews,* 66 N. C., 106.

The record discloses a capital crime of murder, certainly one in the second degree. Yet the jury returned a verdict of manslaughter. Conceding the power of the jury to pardon of the graver offense and to convict of a lesser one, even in the absence of evidence to support the milder verdict, which affords the defendant no cause for complaint as it is favorable to him, *S. v. Bentley,* 223 N. C., 563, 27 S. E. (2d), 738, nevertheless, the mildness of the verdict, in the light of the record, would seem to indicate some hesitancy on the part of the jury to assess the defendant with the homicide. *S. v. Sisk,* 185 N. C., 696, 116 S. E., 721.

The only witness who saw the perpetrator of the crime, and that in the dark and at some distance away, was not familiar with his carriage or manner of walk, and declined to identify the defendant as the man he saw. All he would say was that he "looked to be about the same size and height." *S. v. Thorp,* 72 N. C., 186. The guilt of an accused is not to be inferred merely from facts consistent with his guilt, but they must be inconsistent with his innocence. *S. v. Massey,* 86 N. C., 658. "Evidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict and should not be left to the jury." *S. v. Vinson,* 63 N. C., 335. See, also, *S. v. Battle,* 198 N. C., 379, 151 S. E., 927; *S. v. Swinson,* 196 N. C., 100, 144 S. E., 555; *S. v. Montague,* 195 N. C., 20, 141 S. E., 285; *S. v. Prince,* 182 N. C., 788, 108 S. E., 330; *S. v. Gragg,* 122 N. C., 1082, 30 S. E., 306; *S. v. Rhodes,* 111 N. C., 647, 15 S. E., 1038; *S. v. Goodson,* 107 N. C., 798, 12 S. E., 329; *S. v. Brackville,* 106 N. C., 701, 11 S. E., 284; *S. v. Powell,* 94 N. C., 965; and *Wittkowsky v. Wasson,* 71 N. C., 451.

The theory of the State is, that the defendant left the home of the deceased in the afternoon of the day in question, went to his brother's house in Jones County and secured a .22 rifle, as he threatened to do, returned to New Bern about sundown and shortly thereafter committed the homicide. The defect in this theory is, that the witness Hill who drove the defendant into Jones County, says he did not bring a rifle back with him. Then, too, the record is silent as to the size of the death bullet, although the bullet itself was in evidence.

It all comes to this: The evidence for the prosecution is inconclusive. It is not compelling. Taking it to be true, and entirely so, it still leaves the identity of the accused as the perpetrator of the crime in doubt, and fails to exclude his innocence as a reasonable assumption. *S. v. Miller,* 220 N. C., 660, 18 S. E. (2d), 145; *S. v. Matthews, supra.* It would require a repudiation of Hill's testimony and a guess to bridge the hiatus in the State's case. *S. v. Johnson,* 199 N. C., 429, 154 S. E., 750.

The defendant's demurrer to the evidence will be sustained here. G. S., 15-173.

Reversed.

SOPHIA HARDEE v. TOM RIVERS.

(Filed 15 October, 1947.)

1. Wills § 33a—

A devise generally or indefinitely with power of disposition creates a fee. G. S., 31-38.

2. Wills § 33f—

A devise for life with power of disposition creates a life estate only, since the power of disposition does not enlarge the estate devised or convert it into a fee.

3. Same—

The donee of a power of disposition may exercise that power under the terms and within the limitations contained in the will, and when so exercised by deed sufficient in form and substance to convey the whole estate in the land therein described the grantee takes an indefeasible fee.

4. Same—

Testator devised his realty to his wife for life with power, in the event that the income therefrom was not sufficient for her proper support and maintenance, to sell any or all the real estate at any time she deemed necessary and use the proceeds thereof for her own necessary use and benefit. *Held:* Upon the occurrence of the conditions and within the limitations contained in the will for the exercise of the power, the wife can convey an indefeasible fee to the lands.

APPEAL by defendant from *Frizzelle, J.*, at September Term, 1947, of PITT. Affirmed.

Controversy without action to determine validity of title tendered by plaintiff under contract of purchase and sale.

On 29 July 1932 S. B. Hardee died testate, seized and possessed of real and personal property including the *locus*. He devised all his property, real and personal to his wife for and during her life with the remainder over to two named charitable institutions "subject to the following proviso:

"It is my will and desire that my said wife, Sophia Hardee, shall have the use and control of all my property so long as she shall live, and in the event that the income therefrom is not sufficient for the proper support and maintenance of my said wife, then she shall have the power and authority, in her discretion, at any time she deems necessary, to sell any or all of my real estate at either public or private sale and convey title in

fee simple to purchaser, and use the proceeds thereof for her own personal necessary use and benefit, and in such event she shall not be required to have the consent or approval of the said Trustee of either of the Odd Fellows Orphan Home at Goldsboro or the Free Will Baptist Orphan Home at Middlesex for such sale, and in case of sale shall not be required to give bond to account for the proceeds thereof, it being my desire and purpose that my wife shall be amply provided for during her lifetime, and if necessary she is authorized to use all of my estate for her own personal use and benefit, so long as she may live, but any part of my estate not used by her during her lifetime, shall at her death, as above provided, go one-half to the Trustees of the Odd Fellows Orphan Home at Goldsboro, N. C., and the other half to the Trustees of the Free Will Baptist Orphan Home in Middlesex, N. C., to be applied and added to the endowment funds of said institutions."

Plaintiff contracted to sell and defendant contracted to purchase the tract of land described in the record which is a part of the property devised by said will. Pursuant to said contract plaintiff has tendered defendant a deed which recites the power contained in said will and conveys or purports to convey said premises to defendant in fee. While defendant stands ready to accept a conveyance of an indefeasible fee in said property and to pay therefor, he declines to accept the deed tendered for that plaintiff is seized and possessed of a life estate only in said land and is without power under the terms of said will to convey an indefeasible fee.

It is admitted in this connection that the income from the estate is not sufficient for the proper support and maintenance of plaintiff, and it has become necessary for her in her discretion to sell some part thereof.

The parties submitted this controversy to the end the Court may decide whether the tendered deed conveys an indefeasible fee and defendant is under the legal duty to accept same and pay the agreed purchase price therefor.

The court below being of the opinion that the will of S. B. Hardee vests plaintiff with full power and authority "in her discretion, at any time she deems necessary, to sell any or all of said real estate at either public or private sale and convey title in fee simple to the purchaser" decreed specific performance of the contract. Defendant excepted and appealed.

J. W. H. Roberts for plaintiff appellee.
Albion Dunn for defendant appellant.

BARNHILL, J. A devise generally or indefinitely with power of disposition creates a fee. G. S., 31-38; *Patrick v. Morehead,* 85 N. C., 62;

Herring v. Williams, 158 N. C., 1, 73 S. E., 218; *Darden v. Matthews,* 173 N. C., 186, 91 S. E., 835; *Carroll v. Herring,* 180 N. C., 369, 104 S. E., 892; *Weaver v. Kirby,* 186 N. C., 387, 119 S. E., 564; *Roane v. Robinson,* 189 N. C., 628, 127 S. E., 626. But a devise for life with power of disposition creates a life estate only. *Troy v. Troy,* 60 N. C., 624; *Chewning v. Mason,* 158 N. C., 578, 74 S. E., 357; *Tillett v. Nixon,* 180 N. C., 195, 104 S. E., 352; *Alexander v. Alexander,* 210 N. C., 281, 186 S. E., 319. The estate devised being specifically limited to the life of the devisee, the power of disposition does not enlarge the estate devised or convert it into a fee. *Carroll v. Herring, supra; Roane v. Robinson, supra; Helms v. Collins,* 200 N. C., 89, 156 S. E., 152. One is property, the other is power. Neither limits or enlarges the other.

Even so, the donee of the power to convey may exercise that power under the terms and within the limitations contained in the will and when so exercised by deed sufficient in form and substance to convey the whole estate in the land therein described the grantee takes an indefeasible fee. *Troy v. Troy, supra; Norfleet v. Hawkins,* 93 N. C., 392; *Griffin v. Commander,* 163 N. C., 230, 79 S. E., 499; *Darden v. Matthews, supra; Tillett v. Nixon, supra; Hood, Comr. of Banks, v. Theatres, Inc.,* 210 N. C., 346, 186 S. E., 345.

"The donee is the mere instrument by which the estate is passed from the donor (devisor) to the appointee, and when the appointment is made the appointee at once takes the estate from the donor as if it had been conveyed directly to him." *Norfleet v. Hawkins, supra.* A deed executed by the donee of the power "will vest in the purchaser an estate in fee simple, and he will not be bound to see to the application of the purchase money." *Troy v. Troy, supra; White v. White,* 189 N. C., 236, 126 S. E., 612. It follows that the deed tendered by plaintiff conveys an indefeasible fee and defendant under his contract is bound to accept the same and pay the agreed purchase price. Hence the judgment below is

Affirmed.

STATE v. J. C. BROOKS, GRADY BROWN, AND THURMAN MUNN.

(Filed 15 October, 1947.)

1. Criminal Law § 78e (1)—

An exception for failure of the court to charge upon the question of manslaughter, without exception to any portion of the charge or exception under G. S., 1-180, on the ground that the court failed to explain the law arising on the evidence and pointing out wherein the court failed to comply with the statute, does not properly present the question for review.

2. Homicide § 2—

Where three prisoners conspire to escape, and contemplate as a part of the plan that one of them should attack the guard and another seize the guard's gun, and in the execution of the common design in accordance with the plan, the prisoner agreed upon does seize the gun and kills a guard in order to effectuate the escape, all are equally guilty, and the contention of the co-conspirators that they conspired only to commit an escape which is a misdemeanor, G. S., 14-256, and therefore could not be guilty of more than manslaughter, is untenable since the killing was a natural and probable consequence of the conspiracy as formulated.

3. Conspiracy § 9—

Each conspirator is equally responsible for all acts committed by the others in the execution of the common purpose which are a natural and probable consequence of the unlawful undertaking, even though such acts are not intended or contemplated as a part of the original design.

4. Criminal Law § 8: Homicide § 2—

Where two or more persons are present, aiding and encouraging one another in a common purpose which results in a homicide, all are principals and equally guilty.

5. Homicide § 25—

When an intentional killing with a deadly weapon has been established, the law implies malice, and the State cannot be nonsuited.

APPEAL by defendants from *Pless, J.*, at Special Term, May, 1947, of HENDERSON.

Criminal prosecution upon indictment charging the defendants with the murder of one George Bowman.

The defendants were prisoners serving sentences under the supervision of the State Highway and Public Works Commission, and had been assigned to a prison camp in Henderson County.

The evidence tends to show that the defendants conspired to escape and that it was agreed to overpower a guard, obtain his rifle and use the rifle, if it became necessary, in order to escape. On 3 March, 1947, the defendants decided to carry out their plan of escape. They were working in a rock quarry and those in charge were preparing to set off a charge of dynamite. The prisoners were moving out of the quarry. Defendant Brown first entered a guard shack occupied by the guard, Gordon Morgan, the defendants Brooks and Munn followed him into the shack. The guard was overpowered and his rifle was taken by Brooks. In the struggle the guard was knocked down an embankment 15 or 20 feet from the guard shack into a gravel bin. Brooks fired upon the guard and the guard returned the fire with his pistol. In the meantime another guard, George Bowman, was informed of the trouble and started towards the shack previously occupied by Morgan. The defendant Brooks, using the

seized rifle, stuck the barrel through a hole in the guard shack and shot and killed Bowman. The defendants then escaped, carrying the seized rifle with them. After the defendants were recaptured, according to the testimony of J. E. Braswell, the officer in charge of the Fugitive Office of the State Prison Department, the defendant Munn told him "They had agreed to make the break and that Brooks would use the gun and that Brown would make the attack . . . that Brooks used the gun because he knew how to operate it," and that Brooks admitted he was the gun man.

Verdict: Each defendant guilty of murder in the first degree. Judgment of death by asphyxiation was imposed upon each defendant. Defendants appeal, assigning error.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

E. L. Whitmire for J. C. Brooks.

W. W. Carpenter for Grady Brown.

Charlton E. Huntley for Thurman Munn.

DENNY, J. The defendants Brown and Munn except to the failure of his Honor to charge the jury on manslaughter.

The exception does not properly present this question. There was no request for such instruction. No exception has been entered to any portion of the court's charge to the jury. And there is no exception reserved under the provisions of G. S., 1-180, on the ground that the court failed to explain the law arising upon the evidence in the case and pointing out wherein the court failed to comply with the provisions of this statute. Even so, if such exception had been entered and preserved, it would be without merit.

These defendants contend that they did not knowingly aid or encourage Brooks in the commission of this homicide. They insist they were only engaged in an escape, which is a misdemeanor, G. S., 14-256, and therefore would not be guilty in any event, of more than manslaughter, citing *S. v. Hardee,* 192 N. C., 533, 135 S. E., 345; *S. v. Merrick,* 171 N. C., 788, 88 S. E., 501; *S. v. Powell,* 168 N. C., 134, 83 S. E., 310; *S. v. Durham,* 141 N. C., 741, 53 S. E., 720; *S. v. Horner,* 139 N. C., 603, 52 S. E., 136, and *S. v. Vines,* 93 N. C., 493. This contention on the part of these defendants cannot be sustained in the light of the evidence disclosed on this record. There was a conspiracy to escape. As a part of the common design or plan to escape, it was agreed that Brown was to attack the guard and Brooks, who knew how to operate the guard's gun, was to seize the gun. The exact procedure agreed upon was followed.

Brown entered the guard shack, followed by Brooks and Munn. Brown did attack the guard, Brooks did seize his rifle and used it to fire on the guard Morgan and to kill the deceased, another guard, who was apparently going to the rescue of Morgan. The conduct of these defendants, in carrying out their conspiracy to commit an unlawful act was such as might naturally and reasonably have been supposed to result in a homicide. The defendants Brown and Munn were active participants in the commission of this homicide, giving Brooks aid and assistance; and under our decisions they are equally as guilty as the defendant Brooks, who actually fired the shot that killed Bowman.

Stacy, C. J., in speaking for the Court in *S. v. Smith,* 221 N. C., 400, 20 S. E. (2d), 360, said: "The general rule is, that if a number of persons combine or conspire to commit a crime, or to engage in an unlawful enterprise, each is responsible for all acts committed by the others in the execution of the common purpose which are a natural or probable consequence of the unlawful combination or undertaking, even though such acts are not intended or contemplated as a part of the original design. *S. v. Williams, supra* (216 N. C., 446, 5 S. E. (2d), 314); *S. v. Lea, supra* (203 N. C., 13, 164 S. E., 737); *S. v. Stewart,* 189 N. C., 340, 127 S. E., 260."

Moreover, where two or more persons are present, aiding and encouraging one another in a common purpose which results in a homicide, all are principals and equally guilty. *S. v. Williams,* 225 N. C., 182, 33 S. E. (2d), 880; *S. v. Triplett,* 211 N. C., 105, 189 S. E., 123; *S. v. Gosnell,* 208 N. C., 401.

The exception to the refusal of the court to grant the defendant Brooks' motion for judgment as of nonsuit, cannot be sustained. When an intentional killing with a deadly weapon has been established, the law implies malice and the State cannot be nonsuited. *S. v. Vaden,* 226 N. C., 138, 36 S. E. (2d), 913; *S. v. Rivers,* 224 N. C., 419, 30 S. E. (2d), 322; *S. v. Beachum,* 220 N. C., 531, 17 S. E. (2d), 674; *S. v. Bright,* 215 N. C., 537, 2 S. E. (2d), 541; *S. v. Mosley,* 213 N. C., 304, 195 S. E., 830; *S. v. Robinson,* 213 N. C., 273, 195 S. E., 824; *S. v. Cagle,* 209 N. C., 114, 182 S. E., 697; *S. v. Johnson,* 184 N. C., 637, 113 S. E., 617. In view of what has been said herein, the exceptions of the defendants Brown and Munn, to the refusal of the court to grant their motions for judgment as of nonsuit, are equally untenable.

In the trial below, we find

No error.

STATE v. JAMES FOSTER, DOBE POWELL, JOE HOLLAND, AND CHARLIE COMBS.

(Filed 15 October, 1947.)

1. Criminal Law §§ 17f, 83—

Where, upon defendants' plea in amnesty, the court denies the motion without findings as to some of the material facts alleged as the basis for the motion, judgment will be vacated and the cause remanded for further proceedings. The determination of the motion upon the subsequent hearing is within the discretionary authority of the court. G. S., 8-55.

2. Criminal Law § 56—

Motions in arrest of judgment in criminal actions are allowable only when some error or fatal defect appears on the face of the record.

APPEAL by defendants and movents from *Sink, J.*, at March Term, 1947, of WILKES.

Criminal prosecution on indictment charging the defendants with gambling, *i.e.*, playing poker at which money was bet.

It appears from facts set out in brief of defendants that on 5 July, 1946, at about 1:30 a.m., while the defendants were playing poker in the kitchen of the home of James Foster, a machine gun was thrust through the screen door, and the defendants were commanded to keep their hands on the table. Two masked men, one with a machine gun and the other with a pistol, then entered the room, forced the defendants to stand with their faces to the wall, and each was robbed of the money he had on his person. The money on the table was also taken. James Foster was then marched into another room and forced to open his safe, which contained approximately $19,000.00. In all, the robbers got about $20,000.00.

At the August Term, 1946, Wilkes Superior Court, indictments were returned by the grand jury against Carl Keaton, Cola Keaton and Calvin Spillman, charging them with robbery, and against the defendants herein, James Foster, Dobe Powell, Charlie Combs and Joe Holland (together with Calvin Spillman), charging them with gambling. (Calvin Spillman was physically unable to attend court and has not been tried on either indictment.)

The defendants, and each of them, pleaded guilty of gambling.

Judgment as to each defendant: 12 months in jail "and assigned to work on the roads at hard labor as provided by law, and pay the costs."

Thereupon, at the same term of court, each of the defendants filed motion in arrest of judgment and proffered a plea in amnesty, based on the following allegations:

1. On the bill charging Carl Keaton, *et al.*, with robbery from the person with firearms, which was sent to the grand jury at the August Term,

1946, these defendants were listed as witnesses, and two of them, James Foster and Dobe Powell, actually appeared and disclosed to the grand jury the game of chance they were engaged in playing at the time of the holdup and robbery. This was with the full knowledge and consent of the solicitor.

2. The same grand jury returned a true bill against these defendants for gambling.

3. These defendants were advised that, as a matter of strategy, it would materially assist in obtaining a conviction in the robbery case, if the two indictments were consolidated for trial and pleas of guilty entered by the defendants in the gambling case. Whereupon, the consolidation being "agreed upon and approved by the court," these defendants entered pleas of guilty to gambling prior to the impaneling of the jury in the robbery case, said pleas being entered "for the purpose of aiding and assisting the Solicitor for the State of North Carolina to obtain a conviction in the robbery case."

4. These defendants were used by the State as witnesses in the robbery case, and convictions were obtained therein on their testimony. Indeed, the consolidation and trial of the robbery case with one in which there was nothing to try could have been only for the purpose of aiding in the prosecution of the robbers.

5. These defendants are advised and believe that the solicitor for the State was put to an election of either prosecuting them for gambling or using them as witnesses in the robbery case, in which latter event they were pardoned by operation of the statute. G. S., 8-55. Therefore, they pray for relief from the judgment rendered against them.

Upon consideration of the motions in arrest and pleas in amnesty, the court found certain facts—omitting, however, to make any findings in respect of the matters alleged in paragraphs 1 and 3 above, except that the consolidation was with the court's approval—and being of opinion that the defendants were not entitled to the relief sought, denied the motions, from which rulings, the defendants appeal, assigning errors.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

Hayes & Hayes and W. H. McElwee for defendants.

STACY, C. J. It seems to be conceded that the principal question here sought to be presented is one of first impression in this jurisdiction. However, as no determinations were made by the court below in respect of the material allegations set out in paragraphs 1 and 3 above, we are

disposed to vacate the rulings and remand the case for further proceedings as to justice appertains and the rights of the parties may require.

We refrain from discussing the matters in advance of the further hearing, which may be confined to the pleas in amnesty. Motions in arrest of judgment in criminal actions are allowable only when some error or fatal defect appears on the face of the record. *S. v. Deal,* 207 N. C., 448, 177 S. E., 332; *S. v. Satterfield,* 207 N. C., 118, 176 S. E., 466; *S. v. Bittings,* 206 N. C., 798, 175 S. E., 299; *S. v. Grace,* 196 N. C., 280, 145 S. E., 399; *S. v. McKnight,* 196 N. C., 259, 145 S. E., 281; *S. v. Mitchem,* 188 N. C., 608, 125 S. E., 190. No such error is apparent on the face of the present record.

Needless to add that when the matters are reached again in the Superior Court, the judge hearing the motions will be vested with the same discretionary authority as the judge at the trial term who originally imposed the sentences.

Error and remanded.

IN THE MATTER OF ROBERT LEE THOMPSON, MINOR.

(Filed 15 October, 1947.)

1. Habeas Corpus § 8—

No appeal lies from the order of the court in proceedings in *habeas corpus* to determine the custody of a minor child as between persons who had obtained control of the child with a view to adoption and welfare officers seeking control of the child to place him with members of his family, review being solely by *certiorari.*

2. Habeas Corpus § 3—

Proceedings to obtain control of a minor child between persons with whom the child had been placed for adoption and welfare officers seeking to place the child with his family is not a proceeding under G. S., 17-3, to set the infant free but is a proceeding to fix and determine the right of custody.

3. Same: Clerks of Superior Courts § 7—

Jurisdiction to determine the right of custody of an infant as between persons with whom the infant had been placed with a view to adoption and welfare officers seeking to place the infant with his family, is within the exclusive jurisdiction of the juvenile court, G. S., 110-21 (3), and writ of *habeas corpus* is inadvisedly issued by the Superior Court, but pending determination of the juvenile court, respondent should not surrender custody to a nonresident and no order should be entered until petitioners have had notice and an opportunity to be heard.

IN RE THOMPSON.

APPLICATION for writ of *habeas corpus* heard by *Sink, J.*, at the June Term, 1947, WILKES, here under writ of *certiorari* issued on petition of the respondent.

Robert Thompson is an infant 5 years of age. His father is dead. His mother, a resident of West Virginia, on or about 3 January 1946, left him with J. A. Nelson and wife, Stella Faye Nelson, the petitioners, and executed written consent to the adoption of said infant by said petitioners. No further proceedings have been had looking to his adoption. The child was placed in the home of T. N. Royal, grandfather of *feme* petitioner, where it remained until 9 August 1946. On that date respondent Charles C. McNeill, welfare officer of Wilkes County, at the request of the welfare officers of West Virginia, took custody of the infant for the purpose of delivering him to the said authorities to be placed with members of his family.

The court below awarded custody of said infant to petitioners and respondent appealed.

Ralph Davis and W. H. McElwee for petitioner appellees.
F. J. McDuffie for respondent appellant.

BARNHILL, J. The petitioners filed in this Court written motion to dismiss the appeal for the reasons therein stated. The motion was allowed and the appeal dismissed for that in such cases no appeal lies. *In re Holley,* 154 N. C., 163, 69 S. E., 872; *In re Croom,* 175 N. C., 455, 95 S. E., 903; *S. v. Burnette,* 173 N. C., 734, 91 S. E., 364.

The respondent petitioned for writ of *certiorari* to bring the proceeding and the judgment below before this Court for review. The petition was allowed and the cause is here under said writ.

The petitioners insist that this proceeding was instituted under G. S., 17-3. This contention is not supported by the record. They allege in their petition that they "have a claim to the custody of the child" and "are entitled to its custody" and pray that the Court "inquire into the right to the custody of said minor child and that . . . such custody be awarded to them." On the hearing in the court below the court adjudged "that the petitioners are lawfully entitled to retain custody of said Robert Lee Thompson pending the further orders of this Court . . ." and so ordered. Clearly then it is not a proceeding to set the infant free but to take the child from one restraint and place him under another. It is a proceeding to fix and determine the right of custody of an infant.

The State, with a fixed purpose to protect with jealous care the general welfare of infants of tender age, has decreed that, except in certain specific instances, matters, either civil or criminal, affecting the welfare or custody of children under 16 shall be heard and determined in a special

branch of the Superior Court created and maintained for that purpose. To that end the General Assembly created the juvenile courts of North Carolina and vested them with exclusive original jurisdiction of any case, within the classifications therein specified, of a child less than 16 years of age residing in or being at the time within their respective districts. Ch. 97, P. L. 1919, as amended, now G. S. Ch. 110, Art. 2. This exclusive original jurisdiction includes cases in which the custody of an infant is the subject of controversy. G. S. 110-21 (3).

The writ of *habeas corpus* was inadvisedly issued. *In re McGraw, ante,* p. 46. The controversy is one for the juvenile court of Wilkes County to decide. To that end the court below should remand the cause to that court for further proceedings.

Pending a hearing in the juvenile court the respondent should not surrender custody of said infant to a nonresident, and no order should be entered until petitioners have had notice and an opportunity to be heard.

The judgment below is

Reversed.

STATE v. RUFUS WIGGINS.

(Filed 15 October, 1947.)

Arrest and Bail § 8—

On appeal from conviction in Recorder's Court defendant gave appearance bond. Upon failure of defendant to appear in the Superior Court judgment *nisi* was entered and *scire facias* and capias ordered issued and the action continued. Later, motion to strike out *sci. fa.* during pendency of defendant's military service was allowed. *Held:* The *sci. fa.* having been stricken out, judgment absolute on the bond before issuance and service of another *sci. fa.* is premature. Whether the judgment *nisi* should be made absolute or stricken out upon the subsequent hearing rests in the sound discretion of the trial court. G. S., 15-116.

APPEAL by J. W. Willie and Ossie Wiggins Willie, sureties on defendant's appearance bond, from *Edmundson, Special Judge.*

Criminal prosecution upon warrant issued 9 June, 1945, out of Justice of Peace Court of Craven County, charging defendant with the offense of fornication and adultery.

Defendant, having been bound over to the Recorder's Court of Craven County, and having been adjudged guilty and given a jail sentence by the Recorder's Court, appealed to Superior Court of Craven County. Bond, in the amount fixed, was given by defendant, with J. W. Willie and Ossie Wiggins Willie, as sureties, for his personal appearance at the next

term of the said Superior Court to be held on Monday, 6 September, 1943, and not depart the same without leave.

At the September Term, 1943, of said Superior Court defendant was called in cases Nos. 723 and 724 and failed to appear. Whereupon, the court entered judgment *nisi,* and ordered *scire facias* and capias to issue, and the action to be continued. *Scire facias* was issued on 11 December, 1943, and served. Thereafter, at the January Term, 1944, of Superior Court of said county this entry was made: "No. 723-4. State *v.* Rufus Wiggins. Motion to strike out *Sci. Fa.* Motion allowed during pendency of military service of defendant."

Thereafter, at the June Term, 1947, upon motion of the Solicitor for the State, and without further *scire facias* being issued and served, the court entered judgment absolute against defendant and the sureties on his bond for the amount of the bond.

From this judgment the sureties on the bond appeal to Supreme Court and assign error.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

Charles L. Abernethy, Jr., and John D. Larkins, Jr., for appellants.

WINBORNE, J. The validity of the judgment absolute entered at the June Term, 1947, depends upon the effect of the order made at January Term, 1944. As we interpret the wording of that order the motion to strike out the *sci. fa.* was allowed, and that no further proceedings on the forfeited bond should be had "during the pendency of military service of defendant." Therefore, the *sci. fa.* having been stricken out, judgment absolute could not be entered without further notice, that is until another *sci. fa.* had been issued and served, and defendant and sureties given an opportunity to be heard. Whether the judgment *nisi* will then be made absolute, or whether it will be stricken out, rests in the discretion of the presiding judge of the Superior Court before whom it may properly come. G. S., 15-116. *S. v. Clarke,* 222 N. C., 744, 24 S. E. (2d), 619.

In the light of this interpretation of and holding on the order, the judgment absolute was prematurely entered, and is therefore

Reversed.

EDGAR R. CLAPP, ADMINISTRATOR C. T. A. OF THE ESTATE OF ELLA CLAPP THOMPSON, DECEASED, v. MARSHALL F. MILLS AND VICTOR MICA COMPANY.

(Filed 15 October, 1947.)

Frauds, Statute of, § 1—

In an action to recover royalties on minerals mined, allegations that the individual defendant executed a written mining lease or contract, and that the corporate defendant was a silent partner and shared in the profits under the lease, is sufficient as against demurrer to allege liability on the part of the corporate defendant for obligations incurred under the contract.

APPEAL by plaintiff from *Clement, J.*, at July Term, 1947, of MITCHELL. Reversed.

Suit to recover royalties on minerals mined. Demurrer by defendant Victor Mica Corporation was sustained, and plaintiff appealed.

Charles Hutchins and W. C. Berry for plaintiff, appellant.

Proctor & Dameron and McBee & McBee for Victor Mica Company, appellee.

DEVIN, J. Plaintiff alleged a cause of action against the defendant Mills under a written mining lease or contract, and also alleged that the corporate defendant "was a silent partner with its co-defendant Mills," and shared in the profits under the lease. We think this allegation sufficient to import liability on the part of the corporate defendant for obligations incurred under the contract sued on, and to withstand a demurrer. *Winston v. Lumber Co.*, 227 N. C., 339, 42 S. E. (2d), 218; *Blackmore v. Winders*, 144 N. C., 212, 56 S. E., 874.

The judgment sustaining the demurrer is

Reversed.

JOEL H. DAVIS AND C. K. HOWE v. SAM W. MORGAN.

(Filed 29 October, 1947.)

1. Quieting Title § 2—

Plaintiffs' evidence tending to identify the *locus in quo* as the land embraced within the State grant under which they claim, *held* sufficient to overrule nonsuit.

2. Same: State § 2c—

Plaintiffs' evidence that the *locus in quo* embraced within their State grant was not covered by navigable waters, *held* sufficient to overrule nonsuit. G. S., 146-1.

3. Deeds § 19—

A proceeding under the Torrens Law is a proceeding *in rem*.

4. Same: Judgments § 32—

The present plaintiffs and defendant were parties defendant in a proceeding under the Torrens Law, but the description of the land in that proceeding did not include the land claimed by plaintiffs in this suit. *Held:* Plaintiffs in this suit could not have filed cross-complaint against defendant herein to try title to the land not described in the Torrens proceeding, and therefore the judgment in that proceeding cannot operate as an estoppel, the matter in dispute not being cognizable in the former action.

5. Trespass § 3—

In an action in trespass to try title, the failure of evidence of title in one of the plaintiffs does not justify nonsuit, since one tenant in common owning only an undivided interest in the land can maintain action against a trespasser.

6. Waters and Watercourses § 12: Appeal and Error § 39f—

Plaintiffs claimed title to a part of the *locus in quo* by accretion. The court defined accretion as the gradual deposit of material by waters so as to cause that to become dry land which was theretofore covered by water, and in compliance with defendant's prayer for instruction, charged that the doctrine did not apply to land reclaimed by man in filling in land once under water. *Held:* Defendant cannot complain of the instruction.

7. Pleadings § 22b—

In this action in trespass plaintiffs allege title under a State grant and also under a judgment in a proceeding under the Torrens Law. *Held:* The court had discretionary power at the trial to permit plaintiffs to amend the complaint, over objection, by withdrawing all reference to the proceedings under the Torrens Law.

8. Evidence § 42f—

Plaintiffs alleged title under a State grant and under a judgment in a proceeding under the Torrens Law. At the trial, plaintiffs were allowed to amend by withdrawing all reference to the proceeding under the Torrens Law. *Held:* Defendant was entitled to introduce the portions of the original complaint which had been withdrawn in evidence as "evidential admissions" or declarations against interest, and the exclusion of such evidence is error.

9. Trial § 31c—

In this action in trespass, defendant contended upon supporting evidence that the State grant under which plaintiffs claimed covered only a portion of the *locus*. *Held:* A charge of the court that either the plaintiffs are entitled to all the land in controversy or that the defendant is entitled to all the land, must be held for error as removing from consideration of the jury defendant's evidence that plaintiffs' grant covered only a portion of the *locus*.

10. Trial § 31c—

Plaintiffs and defendant claimed the *locus* under respective State grants. Defendant contended that plaintiffs' grant could not be accurately located and that, if located, covered only a portion of the *locus*. *Held:* An instruction that by the two grants introduced in evidence title had been shown out of the State, must be held for error as an expression of opinion that the grant under which plaintiffs claim was valid and that it had been located to cover the land in question. G. S., 1-180.

APPEAL by defendant from *Burney, J.*, at June Term, 1947, of CARTERET. New trial.

This was an action to establish plaintiffs' title to a tract of land, containing 45 acres, lying and being in the waters of Beaufort Harbor, and to restrain the defendant from trespassing thereon.

Plaintiffs claimed title to the land described in the complaint under a grant from the State issued in 1853 to Joel H. Davis and J. P. Roberson and by descent and *mesne* conveyances from those original grantees. The defendant denied plaintiffs' title on the ground that the grant of 1853 was void under the statute G. S., 146-1, as attempting to grant land covered by navigable waters; that the grant could not be located; that if the grant could be located at all it did not cover the lands described in the complaint, or if so only a small part thereof. Defendant further alleged that plaintiffs were estopped by the record and final judgment in a proceeding under the Torrens Law entitled *Perry and Rumley v. Morgan, Davis and Howe,* rendered in 1941; and that the defendant was the owner of the land described in the complaint as being within the bounds of a grant issued to the defendant by the State in 1937.

The grant of 1853 described the land thereby granted as follows:

> Containing fifty acres, lying and being in the County of Carteret on the east side of Newport Channel and northeast of Bogue Channel and about southwest of Town Marsh. Beginning on the south side of the mouth of a slue that runs on the south side of Reed Marsh where said slue empties into Newport Channel, running thence the various courses of the Channel, viz.: south twenty-six degrees west sixty-eight poles, south five degs. east fifty-eight poles, south forty-seven and a half degs., east one hundred and ten poles, then north thirty-five degs. east twenty-seven poles, then north fifty-five degs. west one hundred and seven poles, then north forty-seven and a half degs. west sixty-eight degs. east sixty poles, and thence to the beginning.

The land to which plaintiffs in this action seek to establish their title, as embraced within the grant of 1853, is described in the complaint as follows:

> *Lying in Beaufort Harber, beginning at the north end of the* Government Breakwater on the west side of Bulkhead Channel, running with said breakwater and low water mark, south 14, east 1790 feet to the south end of said breakwater; thence with the low water mark of Fort Channel north 40 west 1875 feet to a stake; *thence north 1, east 2100 feet to the low water mark of the slough*; thence with said low water mark of the slough and bulkhead or Beaufort Channel southeastwardly to the beginning, containing 45 acres, more or less.

The grant under which defendant claims was issued in April, 1937, and describes the land granted as follows:

> Containing fifty-eight and nine-tenths (58.9) acres, lying and being in the County of Carteret, Beaufort Township: Beginning at an iron stake at the southwest corner of the S. W. Morgan property and running with the Morgan southern line south eighty-seven (87) degrees east six hundred and forty-four (644) feet to Morgan's southeast corner; thence south four (4) degrees east two thousand two hundred and fifty-two (2,252) feet to an iron stake at the northern point of breakwater; thence with the breakwater south fourteen (14) degrees east one thousand seven hundred and ninety (1,790) feet to the southern end of the breakwater; thence north forty (40) degrees west one thousand eight hundred and seventy-five (1,875) feet to an iron stake; thence north one (1) degree east two thousand five hundred and thirty-seven (2,537) feet to the beginning.

Upon issues submitted to the jury there was verdict that plaintiffs were the owners of the land described in the complaint, and that defendant had wrongfully trespassed thereon. No damages were allowed.

From judgment on the verdict, defendant appealed.

C. R. Wheatley, Jr., and D. M. Clark for plaintiffs, appellees.

J. F. Duncan and R. A. Nunn for defendant, appellant.

DEVIN, J. In the trial below defendant moved for judgment of nonsuit on the ground that the evidence was insufficient to show location of the grant of 1853 under which plaintiffs' claim, so as to include any of the land described in their complaint, and on the further ground that the grant was void as attempting to convey land covered by navigable waters in violation of the prohibition contained in the statute, G. S., 146-1. However, upon the evidence offered by the plaintiffs, giving to it that favorable consideration required by the rule on motions to nonsuit, we think the ruling of the trial judge on this point must be upheld. This is

in accord with what was held by this Court in *Perry v. Morgan,* 219 N. C., 377, 14 S. E. (2d), 46, where the same question on similar evidence as to an adjoining portion of the land conveyed by the grant of 1853 was presented.

Likewise, the defendant's plea that plaintiffs are estopped by the record and final judgment in *Perry v. Morgan* cannot be sustained. True, in that case, the defendant Morgan and the plaintiffs Davis and Howe were parties defendant, and the title of Davis and Howe to land under the grant of 1853 was involved, but that was a proceeding under Chap. 43 of the General Statutes, known as the Torrens Law, a proceeding *in rem,* instituted by F. K. Perry and J. H. Rumley to register title to land, the description of which did not include the land claimed by plaintiffs in this suit. *Cape Lookout Co. v. Gold,* 167 N. C., 63, 83 S. E., 3. In that proceeding Davis and Howe became parties and alleged title in themselves under the grant of 1853 as against the petition of Perry and Rumley. The title to the land described in the present complaint was not in issue. In the proceeding under the Torrens Law these plaintiffs, Davis and Howe, would have had no right to file a cross-complaint against Morgan to try the title to land not described in Perry's petition. It was said in *Jenkins v. Jenkins,* 225 N. C., 681, 36 S. E. (2d), 233: "The judgment is conclusive only on the points raised by the pleadings or which might justly be predicated on them, and the rule does not embrace matters not properly introduced and not cognizable in the former action and as to which no judgment was rendered." *Jefferson v. Sales Corp.,* 220 N. C., 76, 16 S. E. (2d), 462; *Stancil v. Wilder,* 222 N. C., 706, 24 S. E. (2d), 527; *Gillam v. Edmonson,* 154 N. C., 127, 69 S. E., 924; *Tyler v. Capehart,* 125 N. C., 64, 34 S. E., 108.

The defendant also points to the failure of plaintiff Howe to show title in himself to an interest in the land claimed under the grant of 1853, but this would not entitle defendant to a nonsuit, as one tenant in common owning only an undivided interest in land can maintain action against a trespasser. *Winborne v. Lumber Co.,* 130 N. C., 32, 40 S. E., 825.

The grant of 1853 was for a tract of land lying and being in and surrounded by the waters between Beaufort and Morehead City. It appears from the evidence that the land was partially or at times submerged. It is variously referred to in the testimony as an island, a marsh, a shoal. Prior to the dredging operation later undertaken only a small portion, known as Abel's Island or Marsh, seems to have been above water at ordinary high tide. The grant describes a tract containing 50 acres, and according to the survey and map thereof, used in the trial to illustrate the testimony of the Engineer Geo. J. Brooks, its shape was in the form of a long narrow curved strip, beginning on the south side of the mouth of a slue or slough (Westernhead Slough) on the east

side of Newport Channel or River, and extending in a southeast direction along Newport Channel and along Bogue Sound or Fort Channel, thence curving eastward with the shore line and extending to what is now the breakwater and Bulkhead Channel. It appears from the map to have had an average width of about 150 yards, with total length of approximately a mile. By accretion from the north and east the acreage as now claimed by the plaintiffs has increased to more than 100 acres. Plaintiffs contended this increase was due to the gradual and continuous shifting of sand and silt caused by wind and tide. The defendant on the other hand contended that the increased amount of land was due to the dredging operations carried on by the United States Government during recent years; that prior to these excavations there was between the eastern end of the land claimed to be covered by plaintiffs' grant and the breakwater open water more than 600 feet in width; that in the prosecution of dredging operations in connection with the Morehead City port terminal sand, mud and silt were poured into this space until it was entirely filled up; and that defendant Morgan then made entry and secured a grant from the State for this land, 58.9 acres, description of which is set out above, and that this is the land (or 45 acres of it) which the plaintiffs now claim in this suit, and seek to have added to their eastern boundary. Defendant further calls attention to the evidence, which he offered to show, that as a result of the proceeding under the Torrens Law, in *Perry v. Morgan,* plaintiffs have had their title registered as to 48 acres covered under the grant of 1853, after yielding to Perry by compromise a like acreage derived from the same source.

On the question of accretion and plaintiffs' riparian rights thereto, the court charged the jury, among other things, as follows: "Accretion is the increase of real estate by the gradual deposit by water of solid material, whether mud, sand or sediment, so as to cause that to become dry land which was before covered by water," and then, in compliance with defendant's prayer for instruction, charged the jury that "the doctrine of accretion does not apply to land reclaimed by man by filling in land once under water and making it dry." We do not think the defendant can complain of this instruction. The plaintiffs did not appeal. As we think there must be a new trial for reasons hereinafter stated, we deem it unnecessary now to determine the extent of the plaintiffs' rights, if any, to the alluvion created by the imperceptible action of natural forces or to that produced in consequence of human agency, under the conflicting evidence here presented. See *Kelly v. King,* 225 N. C., 709, 36 S. E. (2d), 220; *Ins. Co. v. Parmele,* 214 N. C., 63, 197 S. E., 714; *R. R. v. Way,* 169 N. C., 1, 85 S. E., 12; *Ward v. Willis,* 51 N. C., 183; *Lamfrey v. State,* 52 Minn., 181; *Brundage v. Knox,* 279 Ill., 450; *Patton v. Los Angeles,* 169 Cal., 521; *County of St. Clair v. Lovingston,* 90 U. S., 46; 45 C. J., 526; Tiffany Real Property, sec. 534, *et seq.*

In their original complaint the plaintiffs had alleged title to the land described, not only under the grant of 1853, but also under the judgment in the proceeding under the Torrens Law entitled *Perry v. Morgan.* Later, perceiving that the petition and judgment in that proceeding made reference to the Morgan line as the eastern boundary of lands claimed by plaintiffs under the grant of 1853, at the trial plaintiffs asked leave to amend the complaint by withdrawing all reference to the proceeding under the Torrens Law. This was allowed over objection. This was a matter within the discretion of the court. But subsequently when the defendant came to present his evidence he offered as evidence the portions of the original complaint which had been thus withdrawn. Upon objection of plaintiffs this was excluded. In this we think there was error. It was competent for the defendant to offer as evidence the allegations originally made by the plaintiffs as "evidential admissions," or declarations against interest, and in delimitation of plaintiffs' present claim. *Winborne v. McMahan,* 206 N. C., 30, 173 S. E., 278; *Hotel Corp. v. Dixon,* 196 N. C., 265, 145 S. E., 244; *Morris v. Bogue Corp.,* 194 N. C., 279, 139 S. E., 433; *Adams v. Utley,* 87 N. C., 356; Stansbury on Evidence, sec. 177.

In another instance the defendant's exception seems to have been well taken. During the trial, in response to suggestion from the court, the defendant tendered written prayers for instructions setting out defendant's contentions. Among the contentions thus stated was that the grant under which the plaintiffs' claim could not be accurately located, and if located as claimed by plaintiffs, according to the map used by the surveyor in the case, it covered only about 8 acres of the land in controversy. Evidently inadvertent to the contention based upon testimony thus presented, the court charged the jury that it was admitted by plaintiffs and defendant "that either the plaintiffs are entitled to all the land in controversy or that the defendant is entitled to all the land in controversy," thus removing from the consideration of the jury a phase of the testimony tending to show plaintiffs' grant covered only 8 acres of the land described in the complaint, and limiting recovery to a part rather than the whole tract.

Again, the defendant excepted to the court's instruction to the jury that by the two grants introduced in evidence (plaintiffs' grant of 1853 and defendant's grant of 1937) title to the land in controversy had been shown out of the State. This would seem to convey the permissible inference of an expressed opinion that the grant under which plaintiffs' claim was valid, and that it had been located to cover the land in controversy. G. S., 1-180.

For the errors herein pointed out we conclude that a new trial should be awarded, and it is so ordered.

New trial.

STATE v. JOE DAWSON.

(Filed 29 October, 1947.)

1. Criminal Law § 31b—

A lay witness is competent to testify whether or not in his opinion a person was drunk or sober on a given occasion on which he observed him.

2. Criminal Law § 31a: Automobiles § 28d—

The conditions and the opportunity for observation goes to the credibility of a witness' testimony as to whether the person observed was intoxicated, and not to its competency.

3. Same—

Testimony of witnesses to the effect that defendant was intoxicated, based upon their observation, some about three hours prior, others about fifteen minutes prior, others immediately after and others up to three hours after the automobile accident in question, tends to show that defendant was continuously under the influence of intoxicants, and none of the evidence is incompetent as being too remote in point of time.

4. Criminal Law § 42d—

Where the testimony of a witness is challenged and its credibility put at issue by a plea of not guilty and by extensive cross-examination, the admission of a written statement made by the witness prior to trial, in substantial accord with her testimony, for the purpose of corroboration, is without error.

5. Criminal Law § 78e (2)—

Any error or omission in the statement of the evidence on a subordinate feature of the case, or in the contentions of the parties, must be called to the attention of the court in time for correction.

6. Criminal Law § 81c (2)—

Where the charge is free from prejudicial error when construed contextually, assignments of error thereto will not be sustained.

APPEAL by defendant from *Nimocks, J.*, at April Term, 1947, of LENOIR.

Criminal prosecution tried upon indictment charging the defendant with the felonious slaying of one Robert Bruce Johnson.

The evidence shows that about six o'clock on the evening of 13 October, 1946, an automobile driven by the defendant collided with one driven by the deceased, Robert Bruce Johnson, on the Kinston-Greenville Highway, near Kinston. Both cars were badly damaged and the collision resulted in the instant death of the deceased. The defendant sustained a fractured ankle, a chest injury and a slight concussion of the brain as a result of the collision.

The State's evidence tends to show that the defendant had been drinking prior to the time of the collision, and was drunk at the time of the collision and for sometime thereafter. That the defendant stopped at the home of his brother about 3:45 in the afternoon, and in attempting to turn his car around backed it into a ditch from which it had to be pulled out by a tractor. He then went into the home of his brother and remained there about forty-five minutes, and while there took a drink of whiskey. He carried his bottle of whiskey with him. Thereafter, he drove about twenty miles on the highway before his car collided with the car of the deceased. A number of witnesses for the State testified that they had followed the car of the defendant for about twenty miles before defendant reached the point where the collision occurred, and defendant's car was continually zigzagging from side to side on the highway, and narrowly missed hitting a number of automobiles. That they tried to pass him several times, but he would pull over in front of them, and they decided to remain behind him. The defendant, just prior to the collision, stopped at a filling station about two and three-quarter miles from the scene of the wreck. He got out of his car and when he did so a bottle of whiskey fell on the ground. He picked up the bottle and put it in the car. The defendant was seen to stagger and appeared to be in a drunken condition. These witnesses stopped at the filling station to get some oil for their car, and one of them, at the request of the attendant at the filling station, offered to drive the defendant's car to Kinston, but the defendant replied, "No, I can drive my own car." He got in his car and almost collided with a truck as he entered the highway. He then proceeded down the highway towards Kinston. Just before the collision the defendant's car swerved off the paved portion of the highway on to the shoulder of the road, and then turned back sharply on the paved highway and collided with the car of the deceased. The collision took place on the left-hand side of the highway in the direction in which the defendant was traveling.

Verdict: "The defendant is guilty of involuntary manslaughter." Judgment: Imprisonment in the State's Prison and assigned to work under the supervision of the State Highway and Public Works Commission for not less than three nor more than five years. Defendant appeals, assigning error.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

Allen & Allen, John G. Dawson, Rivers D. Johnson, Norwood B. Boney, and Albion Dunn for defendant.

DENNY, J. The defendant has twenty-two assignments of error based on exceptions to the admission of testimony bearing on the question as to

whether or not the defendant was under the influence of an intoxicant at the time of the automobile collision which resulted in the death of Robert Bruce Johnson. Some of the witnesses testified they saw the defendant at 3:30 in the afternoon, eight or ten witnesses testified they saw him a few minutes before the collision, at a filling station. Other witnesses observed him at the scene of the collision, while others saw him in jail shortly afterwards. Each of the witnesses either testified that in his or her opinion the defendant was drunk, or that he was under the influence of an intoxicant. The defendant testified that he took a small drink late in the afternoon before he left the home of his brother, and might have taken one earlier in the day. He also testified that he was in jail not more than an hour and three-quarters before being released on bond, and that he was in a subconscious condition when he was put in jail. He contends, however, that he was not under the influence of an intoxicant, but that his condition was caused from the concussion which he received in the collision. He further testified that the collision was caused by his being blinded by cars following him, which threw lights on his rear vision mirror and blinded him. "They blinded me and I don't know what happened . . . I couldn't tell where I was."

The defendant contends that while a lay witness may, from his observation reasonably made, give his opinion as to whether he was drunk or sober, on the afternoon and evening of 13 October, 1946, the admissibility of such evidence will depend upon the remoteness from the time of the accident and the opportunity of the witness to observe the defendant's condition, citing *S. v. Kelly,* 227 N. C., 62, 40 S. E. (2d), 454. The factual situation in the cited case is not applicable here. There we held it to be error to admit testimony of the condition of the defendant more than twelve hours after the collision as evidence of his condition at the time of the collision, there being no evidence to show a continuous drunken condition. Here the evidence tends to show the defendant was continuously under the influence of an intoxicant during the afternoon and evening of the day in question. We have the testimony of the defendant himself that he took a drink of whiskey after 3:45 that afternoon and that he may have taken a drink earlier in the day. According to the evidence he was staggering and in a drunken condition at a filling station about fifteen minutes before the collision. His condition was such that one of the State's witnesses, at the request of the attendant at the filling station, offered to drive his car to Kinston for him. Furthermore, according to the evidence he was drunk at the scene of the collision. For a short time after the wreck he could not stand alone, and slumped to the ground. Later he staggered when he walked and threatened to kill the Highway Patrolman when he arrested him. The officers who observed him at the scene of the collision, testified that he was under the

influence of an intoxicant. Other officers who observed him while he was in jail, testified that in their opinion he was at that time under the influence of an intoxicant.

Ordinarily opinion evidence is limited to duly qualified experts, but there are exceptions. A lay witness is competent to testify whether or not in his opinion a person was drunk or sober on a given occasion on which he observed him. The conditions under which the witness observed the person, and the opportunity to observe him, go to the weight, not the admissibility of the testimony, Stansbury on Evidence, Sec. 129; *S. v. Harris,* 213 N. C., 648, 197 S. E., 142; *S. v. Dills,* 204 N. C., 33, 167 S. E., 459; *S. v. Holland,* 193 N. C., 713, 138 S. E., 8; *S. v. Jessup,* 183 N. C., 771, 111 S. E., 523. The facts and circumstances revealed by this record tend to show that the defendant was continuously under the influence of an intoxicant from 3:30 in the afternoon of 13 October, 1946, until his discharge from jail between 8:00 and 9:00 o'clock the same evening, following the automobile collision about 6:00 o'clock. Consequently, we hold that none of the evidence offered by the State as to the condition of the defendant before and after the time of the automobile collision involved herein, was too remote in point of time to justify its exclusion from consideration by the jury. Stansbury on Evidence, Sec. 90, p. 170; *S. v. Peterson,* 212 N. C., 758, 194 S. E., 498.

The defendant assigns as error the admission of a written statement of one of the State's witnesses, for the purpose of corroborating her oral testimony given at the trial. The defendant contends the testimony of the witness had not been impeached and the defendant had made no effort to break down her testimony, therefore the written statement previously given by her was inadmissible, citing *S. v. Parish,* 79 N. C., 610, and *S. v. Lassiter,* 191 N. C., 210, 131 S. E., 577. We do not think the record supports the contention of the defendant in this respect. The witness was a young girl, 16 years of age, and on direct examination she had testified that in her opinion the defendant was drunk. On cross-examination an effort was made to impeach her testimony as to his condition at the time of the collision and also as to her testimony relative to the way or manner the defendant had driven his car just prior thereto. The oral testimony of the witness and the statements made by her prior to the trial, which were reduced to writing and introduced in evidence, were in substantial accord. We think the effort of the defendant to impeach the testimony of this witness on cross-examination, was sufficient to make her previously written statement admissible for the purpose of corroborating her testimony. *S. v. Litteral,* 227 N. C., 527, 43 S. E. (2d), 84; *S. v. Scoggins,* 225 N. C., 71, 33 S. E. (2d), 473; *S. v. Gore,* 207 N. C., 618, 178 S. E., 209; *S. v. Bethea,* 186 N. C., 22, 118 S. E., 800. In *S. v. Litteral, supra,* we held where the testimony of

a witness is challenged and its credibility put at issue by a plea of not guilty and by extended cross-examination, evidence may be introduced to corroborate the testimony of the witness.

The defendant brings forward and argues twenty-two assignments of error based on exceptions to his Honor's charge to the jury. It is contended that his Honor failed to give as full and complete a statement of the evidence as he should have, particularly of the testimony elicited from the State's witnesses on cross-examination. There was no request for a more complete narrative of the testimony. Moreover, at the close of the charge, the Court specifically inquired of counsel for the defendant if there was anything further they wished stated to the jury and counsel replied in the negative. Any error or omission in the statement of the evidence, or in the contentions of the parties, must be called to the attention of the Court in time for correction. *S. v. Warren,* 227 N. C., 380, 42 S. E. (2d), 350; *S. v. Thompson,* 227 N. C., 19, 39 S. E. (2d), 823; *S. v. McNair,* 226 N. C., 462, 38 S. E. (2d), 514; *S. v. Smith,* 225 N. C., 78, 33 S. E. (2d), 472.

We have carefully examined the many assignments of error directed to the charge of the Court, and we think when the charge is considered contextually, as it should be, *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. Shepherd,* 220 N. C., 377, 17 S. E. (2d), 469; *S. v. Henderson,* 218 N. C., 513, 11 S. E. (2d), 462, no prejudicial or reversible error is shown.

The remaining assignment of error as to the form of the judgment, is without merit.

In the trial below, we find

No error.

R. M. LEWIS v. D. V. FURR AND RAY McEACHERN.

(Filed 29 October, 1947.)

1. Trial § 20—

Where the legal effect of the description in a deed is the sole question raised by the pleadings, the court properly determines the controversy as a question of law.

2. Boundaries § 2—

Ordinarily a particular description in a deed prevails over a general description, and the specific description cannot be enlarged by the general unless the specific description is ambiguous or insufficient, or the reference is to a fuller and more accurate description.

3. Same—

After allotment of a tract of land to his widow as dower, the remaining lands of intestate were allotted to his heirs at law. Thereafter, one heir at law conveyed by deed describing the land allotted to her by specific description followed by the words "the same being my entire interest in and to the real estate" of the ancestor, for an amount exactly the same as the valuation placed upon the land allotted to her. Thereafter the widow died. *Held:* The specific description in the deed executed by the heir was not enlarged by the general description, and the deed did not convey the heir's undivided interest in remainder in the lands allotted as dower.

4. Evidence § 3—

Our courts will take judicial notice of the laws of a sister state. G. S., 8-4.

5. Wills § 15b—

Where a will devising realty in this State is duly probated in the court having jurisdiction in the state in which testate died, and a copy thereof is duly certified and authenticated by the clerk of that court, and it appears from such copy that the will was executed with two witnesses and proved by affidavit of one of them, G. S., 31-27, such copy may be recorded here as if an original. Want of proper authentication of such copy and of the probate proceedings in accordance with the Federal Rules may be supplied *nunc pro tunc*. U.S.C.A. Title 28, Sec. 688.

APPEAL by defendant from *Alley, J.*, at June Term, 1947, of CABARRUS.

Civil action to determine controversy between plaintiff and defendant Furr as to ownership of proceeds of one-sixth interest in certain land claimed by each of them.

When the cause came on for hearing in Superior Court of Cabarrus County, and after hearing the evidence introduced, the court, being of opinion, and holding that no issue of fact arises on the pleadings, or the evidence that the jury is competent to pass on, it was agreed by counsel for both plaintiff and defendant that the judge take the papers and records and consider the case and render his decision while presiding in the Fifteenth District, out of term, out of the county and out of the District.

From the evidence introduced, the court finds these facts pertinent to the controversy, briefly stated:

1. That the heirs at law of J. R. Blackwelder, who died in the year 1913, filed a petition to allot to his widow, Sarah E. Blackwelder, her dower in his real estate and to divide the remainder among his children, and lot No. 1, containing 111 acres, was allotted to Sarah E. Blackwelder, and lot No. 4 was assigned and allotted to Ida Lewis, one of the children of J. R. Blackwelder, by metes and bounds, containing 65½ acres, valued at $1,965.00 and a charge of $602.07 to be paid by Sarah Furr, another

child, and $154.39 to be paid by Zelia Blackwelder, another child, making a total valuation thereof in the sum of $2,721.46.

2. That thereafter on 15 August, 1914, the said Ida Lewis and husband, R. M. Lewis,—the latter being the plaintiff in this action,—made a deed for said lot No. 4, "together with her boot money, or owelty," to D. V. Furr, the defendant in present action, for the consideration of $2,721.46, with the usual covenants of warranty. That this deed contained the following description: "Fourth lot in the division of lands of J. R. Blackwelder, deceased: Lying and being on No. 2 Township, Cabarrus County, North Carolina . . . described as follows": (Specific description by metes and bounds), "containing 65½ acres, more or less. The same being my entire interest in and to the real estate of my father, J. R. Blackwelder, deceased, whether in lands or boot money allotted and assigned in the division of the lands and real estate of which my said father died seized. (See Report of Commissioners appointed to divide the lands of J. R. Blackwelder, deceased)." Following the description, there is an assignment and conveyance to D. V. Furr of "any and all boot money due us, or either of us, in the division of the lands of the said J. R. Blackwelder, deceased . . . in our place and stead," and authorizing him "to receipt for the same in our place and stead."

3. That thereafter the said Ida Lewis died on 21 August, 1914, leaving a last will and testament, dated 7 August, 1914, containing the following clause: "I do hereby give, bequeath and devise unto my beloved husband, the said R. M. Lewis, all my property, real, personal and mixed, wheresoever situated, to have and to hold the same unto him and his heirs and assigns absolutely and forever in fee simple."

4. That Sarah E. Blackwelder, widow as aforesaid, died on or about 29 November, 1944, and thereupon the heirs at law of J. R. Blackwelder, including plaintiff and defendant, filed an *Ex parte* proceeding to sell the land formerly laid off to Sarah E. Blackwelder as her dower, and set out in the petition the interests of the petitioners, among others, the following: "R. M. Lewis or D. V. Furr owns the one-sixth interest in said lands, it being the undivided interest which Ida Lewis inherited from her father . . . etc.",—R. M. Lewis claiming under the will of Ida Lewis by virtue of the above quoted clause thereof, and D. V. Furr, claiming under the deed of 15 August, 1914, from Ida Lewis and her husband, R. M. Lewis, as hereinabove set forth; and, further, that both R. M. Lewis and D. V. Furr consent that said interest be sold under the proceeding and that the one-sixth of proceeds, representing the Ida Lewis interest in the dower tract as aforesaid, be paid into the office of Clerk of Superior Court of Cabarrus County "to be paid to such person or persons as may be legally entitled thereto."

5. That the dower tract of land was sold under order of court in the *Ex parte* proceeding, and the said one-sixth interest in the proceeds

amounted to $4,091.90, and same has been paid into office of Clerk of Superior Court, and the Clerk is stakeholder, and does not claim the money.

From these facts, the judge recites that "the question presented to the court is: Does the description in the deed from Ida Lewis and husband, R. M. Lewis, to D. V. Furr, as set out herein, convey her interest in the dower tract?" The court being of the opinion, concluded "that the clause following the description by metes and bounds in the deed from Ida Lewis and husband, R. M. Lewis, had reference solely to the 65½ acres tract allotted in the special proceeding introduced, and that, therefore, by virtue of the will of Ida Lewis to her husband, R. M. Lewis, it conveys her interest in the tract containing 111 acres allotted to her mother, widow of J. R. Blackwelder, and the funds derived therefrom are the property of R. M. Lewis, and that he is entitled to recover the same in this action." In accordance therewith, the court entered judgment in which it is adjudged that plaintiff R. M. Lewis recover the $4,091.90, in the hands of Clerk of Superior Court, and that defendant D. V. Furr pay the cost of the action. Defendant Furr appeals therefrom to Supreme Court, and assigns error.

Hartsell & Hartsell for plaintiff, appellee.
B. W. Blackwelder and W. S. Bogle for defendant, appellant.

WINBORNE, J. Appellant presents for decision on this appeal four questions; in three of which, in the view we take of the case, he is interested:

First: Did the court err in holding that the pleadings raised no issue of fact to be submitted to the jury? The question raised is one of law,—the interpretation of the description in the deed from Ida Lewis and husband, R. M. Lewis, to D. V. Furr. As presented here, that is a question of law for the court, and not an issue of fact for the jury.

Second: Does the description in the deed above, set out in the foregoing statement of facts, convey the interest of Ida Lewis in the dower tract? In other words, is the particular description therein enlarged by the language which appears immediately thereafter? The court below answered in the negative, and with that ruling we are in accord.

The specific description in a deed, when definite and clear, is not to be enlarged by a reference to the source of title, such as "being the same property conveyed in deed," etc., because "when connected with the specific description, it can only be considered as an identification of the land described in the boundary," *Midgett v. Twiford,* 120 N. C., 4, 26 S. E., 626, or "as a further means of locating the property," *Loan Assn. v. Bethel,* 120 N. C., 344, 27 S. E., 29.

It is only when the specific description is ambiguous, or insufficient, or the reference is to a fuller and more accurate description, that the general clause is allowed to control or is given significance in determining the boundaries. 18 C. J., 284. *Campbell v. McArthur,* 9 N. C., 33; *Ritter v. Barrett,* 20 N. C., 266; *Quelch v. Futch,* 172 N. C., 316, 90 S. E., 259; *Crews v. Crews,* 210 N. C., 217, 186 S. E., 156.

The rule is that where there is a particular and a general description in a deed, the particular description prevails over the general. *Carter v. White,* 101 N. C., 30, 7 S. E., 473; *Cox v. McGowan,* 116 N. C., 131, 21 S. E., 108; *Midgett v. Twiford, supra; Loan Assn. v. Bethel, supra; Johnston v. Case,* 131 N. C., 491, 42 S. E., 957; *Lumber Co. v. McGowan,* 168 N. C., 86, 83 S. E., 8; *Potter v. Bonner,* 174 N. C., 20, 93 S. E., 370; *Bailey v. Hayman,* 218 N. C., 175, 10 S. E. (2d), 667.

The case of *Midgett v. Twiford, supra,* is not unlike the case in hand. The holding there, pertinent here, is set out in this headnote: "In a deed by one of four devisees to a stranger, the specific description of the land by metes and bounds was immediately followed by the words, 'for the one-fourth part of all the land that my father M. died seized and possessed of': *Held,* that the *addendum* to the description did not control the latter so as to create a tenancy in common in other land devised by the deceased."

To like effect is the holding in *Loan Assn. v. Bethel, supra.* There, to the description of a lot, by metes and bounds, in a deed, were added these words: "This lot is known as lot No. 13 . . . and upon this lot the Hotel Bethel stands," and is appeared that the hotel building extended over the line and covered a part of lot No. 12. And the court held that no part of lot No. 12 passed by the deed, "the hotel being mentioned only as a means of locating lot No. 13."

These rules of interpretation are applicable to the deed in question in the present action. The words "the same being . . ." patently refer only to the tract of land particularly described, as a further means of locating it. Also, it is significant that the consideration expressed in the deed, $2,721.46, is the exact amount of the valuation placed upon the 65½ acre tract plus the owelty when allotted to Ida Lewis in the partition proceeding,—$2,721.46. And we find no error in the ruling of the court below in holding that the description in the deed covers only the 65½ acre tract, which is described by metes and bounds. Hence, under the deed from Ida Lewis and her husband to D. V. Furr, Furr has no claim to the moneys in controversy.

Third: This question relates to the refusal of the court to grant defendant's motion for judgment of nonsuit. However, in his brief appellant concedes that this is controlled largely by the answer to the question relating to the description.

Fourth: The questions as to whether the purported copy of the will of Ida Lewis and of the proceedings had in the county court of Hays County, Texas, in connection with the probate thereof, have been duly certified and authenticated, and as to whether the execution of the purported will and the purported probate thereof in the State of Texas are in conformity with the statutes of North Carolina, are matters in which appellant is no longer concerned.

It is appropriate to say, however, (1) that the laws of Texas, of which we take judicial notice, G. S., 8-4, provide that "the county court shall have general jurisdiction of a probate court," and "shall probate wills, grant letters testamentary . . .," etc., and provides the procedure for probating wills. Revised Civil Statutes of 1925 of Texas, Title 54. (2) That the copy of the purported will of Ida Lewis appears to have been executed with two witnesses and proven by affidavit of one in conformity with the provisions of our statute, G. S., 31-27, and (3) that the will was probated in the county court of the County of Hays in the State of Texas, in accordance with the laws of Texas. Therefore, when duly certified and authenticated by the clerk of the county court of Hays County a copy of the will and of the proceedings had in connection with probate thereof, "may be allowed, filed and recorded in the same manner as if the original and not a copy had been produced, proven and allowed" before the clerk of the Superior Court of Cabarrus County, North Carolina. However, the record on this appeal fails to show proper authentication of the copy of the will and of the proceedings in connection with the probate thereof in accordance with Federal Rules. U.S.C.A. Title 28, Sec. 688. See also G. S., Appendix III. This may be done *nunc pro tunc*. *Coble v. Coble*, 227 N. C., 547, 42 S. E. (2d), 898.

The judgment below will be modified in accordance with this opinion, and as so modified is here affirmed.

Modified and affirmed.

ATLANTIC COAST LINE RAILROAD COMPANY v. WEST PAVING COMPANY AND SUPERIOR STONE COMPANY.

(Filed 29 October, 1947.)

1. Carriers § 14—

A carrier is under public duty to collect for intrastate shipments the full amount of the rates fixed in accordance with tariff schedules duly filed and approved by the North Carolina Utilities Commission. G. S., 60-5; 60-6; 60-52; 60-114.

2. Same—

Misquoting the correct charge or omitting a part of the established rate cannot estop a carrier from enforcing full payment of the established and approved rates.

3. Same—

While the consignor and consignee may agree between themselves as to who shall pay freight charges, such agreement cannot prevent the carrier from collecting the full amount under the applicable tariff schedules from any party legally liable therefor.

4. Same—

In a carrier's action against the consignees to recover the amount of an undercharge, allegations of the answer as to the contractual liability of the consignor to the consignees and of negligence of the carrier in misquoting the correct charge or in omitting a part of the established rate, as a basis for a plea of estoppel against the carrier, are properly stricken from the answer upon motion. The allegations in the consignees' cross-action against the consignor, joined as a party defendant at instance of the consignees, relating to their respective contractual obligations, are not affected by the allowance of the carrier's motion.

5. Same—

In an action by a carrier against the consignees to recover an undercharge, the consignees' demurrer for failure of the carrier to make the bills of lading a part of the complaint and for failure to join the consignor and allege that as between consignees and consignor, consignees were solely or primarily liable, was properly overruled.

6. Same—

The acceptance of delivery of shipments by the consignees imports liability for the transportation charges.

APPEAL by defendant West Paving Company from *Morris, J.*, at June Term, 1947, of LENOIR. Affirmed.

Plaintiff sued to recover unpaid transportation charges on 498 carloads of stone. These shipments originated on the lines of plaintiff Atlantic Coast Line Railroad Company, having been received from defendant Superior Stone Company at Belgrade, N. C., and were transferred at Havelock yard to plaintiff's connecting carrier, the Atlantic & East Carolina Railway Company, for delivery to consignee, defendant West Paving Company, at U. S. Marine Air Station at Cherry Point, N. C. It was alleged in the complaint that these shipments were received and transported by plaintiff and connecting carrier under plaintiff's straight bills of lading upon which were notations that all freight charges thereon had been prepaid; that the line-haul freight rate was paid by defendant Paving Company through its consignor, the Superior Stone Company, on each of these shipments, but that pursuant to tariff sched-

ules duly filed with the North Carolina Utilities Commission, the Atlantic & East Carolina Railway Company was entitled to receive the sum of $5 per car for switching services between Havelock yard and the Marine Air Station at Cherry Point, and that plaintiff having received the shipment as prepaid became obligated to its connecting carrier for the lawful switching charges in connection with the transportation and delivery to defendant Paving Company, and has paid the same in the sum of $2,490. It was alleged "that the defendant (Paving Company), having undertaken and obligated itself to prepay the freight charges upon said 498 carloads of Roc Stone, was and is liable for all lawful charges incurred in connection with the transportation and delivery thereof to it under plaintiff's respective bills of lading, including the switching charges of Atlantic East Carolina Railway Company at the rate of $5 per car," and that defendant Paving Company has not paid this charge to the plaintiff or its connecting carrier.

On motion of defendant Paving Company the Superior Stone Company was made party defendant, and has filed answer. The defendant Paving Company filed an amended answer in which it alleged, among other things, that under its contract with defendant Stone Company the latter was obligated to pay all the freight charges on these shipments, and that the Stone Company's bills, including all freight charges except the switching charges, were paid in full by defendant Paving Company, and upon that basis defendant Paving Company bid on paving contracts with U. S. Government and has been paid in full therefor without being advised of the switching charges now claimed, and that under its contract the Stone Company was primarily liable for all freight charges, and that the plaintiff Atlantic Coast Line Railroad Company was and is estopped now to claim payment from the defendant Paving Company.

Defendant Paving Company, further answering, and by way of cross-action against the defendant Stone Company, alleged that if defendant Paving Company be in law held liable to the plaintiff, then defendant Paving Company is entitled to recover such sums from the defendant Stone Company.

The plaintiff thereupon entered motion to strike such portions of the defendant Paving Company's amended answer as alleged in defense to plaintiff's action against it for unpaid freight charges its contract with defendant Stone Company, and also all allegations of estoppel as against the plaintiff. The motion was allowed, and defendant Paving Company excepted and appealed.

In this Court the defendant Paving Company demurred *ore tenus* to the complaint as not stating a cause of action, for that (a) the bills of lading covering the shipments were not made part of the complaint, (b) the consignor was not made party defendant, (c) and it was not alleged

that defendant consignee had assumed obligation to pay the charges, or (d) that consignor was to be relieved of liability, or (e) that consignor had agreed to assume only secondary liability.

V. E. Phelps, W. B. R. Guion, and F. E. Wallace for plaintiff, appellee.

Whitaker & Jeffress and Allen & Allen for appellant, West Paving Company.

DEVIN, J. It is conceded that the freight charges here sued for were those contained in the legally applicable tariff schedules filed with the North Carolina Utilities Commission and were in effect at the time of the shipments referred to. Hence it follows that under well settled principles of law and in accord with the statutes enacted to prevent rebates and discrimination among shippers, and to provide equal and impartial service to all alike (G. S., 60-5; 60-6; 60-52; 60-114; 49 U.S.C.A. sec. 41 (3)), it was the duty of the plaintiff as a common carrier of freight to collect the full amount at the correct rate for transportation, and where a lawful charge therefor was negligently omitted, or rate misquoted, resulting in undercharge, the carrier was equally bound to exhaust all legal remedies to require payment in full of the proper charge. *Cotton Mills v. R. R.*, 178 N. C., 212, 100 S. E., 341; *Davis v. Gulley*, 188 N. C., 80, 123 S. E., 18. The rates fixed in accordance with the tariff schedules duly filed and approved by the North Carolina Utilities Commission as to intrastate shipments, or by the Interstate Commerce Commission as to interstate shipments, are binding not only upon the carrier but also on consignor and consignee. *R. R. v. Latham*, 176 N. C., 417, 97 S. E., 234; *Cotton Mills v. R. R.*, 178 N. C., 212, 100 S. E., 341; *R. R. v. Armfield*, 189 N. C., 581, 127 S. E., 557; *Pittsburgh C. C. & St. L. R. Co. v. Fink*, 250 U. S., 577; *Louisville & N. R. Co. v. Maxwell*, 237 U. S., 94; *Kansas City Sou. R. Co. v. Carl*, 227 U. S., 639; *Southern Ry. Co. v. Herndon* (S. C.), 179 S. E., 306. Since the carrier is required under penalty to collect the full amount of the commission-fixed rates, payment in accord therewith is not merely a private obligation between shipper and carrier, but the duty to pay is a public one. *Steele v. Gen. Mills, Inc.*, 91 Law. Ed. Adv. Opinions, 315 (decided 6 January, 1947); *Houston & T. C. R. Co. v. Johnson*, 41 S. W. (2d), 14, 83 A. L. R., 241. Hence the carrier may not be prevented by plea of estoppel from the performance of a public duty. Notwithstanding the negligence of the carrier in misquoting the correct charge, or omitting a part of the established rate, it may not be held estopped thereby from enforcing payment of the undercharge. *R. R. v. Latham*, 176 N. C., 417, 97 S. E., 234; *Cotton Mills v. R. R.*, 178 N. C.,

212, 100 S. E., 241; *Davis v. Gulley, supra; Texas & Pac. R. Co. v. Mugg & Dryden,* 202 U. S., 242; *Kansas City Sou. R. Co. v. Carl,* 227 U. S., 639; *Steele v. Gen. Mills, Inc., supra; Pittsburgh C. C. & St. L. R. Co. v. Fink,* 250 U. S., 577. While the tariffs do not prescribe who shall pay the freight charges and while the parties to the shipment, the consignor and consignee, are free to stipulate as between themselves who shall pay, an agreement between them may not be held to prevent the carrier from collecting the full amount according to the rate fixed from any party legally liable therefor. *R. R. v. Latham,* 176 N. C., 417, 97 S. E., 234; *Illinois Steel Co. v. Baltimore & Ohio R. Co.,* 320 U. S., 508; *Steele v. Gen. Mills, Inc., supra; Gardner v. Rich Mfg. Co.* (Cal.), 158 P. (2d), 23.

Hence the ruling of the court below will be upheld in allowing the motion to strike from the answer of defendant Paving Company those allegations which attempted to set up as a defense to plaintiff's action to collect the lawful freight charges a contract with its codefendant whereby it sought to exempt itself from liability therefor, or which attempted to allege facts as the basis of a plea of estoppel against the maintenance of this action against this defendant. The court below properly ruled to confine the pleadings to justiciable issues.

The allegations contained in defendant Paving Company's cross-complaint against the defendant Stone Company are not included in the portions of the answer ordered stricken, and are not affected by the ruling below.

Defendant Paving Company's demurrer *ore tenus,* interposed on the hearing in this Court, on the grounds set out in the defendant's brief, may not be held sufficient to overthrow the complaint, and must be overruled. *Winston v. Lumber Co.,* 227 N. C., 339, 42 S. E. (2d), 218; *Blackmore v. Winders,* 144 N. C., 212, 56 S. E., 874. The right of the plaintiff to sue the defendant Paving Company, the consignee of the shipments referred to, under the allegations of the complaint, may not be denied. *R. R. v. Armfield,* 189 N. C., 581, 127 S. E., 557; *Davis v. Gulley,* 188 N. C., 80, 123 S. E., 318; *R. R. v. Iron Works,* 172 N. C., 188, 90 S. E., 149; *Pittsburgh C. C. & St. L. R. Co. v. Fink,* 250 U. S., 406; *Louisville & N. R. Co. v. Central Iron & Coal Co.,* 265 U. S., 59; *Western Grain Co. v. St. Louis-San Francisco R. Co.,* 56 F. (2d), 160; *Transportation Co. v. Chemical Co.,* 148 F. (2), 777; *Northern Alabama R. Co. v. Phillips,* 220 Ala., 541; *New York C. R. Co. v. Stanziale,* 105 N. J. L., 593; 83 A. L. R., 249 (annotation). The acceptance of delivery of the shipments by the consignee imports liability for the charges for the transportation. *Illinois Steel Co. v. Baltimore & Ohio R. R. Co.,* 320 U. S., 508.

The case of *R. R. v. Simpkins and others,* 178 N. C., 273, cited by appellant, is not in point. The only parties whose liability was considered by the court in that case were the bank which paid the draft and the mortgagor of the goods shipped. No judgment was asked against the consignor and the liability of the consignee was not involved. In *Davis v. Ford,* 193 N. C., 444, the Court considered the effect of an express or special contract between carrier and consignor providing the consignee should pay all charges before delivery. See *Illinois Steel Co. v. Baltimore & Ohio Railroad Co., supra.*

We do not think the plaintiff's complaint in this case should be rejected as fatally defective upon either of the grounds stated in the demurrer.

We conclude that the ruling of the court below must be

Affirmed.

VAN GELDER YARN COMPANY, INC., v. D. C. MAUNEY ET AL.

(Filed 29 October, 1947.)

1. Trial § 31b—

The trial court is required to charge the law upon all substantial features of the case arising on the evidence even though there is no request for special instructions. G. S., 1-180.

2. Sales § 27—

Plaintiff ordered and defendants shipped cotton yarn "subject to provisions of the Cotton Yarn Rule of 1938." Plaintiff rejected the yarn for alleged breach of warranty. One of the rules stipulated that rejection had to be made within ten days after the buyer knew or should have known of defect. Defendants contended upon supporting evidence that the right of rejection was either barred or waived by this rule. *Held:* An instruction to the effect that if the jury should find that there was a breach of warranty and reach the issue of damages to answer that issue in the amount contended by plaintiff, is erroneous as being peremptory in form and as withdrawing from the consideration of the jury defendants' evidence relating to the waiver of the right of rejection.

3. Same—

In a suit by the buyer to recover for breach of warranty the burden is upon the buyer both on the issue of liability and on the extent of recovery.

APPEAL by defendants, D. C. Mauney and Haywood E. Lynch, t/a Betty Yarn Mill, from *Alley, J.,* at August Term, 1947, of CLEVELAND.

Civil action for breach of warranty in the sale of cotton yarns.

The record discloses that during the months of May, August, September and October, 1946, the plaintiff, a New York commission merchant,

purchased from the defendants, cotton yarn manufacturers, 28,512 pounds of No. 4 single-ply yarn and 25,173 pounds of No. 2 single-ply yarn at OPA ceiling prices, less 2% 10-day cash discount, as and when ordered—shipments to be made to the Southern Jersey Warehouse, Trenton, N. J., a public warehouse, subject to the Rules of the Southern Cotton Yarn Association, in respect of cancellations, rejections and claims.

The No. 4 single-ply yarn was shipped on the following dates: May 20th (9,778 pounds, price $4,454.87), October 2nd, 8th and 12th (10,435 pounds, price $8,474.39).

The No. 2 single-ply yarn was shipped on the following dates: August 23rd, September 4th and 23rd, October 2nd and 8th (25,173 pounds, price $18,917.81).

(The above figures are taken from the agreed statement of case on appeal. They are not entirely consistent with those used by the Judge in his charge, or with the figures given in the testimony of some of the witnesses. However, the exact amounts are not now capitally important.)

The jury found that the yarn, as and when ordered, was to be "white stock warp twist 6 x 5 tubes and cones," and that the yarn shipped was not of this quality.

Plaintiffs notified defendants on November 6 and 7, 1946, of rejections "due to softness with almost no twist" and mailed invoice for the rejected yarns, informing the defendants that the rejected yarns were being held subject to their orders.

The defendants denied that the yarns were defective in any way; that they were not to be "warp twist" since the defendants only manufactured "filling twist"; that no complaint was heard from the plaintiff until the market for "any other twist but a full warp twist," according to plaintiff's letter of October 4, 1946, had practically dried up, or was dying a natural death; that any claim for rejections had been waived because not filed within the time specified by the Rules of the Southern Cotton Yarn Association, the pertinent part of the applicable Rule, No. 19, being as follows:

"19. Goods shall be deemed to have been accepted and buyer's rights to reject, cancel or replace because of defect, shall expire:

"(a) When ten days have elapsed after buyer knows or should have known of such defect;

"(b) . . . (not presently applicable)

"(c) In any event, when three months have elapsed after passing of title."

At the conclusion of the evidence, counsel for plaintiff stated that in view of the plea of the Cotton Yarn Rules of 1938, plaintiff would withdraw any claim arising out of the shipment of May 20, 1946, as more than 90 days had elapsed since passing of title.

The court instructed the jury on the issue of damages as follows:

"The next issue, No. 6, is: 'What damage is the plaintiff entitled to recover of the defendants.' As I have instructed you the plaintiff abandoned its claim to $4,070.50 under the contract of May 20th, 1946, so deducting that from the amount originally sued for and adding together the other shipments without including that, under the contract price, and if deducting from that 2% discount the plaintiff is now contending that the amount it is entitled to recover of the defendants is $26,180.72; and if you reach that issue your answer should be the amount which the shipments aggregate at the contract price without including the $4,070.50 with respect to the contract of May 20, 1946." Exception by defendants.

From verdict and judgment in favor of the plaintiff for the amount mentioned in the court's charge, the defendants appeal, assigning errors.

McDougle, Ervin, Fairley & Horack for plaintiff, appellee.

D. Z. Newton and J. R. Davis for defendants, appellants.

STACY, C. J. We think the court's charge on the issue of damages must be held for error. In the first place, it is peremptory or directory in character; and, secondly, it takes from the defendants their plea in bar, or of waiver, under subsection (a), Rule 19, of the Southern Cotton Yarn Association. The trial court seems to have overlooked, for the moment, the defendants' contentions in respect of the amount, even if the issue of liability should be answered against them.

The orders were given and the shipment made, "subject to the provisions of the Cotton Yarn Rule of 1938." Under these, the merchandise purchased is deemed to have been accepted when received, and the buyer's right to reject or cancel an order, "because of defect," expires ten days after the buyer "knows or should have known of such defect." It is the position of the defendants that all the shipments, here involved, were barred from rejection under this provision. Certainly, they say, not more than the last three shipments could survive its effect, and as to these, they contend, the issue was at least one for the jury. The plaintiff takes the opposite view. We think the court was in error in resolving these mooted points against the defendants and in directing the amount of damages, should the jury reach that issue.

It is required of the trial judge that he "state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon," and this without expressing any opinion on the facts. G. S., 1-180. The manner in which the trial court shall state the evidence and declare and explain the law arising thereon must necessarily be left in large measure to his sound discretion and good judgment, "but he must charge on the different aspects presented by the evidence, and

give the law applicable thereto." *Blake v. Smith,* 163 N. C., 274, 93 S. E., 596. "On the substantive features of the case arising on the evidence, the judge is required to give correct charge concerning it." *S. v. Merrick,* 171 N. C., 788, 88 S. E., 501. "The failure of the court to instruct the jury on substantive features of the case arising on the evidence is prejudicial. This is true even though there is no request for special instructions to that effect." *Spencer v. Brown,* 214 N. C., 114, 198 S. E., 630. The pertinent decisions are to the effect that the statute "confers upon litigants a substantial legal right and calls for instructions as to the law upon all substantial features of the case"; and further, that the requirements of the enactment "are not met by a general statement of legal principles which bear more or less directly, but not with absolute directness, upon the issues made by the evidence." *Williams v. Coach Co.,* 197 N. C., 12, 147 S. E., 435.

In charging on the issue of damages, the court appears to have been unmindful of the position of the defendants in respect of the delay of the plaintiff in rejecting or canceling orders "because of defect." They not only invoked the three-months provision in subsection (c) of Rule 19, Cotton Yarn Rule of 1938, but also the 10-days provision in subsection (a) of this Rule. As the plaintiff had the laboring oar in respect of the issues of liability and extent of recovery, both being controverted, it was error for the court to determine the amount and instruct the jury to answer the issue of damages accordingly. *Haywood v. Ins. Co.,* 218 N. C., 736, 12 S. E. (2d), 221, and cases cited.

There are other exceptions appearing on the record which would require attention, if the charge on the issue of damages were upheld, but as these may not arise on the further hearing, we omit any present rulings thereon.

For error in the charge, as indicated, the defendants are entitled to another day in court. It is so ordered.

New trial.

T. L. COX v. D. D. HINSHAW AND LENA HINSHAW.

(Filed 29 October, 1947.)

1. Arbitration and Award § 2: Deeds § 16c—Provision for arbitration held to relate to accounting upon termination of agreement by mutual consent.

The parties entered into an agreement under which defendants were to care for and maintain a home for plaintiff the remainder of his natural life, operate plaintiff's businesses and turn over to plaintiff a percentage of the profits, in consideration, *inter alia,* of plaintiff's execution of a deed

to defendants, deposited in escrow under the agreement. The contract provided for arbitration in the event the parties decided, for any cause, to terminate the contract and cancel the deed. *Held:* The provision for arbitration does not empower either party acting alone to terminate the contract and force settlement of all differences by arbitration, but relates only to differences which might arise in a final settlement or accounting in the event the parties mutually agree to terminate the contract and cancel the deed.

2. Evidence § 39—

Where defendants allege that the contract between the parties contained the complete agreement in which all prior negotiations were merged, and do not seek reformation for fraud, it is error for the trial court to permit a defendant to read out portions of the contract to which he objected and to testify as to what those provisions should have been according to the proposals of plaintiff made prior to the execution of the agreement.

3. Deeds § 16c—

In an action for breach of conditions in a contract under which defendants were to care for and provide a home for plaintiff in consideration of plaintiff's conveyance of realty to defendants, testimony of plaintiff as to the condition of his room subsequent to the time plaintiff quit the premises for alleged condition broken, is incompetent in the absence of evidence that plaintiff had in the meantime requested that the room be put in order and made available to him.

APPEAL by plaintiff from *Alley, J.*, at March Term, 1947, of RANDOLPH.

Civil action to cancel a contract for noncompliance with the terms and conditions contained therein, and for the return of a deed held in escrow in connection therewith.

The plaintiff and defendants entered into a contract as of 27 September, 1944, whereby the defendants were to move into the home of the plaintiff and, among other things, were to "maintain and provide said T. L. Cox with a peaceful, quiet and comfortable home during the remainder of his natural life." The defendants also agreed to take over the operation of a mill and ice plant situated on the premises of the plaintiff and to operate and maintain them in a business-like manner, pay all expenses in connection with the operation of said plants, including taxes, and to pay over to T. L. Cox one-half of the net profits derived from the operation thereof, during his natural life. As a part of the consideration involved in the agreement, the plaintiff herein executed a warranty deed to the defendants for sixty acres of his land on which the above plants are located. The contract referred to herein was incorporated in said deed and placed in escrow with the First National Bank of Asheboro, to be delivered to the defendants upon the death of T. L. Cox, provided in the meantime the defendants had performed the conditions set forth in

the deed and contract. Otherwise, the deed is to be destroyed or returned to the estate of T. L. Cox.

Other facts were stated in the opinion of the Court, when this case was before us at the Fall Term, 1946, reported in 226 N. C., 700, 40 S. E. (2d), 358, and need not be repeated here.

In the trial below issues were submitted to the jury and answered as follows:

"1. Did the plaintiff and the defendants execute the contract referred to and described in the deed dated 27 day of September, 1944, from the plaintiff, T. L. Cox, to the defendants D. D. Hinshaw and Lena Hinshaw, his wife, and as fully described in the complaint, with the further understanding that said deed should be held in escrow during the lifetime of the grantor, T. L. Cox, to the end that it might be ascertained whether the defendants had complied with their contract as provided in the escrow agreement attached to said deed? Answer: Yes.

"2. Did the defendants breach the conditions set forth in said deed and contract, as alleged in the complaint? Answer: No."

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

John G. Prevette and Horton & Bell for plaintiff.

H. M. Robins for defendants.

DENNY, J. The plaintiff alleges that by reason of the failure of the defendants to perform the conditions in the contract executed by the parties, he desires to terminate the contract and cancel the deed, and has so notified the defendants and made demand that they vacate the premises and submit any differences or claims of dispute the plaintiff and defendants may have to arbitration, according to their agreement so to do; but the defendants have refused to vacate the premises or to submit their differences to arbitration.

The defendants, on the other hand, deny any breach of the contract and allege that the contract does not contain a provision requiring the arbitration of the matters in dispute in this action.

There is a provision in the contract that if the parties decide, for any cause, to terminate and cancel the deed and contract, in such event, the parties agree to arbitrate any differences that may arise between them. However, there is no provision in the contract for arbitration of any differences which might arise between the parties respecting the performance of the conditions contained therein.

We think it is evident the differences which the parties agreed might be settled by arbitration, were those differences which might arise in a final settlement or accounting between the parties arising out of the

management of plaintiff's properties by defendants, as provided in the contract, in the event the parties mutually agreed to a termination of the contract and the cancellation of the deed. The plaintiff nor the defendants acting alone can effect a termination of the contract and a cancellation of the deed involved herein, thereby forcing a settlement of all differences arising in connection therewith by arbitration.

Consequently, the courts constitute the only forum in which the plaintiff may obtain relief for any breach of the conditions contained in the deed and contract. The jury in the trial below, having found that the defendants have not breached the contract, we must determine whether or not any prejudicial error was committed in the trial below.

The defendants allege in their answer that the deed and contract, dated 27 September, 1944, sets forth and contains the full and complete contract and agreement between the parties, with all the terms and conditions thereof, and that "all prior negotiations of the parties were and are merged in said written deed and contract—and that there are no existing terms of the agreement between the parties that are not set forth and contained in said deed and contract." Notwithstanding these allegations made and verified by the defendants, the defendant, D. D. Hinshaw, was permitted, over objection by the plaintiff, to testify that certain provisions in the deed and contract were grossly unfair to the defendants and were not in accord with his understanding with the plaintiff prior to the preparation and execution of the agreement. He was permitted to point out and read to the jury the provisions to which he objected, and to testify as to what those provisions should have been, according to the proposals of the plaintiff made prior to the execution of the agreement. This evidence was inadmissible and prejudicial. *Williams v. McLean,* 220 N. C., 504, 17 S. E. (2d), 644; Stansbury on Evidence, Sec. 251, p. 503. It tends to show that the plaintiff did not act in good faith in connection with the preparation of the contract. The defendants in their pleadings do not raise an issue of fraud or seek to have the contract reformed, hence the exception of the plaintiff to the admission of this evidence will be sustained.

The appellant also assigns as error the refusal of the court below to permit him to introduce evidence as to the condition in which he found his room the day before the trial, in his home occupied by the Hinshaws. There is no evidence disclosed on the record tending to show that the plaintiff has occupied the room at any time since he left there, 23 September, 1945, or that he has requested the defendants, in the meantime, to have the room in order and available for him. These assignments of error are without merit.

We deem it unnecessary to discuss the remaining assignments of error, since there must be a new trial, and it is so ordered.

New trial.

W. L. SUTTON AND WIFE, ANNIE FIELDS SUTTON, v. MABEL B. QUINERLY, CORA A. CRADDOCK, JOHN HICKSON AND WIFE, THELMA JENKINS HICKSON; LOIS HICKSON SCOTT AND HUSBAND, K. D. SCOTT; WILLIAM F. HICKSON AND WIFE, MARGARET COUCH HICKSON; EDWARD B. HICKSON, ROBERT W. HICKSON, PHILIP H. HICKSON AND WIFE, WINAFRED ALLEN HICKSON; ANN HICKSON BOWEN AND HUSBAND, HARRY BOWEN; JAMES F. HICKSON AND RICHARD C. HICKSON, AND FRANCES FIELDS HOLLIDAY AND HUSBAND, JOSEPH W. HOLLIDAY.

(Filed 29 October, 1947.)

1. Wills § 32—

The presumption against partial intestacy has varying force according to the circumstances of the particular case, but in no event can it justify the court in making a will for testator.

2. Same—

The presumption against partial intestacy applies with particular force as to lands which testator undertakes to dispose of and selects the objects of his bounty.

3. Wills § 34—

Testator devised certain lands to his daughter for life with limitation over to her child or children if she should marry and bear children, but "if she does not marry" then to her brother or sisters who may survive her. *Held:* The limitation over to brother and sisters of the first taker is not defeated by her subsequent marriage, it being the obvious intent of the testator that the limitation over to them should take effect in the event the first taker dies without child or children of her marriage surviving her.

4. Wills § 33c—

Where there is devise to testator's daughter with limitation over to her children, and in the event of failure of such children then to the brother and sisters of the first taker who should survive her, those who take the contingent limitation over must be ascertained as of the date of the death of the first taker.

DEFENDANTS' (except Mabel B. Quinerly and Cora A. Craddock) appeal from *Hamilton, Special Judge,* at September Term, 1947, of LENOIR.

John G. Dawson for plaintiffs, appellees.
Whitaker & Jeffress for Cora A. Craddock, defendant, appellee.
William A. Allen, Jr., and Allen & Allen for defendants, appellants.

SEAWELL, J. The proceeding under review was instituted before the Clerk of the Superior Court for a twofold purpose: To obtain a court construction of the will of W. C. Fields, deceased, with respect to the devise in paragraph 5 thereof; and secure an order of sale for certain

property therein described. The jurisdiction of the Clerk on matters of construction is not in question, since final action was in the Superior Court before the Judge.

The case went up to the Superior Court on an appeal from the Clerk, the objection being to his construction of the controversial paragraph hereafter quoted, and the judgment was there affirmed. It comes here on appeal by defendants other than Mabel B. Quinerly and Cora A. Craddock, to whom the result was favorable,—the appellants directing their objection and exceptions solely to that part of the judgment adversely construing the devise under paragraph 5. As to the sale of the land as provided for in the judgment, all the parties are agreed and further reference thereto will not be necessary.

The paragraph of the will concerned with the controversy reads as follows:

> "Item 5th: I loan to my daughter Annie C. Fields, the following lots and lands: The lot on which stands the 'Farmers Warehouse'—corner of Heritage and Gordon Streets—being about 110 x 190 feet —The lot on which Geo. Herring now lives adjoining the lot of H. D. Spain—(on Queen Street—)and the lot now occupied by J. A. Long—being about 55 or 60 feet front by 210 deep. The vacant lot next to the lot in which Tom Cox now lives on East side of Independence Street, between Washington and Lenoir Streets—being about 60 x 200 feet. The vacant square or lot on west side of W. & W. Rail Road, about 132 x 265 feet adjoining lots formerly beyonged to L. Harvey on the west & Mrs. Lillian Perry on the south and the W. & W. Rail Road on the east—The tract of land—about 350 acres in Vance Township—known as 'Moore Dale' on which Josh Mewborn now lives, during the term of her natural life and, after her death, if she shall have married and borne children (or a child) by such marriage, I give, devise and bequeath said lands—and lots to such child or children—and, if she does not marry, I give, devise and bequeath said lots and lands to her brother or sisters who may survive her to them, their heirs and assigns."

Since the death of the testator, Annie Fields, holder of the life estate, married W. L. Sutton and these two are plaintiffs in the action. W. C. Fields, Jr., has since died.

The judgment challenged by the appellants concludes and declares that upon the death of Annie Fields Sutton, without children, the property devised in the quoted paragraph of the will will go under the terms thereof to Mrs. Quinerly or Mrs. Craddock, or both, according as either or both may survive the life tenant, and contingent upon such survival.

The appellants take a strict and literal view of the contingency as expressed in the will, "If she [Annie] does not marry,"—contending that the sole contingency upon which the appellees could succeed to the remainder under the devise having already transpired adversely to their interest, W. C. Fields died intestate and without further provision as to the said remainder and it must, therefore, descend under the statute to his heirs general, *per stirpes.*

The appellees contend that it was the purpose of the testator to devise the property to such of the brother and sisters who might survive Annie in case she had no children, to the exclusion of other heirs who might take as representatives of deceased ancestors; and to arrive at the true meaning it is necessary and competent to read into the will (simply as an explanatory device) after the words, "does not marry," a clause reading, "or leave a child or children surviving her," in which event the remainder would go to such member or members of the designated group as might survive Annie. Favoring that construction they call to our attention the presumption against intestacy, and particularly against partial intestacy. *Ferguson v. Ferguson,* 225 N. C., 375, 377, 378, 35 S. E. (2d), 231; *Holland v. Smith,* 224 N. C., 255, 257, 29 S. E. (2d), 888; *Trust Co. v. Miller,* 223 N. C., 1, 4, 25 S. E. (2d), 177; *Coddington v. Stone,* 217 N. C., 714, 720, 9 S. E. (2d), 420; *Austin v. Austin,* 160 N. C., 367, 369, 76 S. E., 272; 69 C. J., p. 91, see *id.,* note 83, especially N. C. Citations on p. 93; Page on Wills, Sec. 926.

The presumption that the testator, having undertaken to make a will, intended to make a complete disposition of his property is of varying force, according to the circumstances of the particular case, and cannot, of course, justify the Court in making a will for the testator. Where the estate is large, the beneficiaries numerous, some *in esse* and others prospective, and the adjustments complex, we can conceive that the presumption may not be so impelling. But once the mind of the testator has penetrated to that point and has actually dealt with the item and chosen the objects of his bounty upon an expressed contingency, it would be singular if he should permit defeat of the testamentary disposition, abandon the pursuit, or leave the property undisposed of upon the failure of some other irrelevant contingency, also mentioned.

Of what significance then is the expression "if she shall not marry" used in parallel construction with the expression "if she shall have married and borne children (or a child) by such marriage," which immediately precedes it in the will? We think a reasonable construction would be that in the expression "if she does not marry" the testator intended to state the converse or reverse of the contingency he first stated *in its entirety,* substituting for the fuller expression the words "if she shall not marry," which meant to him that she would not have children surviving

her if she did not marry. Such a construction brings into logical relation the provisions as to the disposition of this property and the reasonableness of the phrase "if she does not marry" in this relation, which would otherwise be wanting. It puts the appellees and the appellants on different sides of the same contingent event; the children of Annie to take if any survived her; if she had none surviving her, such of the brother and sisters as might survive her to take. Mrs. Quinerly and Mrs. Craddock now survive; but the roll is to be called at the death of Mrs. Sutton. We are confirmed in this opinion since otherwise, as above suggested, the mere fact of Annie's marriage or non-marriage would be an arbitrary contingency, no more related to the scheme of disposition and the natural provision and care for the chosen objects of testator's bounty than if the contingency had been predicated on the event of the next Democratic Convention being held in Chicago or Byrd's safe return from the Antarctic. *Desmartean v. Fortain,* 326 Ill., 608, 158 N. E., 444. We cannot see how the bare fact of Annie's marriage could have been important to the testator except as it bore on the possibility of having children who might survive her.

In our opinion the court below correctly construed the devise, and the judgment is

Affirmed.

MADELINE DUNN BARWICK v. EDWARD MILTON BARWICK.

(Filed 29 October, 1947.)

1. Divorce § 12—

If the complaint sufficiently alleges any one of the grounds for alimony without divorce, it is sufficient to sustain an order for alimony *pendente lite.*

2. Divorce §§ 1b, 5d—

If the wife is compelled to leave the home of the husband because he offers such indignities to her person as to render her condition intolerable and life burdensome, his acts constitute in law an abandonment of the wife by the husband, and allegations to this effect are sufficient to state a cause of action for alimony without divorce.

3. Divorce § 5d—

Allegations to the effect that defendant husband, without provocation or excuse, would frequently leave his wife and child and visit the wife of a neighbor, sometimes in the neighbor's absence, and that without provocation on her part, but merely upon inquiry concerning such visits, defendant assaulted plaintiff, and refused reconciliation unless plaintiff apologized for statements which defendant had admitted to be true, *is held* sufficient to allege a cause of action for alimony without divorce on the

ground that defendant had offered such indignities to the person of plaintiff as to render her condition intolerable and life burdensome.

4. Divorce § 1e—

Acts of a husband which will constitute such indignities to the person of his wife as to render her condition intolerable and life burdensome largely depend upon the facts and circumstances in each particular case.

5. Divorce § 12—

A temporary order for subsistence and attorneys' fees upon proper findings by the court do not affect the controverted issues of fact which must be determined by the jury upon the evidence in the action.

6. Same—

When the allegations of the complaint are sufficient to support a verdict, if proven, in actions brought for alimony without divorce, under the provisions of G. S., 50-16, the amounts allowed plaintiff for subsistence *pendente lite* and for counsel fees, are determined by the trial judge in his discretion.

APPEAL by defendant from *Frizzelle, J.*, at Chambers in Snow Hill, 29 March, 1947. From CRAVEN.

Action for alimony without divorce. Plaintiff and defendant were married 24 December, 1940. The plaintiff seeks an allowance for her subsistence, for the support of the minor child born of said marriage, and for her attorneys' fees.

From an order granting the plaintiff an allowance *pendente lite* for subsistence for herself and child, and for counsel fees, the defendant appeals, assigning error.

R. E. Whitehurst and J. A. Jones for plaintiff.

J. Faison Thomson and Whitaker & Jeffress for defendant.

DENNY, J. The sole question presented on this appeal is whether or not the plaintiff has alleged sufficient facts, and with the particularity required by our decisions, to support a verdict for the relief sought. *Lawrence v. Lawrence,* 226 N. C., 624, 39 S. E. (2d), 807; *Brooks v. Brooks,* 226 N. C., 280, 37 S. E. (2d), 909; *Blanchard v. Blanchard,* 226 N. C., 152, 36 S. E. (2d), 919; *Pearce v. Pearce,* 225 N. C., 571, 35 S. E. (2d), 636; *Howell v. Howell,* 223 N. C., 62, 25 S. E. (2d), 169; *Pollard v. Pollard,* 221 N. C., 46, 19 S. E. (2d), 1; *Carnes v. Carnes,* 204 N. C., 636, 169 S. E., 222; *McManus v. McManus,* 191 N. C., 740, 133 S. E., 9.

The defendant complains because it is somewhat difficult to ascertain from the pleadings whether the plaintiff bottoms her action on abandonment by the defendant or upon a course of conduct on the part of the

defendant which she alleges constituted such indignities to her person as to render her condition intolerable and life burdensome. We concede that the pleadings filed herein by the plaintiff and the defendant, consisting of 25 pages of the record, are somewhat prolix. However, if the allegations of the plaintiff are sufficient, if proven, to sustain a verdict, the plaintiff is entitled to an affirmance of the order entered below.

The defendant contends the plaintiff abandoned him, and therefore she is not entitled to the relief she seeks. The plaintiff, on the other hand, alleges in her complaint that she left the home of the defendant on 1 January, 1947, and took refuge in the home of her parents, but she further alleges she was compelled to do so by reason of the conduct of the defendant which constituted such indignities to her person as to render her condition intolerable and life burdensome. If these allegations are true, they would constitute in law an abandonment by the defendant. *Dowdy v. Dowdy,* 154 N. C., 556, 70 S. E., 719; *Pollard v. Pollard, supra; Blanchard v. Blanchard, supra.*

The plaintiff alleges, among other things, that the defendant, over a considerable period of time prior to their separation, insisted on spending a great deal of his time in the home of Mr. and Mrs. James Sutton. That Mr. Sutton is a partial invalid. That the defendant, about July, 1946, began to exhibit an interest in Lillie Mae Sutton, who prior to that time together with her husband had been intimate friends of the plaintiff and the defendant. That said interest increased on the part of Lillie Mae Sutton and the defendant in each other, until such relationship affected adversely the happiness which had theretofore existed between the plaintiff and the defendant. The defendant, without provocation, excuse or just cause on the part of the plaintiff, would leave the plaintiff and the child born of the marriage alone and visit in the Sutton home. Numerous visits were made, some in the daytime and others at night, some when Mr. Sutton was at home and some when he was away from home. That without provocation on her part, but merely upon inquiry concerning his visits to the home of the Suttons, the defendant assaulted her in July, 1946, and on 5 December, 1946. And on the latter date as he assaulted her, he stated in an angry tone of voice that he "ought to beat the dam hell out of her." Later, after the separation, an effort was made to reconcile the marital differences between the plaintiff and defendant, and the defendant agreed to conduct himself with reference to Lillie Mae Sutton, so as not "to again arouse suspicion on the part of his wife; and further agreed to go for the plaintiff on 12 January, 1947, and take her to his home." Plaintiff alleges that defendant failed to keep his agreement and later "insisted that the only condition on which he would reestablish his home, was that the plaintiff apologize to the said Lillie Mae Sutton and her husband for what the plaintiff had said concerning his,

the defendant's conduct in respect to the said Lillie Mae Sutton, all of which said statements made by the plaintiff had theretofore been admitted by the defendant." It is further revealed by the pleadings that the plaintiff is of a nervous temperament, having undergone six operations following the marriage between the plaintiff and defendant, two of which were for miscarriages.

We think the allegations of the plaintiff are sufficient to support a verdict on either or both grounds alleged, if proven by competent evidence. The acts of a husband which will constitute such indignities to the person of his wife, as to render her condition intolerable and life burdensome, largely depend upon the facts and circumstances in each particular case. And such facts and circumstances are for the jury to pass upon unaffected by any temporary order entered for subsistence and attorney's fees. *Sanders v. Sanders,* 157 N. C., 229, 72 S. E., 876. In the last cited case, *Hoke, J.,* speaking for this Court, quoted with approval from the opinion in *Taylor v. Taylor,* 76 N. C., 436, as follows: "No undeviating rule has been as yet agreed upon by the courts, or probably can be, which will apply to all cases in determining what indignities are grounds for divorce, because they render the condition of the party injured intolerable. The station in life, the temperament, state of health, habits and feelings of different persons are so unlike the treatment which would send the broken heart of one to the grave would make no sensible impression upon another. . . . We may assume, then, that the Legislature purposely omitted to specify the particular acts of indignity for which divorces may in all cases be obtained. The matter is left at large under the general words, thus leaving the courts to deal with each particular case and to determine it upon its own peculiar circumstances, so as to carry into effect the purpose and remedial object of the statute."

The court below found as a fact: "That prior to 1 January, 1947, and beginning with the early summer of 1946, the conduct of the defendant was such as to render life for the plaintiff burdensome and living with the defendant intolerable, and such as resulted in a separation between the plaintiff and the defendant under date of 1 January, 1947."

When the allegations of the plaintiff are sufficient to support a verdict, if proven, in actions brought for alimony without divorce, under the provisions of G. S., 50-16, the amounts allowed plaintiff for subsistence *pendente lite* and for counsel fees, are determined by the trial judge in his discretion. *Oldham v. Oldham,* 225 N. C., 476, 35 S. E. (2d), 332.

The order granting the plaintiff temporary subsistence and attorneys' fees, pending the trial and final determination of the issues raised in this action, will be upheld.

Affirmed.

IN RE CARL FRANKLIN BARWICK.

(Filed 29 October, 1947.)

Habeas Corpus § 3: Appeal and Error § 48—

In *habeas corpus* to determine the custody of a minor child as between husband and wife separated but not divorced, G. S., 17-39, the findings of the court that the best interests of the infant require that its custody be awarded its mother are sufficient to support the judgment in her favor, and an exception to the signing and entering of the judgment cannot be sustained.

APPEAL by respondent from *Nimocks, J.,* at Chambers, 12 April, 1947. From LENOIR. Affirmed.

J. A. Jones for petitioner, appellee.

J. Faison Thomson and Whitaker & Jeffress for respondent, appellant.

PER CURIAM. The petition of Madeline Dunn Barwick for the custody of her infant son was heard upon return to the writ of *habeas corpus* issued under G. S., 17-39. Petitioner is separated from her husband but not divorced. *Barwick v. Barwick, ante,* 109. After full hearing afforded to petitioner and respondent, and consideration of the supporting affidavits of each, judgment was rendered awarding custody of the child to the petitioner, the court finding "that the best interest and general welfare of said infant Carl Franklin Barwick require that its custody, care and control be awarded to its mother, Mrs. Madeline Dunn Barwick." Provision was made for respondent father to have the child with him at certain times. Respondent appealed. His only exception "was to the signing and entering of judgment." The facts found by the court below were sufficient to support the judgment.

Judgment affirmed.

MILLARD C. STONESTREET v. B. W. MEANS.

(Filed 29 October, 1947.)

Courts § 3c: Ejectment § 4—

Courts of justices of the peace do not have exclusive original jurisdiction of actions in summary ejectment but the Superior Courts have concurrent jurisdiction of such actions, G. S., 7-63, and therefore in a possessory action against a tenant wrongfully holding over, instituted in the Superior Court, defendant's motion to dismiss for want of jurisdiction is

properly overruled whether the action be regarded as one to recover possession of the land or a summary proceeding in ejectment. G. S., 42-28.

APPEAL by defendant from *Alley, J.*, at April Term, 1947, of CABARRUS.

Civil action to recover possession of land.

On 21 October, 1946, the plaintiff purchased a farm in Cabarrus County from D. H. Furr, and immediately notified Furr's tenant, defendant herein, to vacate on or before 1 November, 1946. The tenant declined to vacate on the ground that he was holding under a three-year lease which had not expired. Furr contended the tenancy was by the month or from month to month.

This action was instituted in the Superior Court of Cabarrus County on 27 November, 1946, to recover possession of the farm, and, by later amendment, to assess the defendant "$25 per month since 21 October, 1946, as a reasonable rental therefor."

The defendant filed answer, admitted plaintiff's ownership of the land, declined and refused to vacate, claimed right to possession under lease from plaintiff's predecessor in title, and moved to dismiss for want of original jurisdiction in the Superior Court to entertain the action.

The jury found (1) that the plaintiff was the owner of the land; (2) that the defendant did not hold under a three-year lease, as alleged; (3) that the defendant's possession was wrongful, and (4) that plaintiff is entitled to recover no damages for the wrongful detention. The jury recommended that the defendant be given an additional ninety days within which to vacate the premises "without payment of rent for this additional time."

From judgment on the verdict for plaintiff, the defendant appeals, assigning errors.

Morton & Williams and Zeb A. Morris, Jr., for plaintiff, appellee.
Hartsell & Hartsell for defendant, appellant.

STACY, C. J. The question for decision is whether the purchaser from a landlord may maintain a possessory action in the Superior Court against a tenant who holds over when he might have proceeded in summary ejectment before a justice of the peace. The trial court answered in the affirmative, and we approve.

It is provided by G. S., 42-26, *et seq.*, that a landlord may dispossess a tenant who holds over and continues in possession of demised premises without permission and after demand for surrender, by a summary proceeding in ejectment instituted before any justice of the peace of the county in which the demised premises are situated. G. S., 42-28. Such proceeding, however, even when appropriate and available, is neither

mandatory nor exclusive. The Superior Court still has original jurisdiction to entertain actions for the recovery of land and "it seems that justices of the peace, as between landlords and tenants, have concurrent jurisdiction with the Superior Courts." *McDonald v. Ingram,* 124 N. C., 272, 32 S. E., 677.

Here, the plaintiff's ownership of the land is admitted. Defendant concedes that, in view of the verdict he is a tenant wrongfully holding over. He resists eviction on the ground that a court of the justice of the peace, and not the Superior Court, has exclusive original jurisdiction of the action.

It can make no difference whether the action be regarded as one to recover possession of land, or a summary proceeding in ejectment, the jurisdiction of the Superior Court attaches in either event. *Bryan v. Street,* 209 N. C., 284, 183 S. E., 366. It is provided by G. S., 7-63, "The Superior Court has original jurisdiction of all civil actions whereof exclusive original jurisdiction is not given to some other court." *Ogburn v. Booker,* 197 N. C., 687, 150 S. E., 330; *Shelton v. Clinard,* 187 N. C., 664, 122 S. E., 477; *Seligson v. Klyman,* 227 N. C., 347. Exclusive original jurisdiction is not vested in courts of justices of the peace in summary ejectment. See *Machine Co. v. Burger,* 181 N. C., 241, 107 S. E., 14, for general discussion.

The challenge to the jurisdiction was properly overruled. It is observed that the jury attached a recommendation to its verdict, which the court incorporated in the judgment, without objection from either side. No doubt they smiled and said nothing, like the parties to a certain deed when they noticed that the eminent lawyer who drew it, while not a party to the deed, had inserted a clause therein reserving to himself "the right to fish in said mill pond for and during the term of his natural life."

The verdict and judgment will be upheld.

No error.

SYCAMORE MILLS, INC., ET AL., V. HERVEY VENEER CO. ET AL.

(Filed 29 October, 1947.)

1. Landlord and Tenant § 26—

Where a lease beginning the calendar year stipulates quarterly rental, the first quarter rent to be due April 1st and quarterly thereafter, the rent is payable at any time during the quarter, particularly when this is accordant with the *ante litem motam* interpretation of the parties.

2. Landlord and Tenant § 22a—

Where rent is payable quarterly, contention of forfeiture of the lease for nonpayment of the July quarter rent is untenable when it appears that

the following December lessor wrote lessee that unless another lease agreement were reached lessor would repossess the following January, and in October of the following year lessor institutes summary ejectment and seeks to recover rent only from the prior January, since it would seem that lessor had waived the alleged breach.

3. Ejectment § 7—

In an action in summary ejectment on the ground that lessee had forfeited the lease by nonpayment of rent, nonsuit will be entered upon failure of proof of forfeiture as set out in the complaint.

3. Ejectment § 7—

A fatal variance between allegation and proof justifies nonsuit, as it amounts to a total failure of proof on the declaration or the cause alleged.

APPEAL by defendants from *Pittman, J.*, at February Term, 1947, of McDOWELL.

Summary proceeding in ejectment.

It is alleged that by written agreement executed 1 January, 1940, the plaintiffs leased to the defendant certain lots adjoining the plant of the defendant in Old Fort, McDowell County, for "the sum of fifteen dollars ($15.00) quarterly, beginning January 1st, 1940, the first quarter due April 1st, 1940, and quarterly thereafter."

The term of the lease was to be for five years from 1 January, 1940, with privilege of renewal for one or more five-year periods up to a total of three five-year periods; provided agreement could be reached "as to the advanced rental, if any be charged," over and above the quarterly amount fixed for the original term. The lease was to terminate "in the event an agreement cannot be reached as to the advanced rate of rental." In this connection, however, it was further provided, that the lessee was to have the "refusal of the above property for the three five-year periods at an amount not less than fifteen dollars per quarter, nor more than any other *bona fide* renter is willing to pay at that time." In the concluding paragraph, it is stipulated that the lease shall terminate upon failure, neglect or refusal on the part of the lessee "to pay quarterly rentals promptly when due."

On 1 September, 1944, the lessee gave the plaintiffs written notice "that we plan to exercise our option for leasing the lots for another 5-year period beginning January 1, 1945."

Thereafter, on 26 December, 1944, the plaintiffs notified the defendant by letter "that unless you meet with me, or otherwise arrange another lease agreement, I will repossess the lots on January 1st, 1945, or shortly thereafter, and claim damages and expenses."

On 23 October, 1945, plaintiff instituted this summary proceeding in ejectment before a justice of the peace for nonpayment of rentals as

specified in the lease and demanded $150.00 "for rent of the premises from 1st day of January, 1945, to present."

From judgment for plaintiffs, the lessees appealed to the Superior Court where the matter was heard *de novo* at the February Term, 1947, and again resulted in a verdict and judgment for plaintiffs, the jury assessing the damages at $280.00.

From judgment on the verdict for plaintiffs, the defendants appeal, assigning errors.

Paul J. Story for plaintiffs, appellees.

R. H. McNeill for defendants, appellants.

STACY, C. J. It seems that on the hearing in the Superior Court, the plaintiffs asserted that the lease was terminated in July, 1944, because the quarterly rental of $15.00 was not paid in advance at that time. The defendants, on the other hand, claimed there was no forfeiture of the lease as the rent was tendered within the first thirty days of the quarter. The lessee's contention that the rent was payable at any time during the quarter, seems to accord with the terms of the lease, and also with the *ante litem motam* practical interpretation of the parties. *Jones v. Realty Co.*, 226 N. C., 303, 37 S. E. (2d), 906; *Cole v. Fibre Co.*, 200 N. C., 484, 157 S. E., 857. The rent was to begin on 1 January, 1940, and became due "the first quarter due April 1st, 1940, and quarterly thereafter."

Moreover, as we understand the record, the plaintiffs herein—proceeding instituted 23 October, 1945—seek to dispossess their tenant and to recover rent "from 1st day of January, 1945, to present." This would seem to be a waiver of any alleged breach in July, 1944, six months earlier, if not already waived by plaintiff's letter of 26 December, 1944, in which it was stated "that unless you meet with me, or otherwise arrange another lease agreement, I will repossess the lots on January 1, 1945, or shortly thereafter."

At any rate, so far as we are able to discover, the record appears barren of any evidence to support the claim set out in the complaint. A fatal variance between allegation and proof suggests a nonsuit, as it amounts to a total failure of proof on the declaration or the cause alleged. *Whichard v. Lipe*, 221 N. C., 53, 19 S. E. (2d), 14, and cases cited. It is so ordered.

Reversed.

L. C. FERRELL v. G. C. WORTHINGTON.

(Filed 29 October, 1947.)

Arbitration and Award § 2: Reference § 5a—

Where the parties by consent judgment stipulate that the amount of commissions due defendant should be determined by a referee and that the amount so found should be binding and conclusive on the parties, the amount found by the referee in accordance with the agreement is conclusive, and the trial court properly declines to entertain exceptions to the referee's report.

APPEAL by defendant from *Burney, J.*, at September Term, 1947, of LENOIR.

Civil action for an accounting for collection of "charged off" accounts of partnership existing between plaintiff and defendant. See former appeal, 226 N. C., 609.

At May Term, 1947, of Superior Court of Lenoir County a consent judgment was entered in which it is recited that all matters in controversy have been satisfactorily compromised and adjusted between the parties, upon the terms and conditions therein set forth, among others that defendant shall also receive commissions for collecting $36,490 from charged off accounts,—the amount of the commissions to be determined by a reference as therein provided, to wit: "That William Dunn, Sr., New Bern, North Carolina, is hereby named a Referee and is hereby authorized, empowered and directed to ascertain what is a reasonable commission to be allowed and paid . . . said amount to be determined by the Referee on a basis of what would be charged for collection of said amounts of money by reputable collection agencies operating in Lenoir and adjoining counties. Whatever amount may be found by said Referee to be due the defendant for making said collections as herein provided shall be conclusive and binding on the parties hereto."

Thereafter, on 23 June, 1947, William Dunn, Referee, purporting to act in accordance with the agreement set forth in said consent judgment, reported to the court that defendant is entitled to receive as commissions for collecting the $36,490 the sum of $2,522.09.

Defendant filed exceptions to the report. Plaintiff moved to strike out the exceptions for that, among other things, the findings and award of the Referee are conclusive and binding upon the parties hereto.

The court declined to entertain the exceptions to the report and ordered that same be disallowed and stricken from the record,—adjudging the report to be final and conclusive and binding upon the parties.

Defendant appeals to Supreme Court and assigns error.

W. Frank Taylor, Matt H. Allen, and Geo. B. Greene for plaintiff, appellee.

Whitaker & Jeffress, F. E. Wallace, and E. R. Wooten for defendant, appellant.

PER CURIAM. William Dunn, Sr., purporting to act in accordance with the yardstick prescribed by the parties, has determined the amount of commissions due to defendant. The parties have agreed that whatever amount found by him to be due shall be conclusive and binding on them. Their agreement was made a judgment of court record. So be it!

Affirmed.

STATE v. CARL COFFEY.

(Filed 5 November, 1947.)

1. Criminal Law § 52a—

Where the State relies upon circumstantial evidence, the facts or circumstances adduced must be of such a nature and so connected or related as to point unerringly to defendant's guilt and exclude any other reasonable hypothesis.

2. Same—

Circumstantial evidence which tends only to show an opportunity to commit the crime charged is insufficient to be submitted to the jury.

3. Same—

The introduction of testimony by the State of statements made by defendant does not preclude the State from showing that the facts are otherwise, but where the State offers no evidence tending to contradict the statements, the State presents such statements as worthy of belief.

4. Homicide § 25—Circumstantial evidence held insufficient to show that defendant was the perpetrator of the homicide.

The State's evidence tended to show that deceased died of head wounds inflicted by a blunt instrument during the night while he was guarding a wagon load of whiskey. The only evidence that defendant was at the scene of the crime was testimony of a statement made by him to the effect that others were at the scene and that "they" shot not only defendant but also deceased. Testimony of other witnesses for the State tended to show the presence of others at the scene shortly before the homicide. The evidence disclosed that defendant had been shot in the leg and that he had blood on his trouser leg and on his sleeve. There was no evidence of record that there were no gunshot wounds on the body of deceased. Defendant made contradictory statements as to the manner and circumstances under which he was shot, his meeting with deceased and his activities during the time in question. There was evidence that a quantity

of the whiskey was missing the morning after the homicide. *Held:* The statement of defendant uncontradicted by other evidence for the State, placing him at the scene of the crime also tended to exculpate him, and taking all the evidence to be true it does not exclude a reasonable hypothesis of defendant's innocence, and therefore defendant's motion to nonsuit is allowed in the Supreme Court upon appeal from conviction of murder in the second degree. G. S., 15-173.

5. Criminal Law § 52a—

While evidence of motive is not necessary to sustain conviction, motive or the absence of motive is a circumstance to be considered.

SEAWELL, J., dissents.

APPEAL by defendant from *Olive, Special Judge,* at May Term, 1947, of CALDWELL.

Criminal prosecution upon indictment charging that defendant, late of Caldwell County, on 22 April, 1947, with force and arms, at and in the said county, feloniously, willfully, and of his malice aforethought, and with premeditation, did kill and murder one Thomas J. Oliver, contrary to the form and the statute in such case made and provided, and against the peace and dignity of the State.

Defendant entered plea of not guilty.

Upon the calling of the case for trial, the Solicitor for the State announced in open court that he would not ask for a verdict against the defendant of guilty of murder in the first degree, but would ask for a verdict of guilty of murder in the second degree, or manslaughter, as the facts and law may warrant.

The evidence offered upon the trial by the State, as set out in the record on this appeal, tends to show this narrative of events and circumstances at and about the date of, and in connection with the alleged homicide of Thomas J. Oliver, with which defendant Carl Coffey is charged:

Thomas J. Oliver, called Tom Oliver, resided with his wife, a son, Tom, Jr., and two daughters, Ruth, an adult, and Marceline, of teen age, in a house located on the county line between Burke and Caldwell Counties, North Carolina, about 300 to 400 yards to the left of the highway from Lenoir to Morganton, in a community thickly populated on both sides of the highway in directions of both Lenoir and Morganton. The highway was much used, and traveled day and night by trucks and other vehicles. A private road ran from the highway at the county line to the Oliver house. There was also an old road from the highway which ran in the direction of the Oliver house, and around the field. Between the house and the highway there was a patch of woods,—a V-shaped piece of woodland. This house was about one-half mile from the house

in which defendant resided, and about the same distance from the home of Eldridge Cannon. Defendant's home was about one-fourth mile from the Cannon home, and on the same old road that it is. Defendant had been buying milk from the Olivers, and would come to the Oliver house to pay for it.

On Monday night, 21 April, this year, Tom Oliver, with the assistance of his son Tom, Jr., transferred from his crib to a wagon "between 20 and 25" pasteboard cartons of whiskey, and "moved wagon and all" down below the house, next to the steep bank, out in the edge of the woods, near the old road, and left the whiskey on the wagon. Tom, Jr., testified: "Dad and I stayed with it Monday night . . . April 21st, the night before he was killed." Tom Oliver had his gun that night. Tom, Jr., left home to go to his work at factory in Lenoir about 6 o'clock, and was not at home on the afternoon of April 22nd,—but "went home about 11:20."

Tom Oliver was at his home, says his daughter Ruth, until 2 o'clock that day when he picked up the ax and went down in the woods. About that hour his wife, who was at home, saw him and defendant coming down through the woods. She says, "They walked to the wagon and stopped and were talking." They were "up there" about 4 o'clock when the younger daughter came home from school. Later, between 6 and 6:30 o'clock, the two daughters went out there in the woods to get the ax and to call their father to supper. At that time he and defendant were sitting on a log out in the woods, talking. The older daughter testified: "I saw somebody talking with him above the wagon, but I didn't recognize the person. It was just a short distance above. It was more than one person. There was just one person with Father, a man." She also testified that she knows defendant, and that she saw a person around the house that day, but was not close enough to recognize who it was. When the daughters called him to come to supper, Tom Oliver said "OK." The younger daughter saw the Oliver shotgun out there under the wagon—"but the older one did not see it." Both of them saw cartons of whiskey out there. They got the ax off the wagon, and went back to their house. The younger daughter also testified: "Daddy looked like he was drinking some, and Carl Coffey, too"; and that as she was going toward the house, quoting her, "I heard Daddy crying and I heard Carl Coffey laughing,—it sounded like. Daddy was crying. I do not know whether Carl Coffey was laughing or what . . . I was out in the front yard and I could see them." Tom Oliver was "drinking some" when he came to supper, about 6:30 o'clock,—about "dusky dark," in the language of his wife. He stayed 20 minutes to half an hour and "went back out there . . . about 7:30 o'clock." That was the last time his wife and daughters saw him, they testified.

The next morning, Wednesday, about 5:30 o'clock, Tom Oliver, Jr., found his father below the wagon. He was in a dying condition, lying there with "his head beat up," and "kind of down hill," "bleeding and not conscious." Blood had run down on his face and off and puddled on the ground,—about two feet long and one foot wide, and had congealed,—"clotted and kind of dried around the edges." His body was stiff. He died in the course of an hour or so, without regaining consciousness. There were four lacerations on his skull, (1) outside and above the left eye, (2) just above and behind the left ear, (3) along the crest of the left upper head, and (4) on top of the head, behind. His skull and lower jaw were fractured. In the opinion of medical expert these wounds were inflicted by some "blunt typed instrument," and the fracture of the skull caused his death. "His head had been cleaned up when I saw him," the doctor testified. The body was then at a funeral home.

At the time Tom Oliver was found on Wednesday morning the wagon was in the place it had been left Monday. His shotgun had been broken in two. The stock of it was on the ground about one and a half to two feet from his head, and the barrel, with trigger attached, was up in the leaves about four feet from the body, according to his son, Tom, Jr., and was down the hill below the wagon, on the old road about fifty feet from the body, according to Hallyburton, a neighbor, and the officers. There was an empty shell in the barrel. When Officer Duckworth picked it up with his handkerchief on the trigger, "it looked like blood on the barrel," he says. Duckworth also testified: "I took the gun barrel and stock with me. I put it in my car and carried it to Morganton," and he later turned it over to Officer Coble of Caldwell County, who says that then sticking to the gun hammer there was some "lint identical to the lint that was on Mr. Oliver's light felt hat. The hat . . . had blood . . . on the side that was lying in the edge of the puddle of blood." (Both the stock and the gun barrel were offered in evidence). At the point where Tom Oliver was lying there was no evidence of scuffling, but down where the gun barrel was found, fifty feet away, "the leaves and stuff had been torn up like a scuffle had taken place." At the time and place there were cartons of whiskey of the same kind as those on the wagon Monday night. Some were stacked up on the wagon, or beside it, or above it, and covered up with "old quilts and things," and some were scattered around up in the woods. About eight cases were broken open, and scattered and uncovered in the woods. Some of it had fallen out in the leaves. The witness Hallyburton says it looked like there were 18 to 20 cases. The officers took possession of the whiskey—but "didn't count the cases."

Defendant, according to testimony of Eldridge Cannon and his wife, came to the Cannon home "that night, April 22nd, between 8:30 and 9 o'clock." His wife came ten or fifteen minutes before he did. He came

to the window and called Cannon "to come out there." He said he was shot and wanted Cannon to take him to a doctor. "He seemed to be pretty drunk. He stumbled in the door and fell on the floor." He had a double-barrel shotgun, and set it down in the corner and stated that there were not any shells in it,—saying, "My wife hid the shells." His left pants' leg was bloody. Cannon asked him to pull up his pants' leg to see how bad he was shot, and he did so. "Blood was on his leg half way between his ankle and knee . . . and a hole about like a small shot or probably like a nail would make." He wanted Cannon "to go and get the doctor and get some liquor." "He said there was some liquor near the county line, and he wanted to get the Law and wanted the Law to clean up that liquor business. He said he went down to Mr. Oliver's . . . that he met up with Mr. Oliver at the mail box, and that Mr. Oliver wanted him to come out and talk to him, said he was guarding some liquor, and he said he went out there and talked to him a while, and that when he started to leave, somebody shot him . . . that after he walked about 30 steps from the wagon somebody shot him,"—saying "he didn't know who shot him." His wife asked him if it was Mr. Oliver who shot him, and he said no, he didn't think so. Upon Cannon declining to go and "get the Law," defendant said he would see if he could get somebody else, and got up and went out, but did not take his gun. After about five minutes he came back, and again wanted Cannon to take him to the doctor,—and to get the Law. After Cannon examined his leg, he fell down on the floor. He said he had lost a lot of blood and was weak,—but he got up, and sat in a chair. Mrs. Cannon gave him some coffee, and after drinking several cups, he appeared to be more sober than before. "He got to talking," according to testimony of Cannon, "and said the same thing over and over until just before he left . . . said there were 30 cases of whiskey down there at first, and then later said there were 40, and about 11 o'clock, just before he left, he told us that Mr. Oliver was shot down there. He said, 'You don't believe it. You don't believe that, do you?' My wife said he probably was, that it could be so, and he said, 'Well, he is. They shot him. I stepped over his body,' and he said, 'Mr. Oliver called to me and said "I am shot. I am dying," ' and he said, 'You don't believe that, do you?' . . . 'If you don't believe it, I will take you down there and show you; do you want to go?' I told him no, that I didn't want to get mixed up in it. He did not tell me who 'they' were, he just said 'they.' He cursed . . . said 'Those G——d—— s.o.b.'s shot me.' He said he did not know who shot Mr. Oliver . . . He only told me who Mr. Oliver told him the liquor belonged to. He told me that just before he left the second time. He was cursing pretty big . . . It was about two hours from the time he came there when he told me that Mr. Oliver had been shot. He did not say a word about Mr. Oliver molesting

anybody . . . He said Mr. Oliver was dead . . . After he left I went to my Dad's . . . Carl Coffey never did say he had any difficulty or altercation with Oliver. He seemed to be drinking pretty heavy. The place he showed me on his leg, blood had been flowing from it but not flowing at the time. Carl Coffey had some scratches on his forehead and one side of his nose. I do not remember that he said how they got there."

Mrs. Eldridge Cannon gave similar testimony. She also stated that defendant said "Mr. Oliver was watching some whiskey"; that after defendant left their home the second time, he came back in probably ten minutes and got his gun, which he had left, and asked her for his hat . . . "He only mentioned Clark's name other than Oliver's. He said it was Clark's liquor."

When officers arrested defendant about 8 o'clock on the morning the body of Tom Oliver was found, he told them that he had some liquor covered up over in the woods and when he went to get it "some s.o.b. shot him, but that he did not know who it was . . . All he said was some s.o.b. shot him." Later, upon being asked to tell everything that occurred from the time he ate dinner the day before, until the time the officers came to his house, defendant said that in the middle of the afternoon of Tuesday, April 22nd, he left home and went to his mail box across the road; that he carried his small ax and was going to chop a few sticks of wood or brush or something; that seeing some cases of something stacked up out in the woods, he stepped out there about 15 or 20 steps, where he could read the words "Schenley Whiskey"; that he was looking at that, and about that time somebody fired a gun and shot him in the leg and almost knocked him down and scared him; that the shot came down through the woods towards Oliver's home, or the other way; that he went home and his wife was not there, and he went up to Mr. Cannon's and told him that someone had shot him and wanted him to get the doctor and to get the Law—that if he would take him he would tell the officers and get them to come out there for the whiskey; but that Cannon did not take him; and he and his wife went up and spent the night at home. Later defendant told the same officer that he had been working on his road, and two men came along and stopped and talked to him, and he worked until late, about 6 o'clock; that Oliver had been working some for him, plowing or something, a few days before, and he had not paid him, and he thought he would go out and pay Oliver, and went to the mail box and walked on out towards Oliver's house, and when he got to the edge of the field, he saw Oliver's wagon out to the left, and did not see anybody out there but saw the whiskey or something out there and started that way and somebody shot him; that he did not see Oliver in the woods on Tuesday the 22nd,—did not see anybody; that it had been two or three days since he had seen Oliver,—said this a number

of *times*; and that he went home and he and his wife spent the night at home.

When arrested the officers testified: "Carl was drinking; he appeared to be under the influence of whiskey, and in a very nervous condition," and "had the odor of whiskey on his breath,"—though he said he had not drunk any whiskey in about four months. The officers also testified that when asked how he got the skinned place on his head and face, defendant said "he didn't know," and said, "I have been shot too," and showed a place on his leg that looked like it had been made by a No. 6 shot; and that later, defendant said that he fell down, or ran into a tree when somebody shot him.

The officers also testified that defendant had some blood on his pants where he was shot, down on that leg, half way between his ankle and his knee, some also on the right leg, "about even with the leg up in front," and a spot on the right sleeve between elbow and shoulder of the leather jacket he said he was wearing the day or night before.

One of the officers testified that later he searched the woods and all around for signs of shotgun shot in the timber, but did not find any.

Also there was evidence tending to show that Tom Oliver was about 50 or 60 years of age, and would weigh about 150 to 170 pounds, and that defendant was 42 years of age, about six feet tall and would weigh 200 or maybe 210 pounds.

The State also offered, as a witness, a special agent of the State Bureau of Investigation, who testified, that he "had a talk with Carl Coffey in the Sheriff's office last Friday." What Coffey said is not shown.

At the close of State's evidence, defendant reserved exception to the denial of his motion for judgment as of nonsuit. And thereupon defendant rested his case, and renewed motion for judgment as of nonsuit—to the denial of which he excepts.

Verdict: "Guilty of murder, second degree."

Judgment: Confinement in the State Prison at Raleigh for a term of not less than twenty (20) years nor more than twenty-five (25) years.

Defendant appeals therefrom to the Supreme Court and assigns error.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

Max Wilson and Mull & Patton for defendant, appellant.

WINBORNE, J. Here the defendant stresses for error, in the main, and properly so, the refusal of the court below to grant his motion for judgment of nonsuit. G. S., 15-173.

A careful consideration of the evidence in the record of case on appeal, narrated above, taken in the light most favorable to the State, leads to the conclusion as a matter of law that the evidence is insufficient to support a verdict of guilty on the charge against defendant as set out in the bill of indictment. There is no direct evidence to connect defendant with the commission of the crime. The evidence offered is circumstantial, conjectural and speculative. All that is shown may be true, and defendant be innocent of the crime. Hence, the motions of defendant for judgment of nonsuit should have been sustained.

In passing upon the legal sufficiency of the evidence, it must be borne in mind that when the State relies upon circumstantial evidence for a conviction of a felony, as in this case, "the rule is that the facts established or advanced on the hearing must be of such a nature and so connected or related as to point unerringly to the defendant's guilt and exclude any other reasonable hypothesis," *Stacy, C. J.*, in *S. v. Harvey, ante,* 62, citing *S. v. Stiwinter,* 211 N. C., 278, 189 S. E., 868; *S. v. Matthews,* 66 N. C., 106. The evidence in its entirety tends to show no more than that defendant had the opportunity to commit the crime. And evidence of opportunity standing alone will not justify a finding that the act was done by the defendant. It is only a circumstance to be considered along with other evidence in the case. Stansbury on The North Carolina Law of Evidence, Sec. 84, p. 157. *S. v. Woodell,* 211 N. C., 635, 191 S. E., 334. See also *S. v. Jones,* 215 N. C., 660, 2 S. E. (2d), 867.

The statement of defendant made to witness Cannon, and offered in evidence by the State, tends to put him at the scene of the crime, but it does more, it tends to exculpate him. While the State, by offering in evidence a statement of defendant in a criminal action, is not precluded from showing that the facts were different, no such evidence tending to identify the defendant as the culprit was offered in the present case, and in this respect the State's case is made to rest entirely on the statement of the defendant, which the State presented as worthy of belief. *S. v. Todd,* 222 N. C., 346, 23 S. E. (2d), 47; see also *S. v. Fulcher,* 184 N. C., 663, 113 S. E., 769; *S. v. Cohoon,* 206 N. C., 388, 174 S. E., 91; *S. v. Baker,* 222 N. C., 428, 23 S. E. (2d), 340; *S. v. Boyd,* 223 N. C., 79, 25 S. E. (2d), 456; *S. v. Watts,* 224 N. C., 771, 32 S. E. (2d), 348.

The statement made by defendant to Cannon, considered as worthy of belief, tends to show that others were there, and that "they" shot not only defendant, but that they shot deceased. The evidence is clear that defendant was shot, and the record is devoid of evidence that there were no gunshot wounds on the body of deceased. The evidence of the doctor is confined to wounds on the head of deceased sufficient in his opinion to cause death. Moreover, there is other evidence from which it appears, or

may be inferred that others were at the scene during the twenty-four hours preceding the finding of Oliver mortally wounded. According to his adult daughter, there was a person around the house that day, but not close enough to be recognized by her. Indeed, as we read her testimony, she says that when she, with her sister, went to call their father to supper, there was "more than one person" out there, but just one man with him. Moreover, the statement of defendant, offered in evidence by the State, is that the large quantity of whiskey described in the evidence was not the property of Tom Oliver, but of one Clark. Such a large quantity of whiskey in a dry territory under the circumstances detailed, leads to the inference that it was there for sale. And the fact that there were 20 to 25 cases on the wagon Monday night, and 30 to 40 cases according to defendant's statement to Cannon, offered in evidence by the State, and only 18 to 20 there Wednesday morning, it may be inferred that there had been sales made of the difference, and, if sales were made, it may be inferred that they were made at that place. The fact that several cases were broken open leads to inference that sales were made in less than case lots. If there were sales, it may be inferred that the fact that whiskey was there would have become known to others in the community and along the highway, and the difference in quantity may be accounted for even by hijacking. The fact that Oliver had his gun out there indicates he thought he might have occasion to use it. And from the fact that there was an empty shell in it Wednesday morning, it may be inferred that he had used it.

Moreover, the blood spots seen on the legs of defendant's pants and on his leather coat sleeve are entirely accordant with his innocence. The State offered proof that defendant told Cannon that he was shot in the leg, and that Cannon had defendant pull up his pants' leg to show the wound, and that the leg had been bleeding. From this it may be inferred that defendant had previously pulled up his pants' leg to see and had seen the wound, and had gotten blood on his left hand, and had transmitted the blood from his left hand to his right sleeve,—in a perfectly natural way.

Furthermore, the evidence offered fails to show any motive for defendant to have killed Oliver. While not necessary to be proven, motive or the absence of motive is a circumstance to be considered. Oliver and defendant were neighbors. Defendant for some time had bought milk from the Olivers, and had been to the house to pay for it, and was known to the Oliver family. Oliver had previously plowed for defendant. They were together in the afternoon, sitting in the woods, and drinking together. And, while the little girl says she heard her father crying, before he came to supper, and defendant laughing, it is strange that there is no evidence that he appeared to have been crying when he came to supper.

The contradictory statements made by defendant to the officers when and after he was arrested, may point a finger of suspicion at him, but "The circumstances" here, as stated by *Devin, J.*, in *S. v. Penry,* 220 N. C., 248, 17 S. E. (2d), 4, "may have been such as to excite suspicion, but the evidence does not exclude the rational conclusion that some other person may have been the guilty party," citing *S. v. Prince,* 182 N. C., 788, 108 S. E., 330; *S. v. English,* 214 N. C., 564, 199 S. E., 920; *S. v. Shu,* 218 N. C., 387, 11 S. E. (2d), 155. See also *S. v. Goodson,* 107 N. C., 798, 12 S. E., 329.

The defendant's motion for judgment of nonsuit will be sustained here, G. S., 15-173, and judgment below is

Reversed.

SEAWELL, J., dissenting: 1. Theoretically, at least, a person convicted of crime through the instrumentality of circumstantial evidence does not escape punishment by showing in this Court that the intensity of proof in his case was less in degree than that required to convict beyond a reasonable doubt. I have the impression that in the main opinion there is a balancing of the evidence, *pro* and *con,* which involves the weight and the intensity of proof required to convict rather than the existence of evidence of guilt, which latter investigation should mark the limit of appellate review. A conclusion resting upon the theory that the circumstantial evidence offered has not excluded every reasonable hypothesis of defendant's guilt and based upon a comparative analysis of the phases of the evidence which indicate guilt with other considerations more favorable to innocence, necessarily challenges the degree of proof rather than a conclusion reached without any evidence at all.

It is well enough as an aid to the jury in its dealing with circumstantial evidence, to instruct them that in order to convict of crime the evidence must exclude every reasonable hypothesis of defendant's guilt. This is only an analytical converse of the rule that the evidence must be such as to convince the jury beyond a reasonable doubt of the defendant's guilt. If it means anything more, it ought to be stricken out of the books. But, under constitutional and statutory methods of trial, where there is evidence of guilt, the process of comparing, appraising, weighing, and deciding whether conjecturable theories of the defendant's innocence have been excluded is properly that of the jury. The Court has no right to thrust itself into the penetralia of the jury's mental processes,—either at the trial or upon review,—and substitute its own thinking for that of the jury, because of any supposed difference between circumstantial evidence and direct testimony. The true test is whether, upon the consideration of the whole evidence, there is reasonable doubt of defendant's guilt; and where there is evidence of guilt, I repeat, this is a matter for

the jury, whether it is reached through the instrumentality of circumstantial evidence or the equally fallible means of so-called direct evidence or testimony.

Frankly, I think the Court, in its analysis and comparison of the several phases of the evidence in the instant case, and in the conclusion reached, has departed from traditional standards. And I respectfully suggest,—if the matter is indeed our responsibility at all,—that the reasonable hypotheses of innocence advanced by the Court as not having been excluded in the instant case appear to me to be *dehors* the evidence, unsubstantial, speculative.

Especially is this true of the suggestion that Oliver might have been the victim of "hijackers," the mysterious "they" who murdered to rob, but forgot to take.

For the statement in the main opinion that the evidence does no more than raise a suspicion of defendant's guilt, there is, of course, no answer except to challenge that appraisal, and direct attention to the rules which have been, as I think inadvertently, but nevertheless mistakenly, applied to its consideration. I am sure, however, that the cited cases, while they supply the formula, do not by any factual similarity support its application to the instant case.

2. There is in this record strong and compelling evidence of the defendant's guilt, which fully justified his conviction by the jury, unless it is made unavailable by the rule advanced in the main opinion: "While the State by offering in evidence a statement of the defendant in a criminal action is not precluded from showing that the facts are different, nevertheless it presents the statement as worthy of belief." Cited in support of this statement are, *S. v. Fulcher,* 184 N. C., 663, 113 S. E., 769; *S. v. Cohoon,* 206 N. C., 388, 174 S. E., 91; *S. v. Todd,* 222 N. C., 346, 23 S. E. (2d), 47; *S. v. Baker,* 222 N. C., 428, 23 S. E. (2d), 340; *S. v. Boyd,* 223 N. C., 79, 25 S. E. (2d), 456; *S. v. Watts,* 224 N. C., 771, 32 S. E. (2d), 348.

In stating the rule it is pointed out that while in this case "the admissions in the statement of the defendant put the accused at the scene of the crime," it tends to exculpate him; and the conclusion drawn is that the State, having introduced it, presents such matter as worthy of belief and is bound by it.

So stated, it is simply a case-hardened extension of the rule that the State may not "impeach" its own witness but may show the facts to be otherwise than stated. As applied to declarations of the defendant introduced through the State's witnesses for the purpose of incrimination, it practically puts the defendant on the stand as a witness for the State, with all the privileges with respect to endorsement on the part of the prosecution that such a witness might have, without even the traditional

right of the jury to scrutinize it in the light of the declarant's interest and reject such part of it as may be unworthy of belief.

The State must choose one or the other of the horns of the dilemma, either to let the incriminating declaration alone or to be bound by the so-called exculpatory additions, although they may to reasonable minds appear to be a complete self-serving fabulation.

The prevailing rule and the only one which will serve the purpose of trial, which is to extract the truth from contradictory evidence, is that when the declarations of the defendant are introduced at all he is entitled to have them introduced in their entirety. Where the proffered statement is both integral and documentary as it was in *S. v. Cohoon, infra,* this presents no problem; where it is oral the defendant may resort to cross-examination, or introduce independent evidence. But while the defendant is entitled to have the entire statement presented in the evidence, and when this is done it must be considered in its entirety, nevertheless it is left with the jury to accept such parts of it as they may deem worthy of credence and reject such parts as they consider unworthy of belief. Chamberlayne, Trial Evidence (Tompkins), pp. 471, 472. Even when the declaration is in written form, "the jury may follow certain portions and disregard the balance." A full discussion of this subject may be found in Wigmore on Evidence, in Section 2100, reaching the same conclusion.

Analyzing the cases cited in the main opinion as authority for the rule as expressed therein, *S. v. Fulcher, supra,* has nothing in particular to do with the point in consideration. It deals with the evidence introduced by defendant himself and its significance on demurrer. In *S. v. Cohoon, supra,* the State relied solely upon the documentary statement or affidavit of the defendant and there was nothing whatever in that statement that indicated guilt. The same is true of *S. v. Todd, supra; S. v. Baker, supra; S. v. Boyd, supra;* and *S. v. Watts, supra.* The supposed exculpatory statements in all these cases might have been stricken out altogether and the State would still have failed to make out its case.

The evidence ought to go to the jury and be considered by them as objectively as possible without being weighted before it is weighed by the irrelevant circumstance of its presentation. If it means anything else, the ball should be carried back to the point where the Court stepped outside the bounds.

However this may be, the rule as advanced, however restrictive in its requirements, even if too well established to be dislodged, can have no reasonable application to the facts of this case. The declarations here are not one, but several; not made to one witness, but to a number of them; evasive, contradictory, incredible; and considered together the

statements made by the defendant, assumed in the main opinion to be exculpatory, are, if possible, more damning than the admissions from which they are supposed to relieve him. And we have to consider not only these statements but the *manner* and *order* of the revelations they contain and the conduct of the defendant immediately following the tragedy, which is a matter of independent evidence. Amongst his statements made to different witnesses are the following: That he had not seen Oliver that night or for several days, although he had stated that he was at the scene of the killing, heard Oliver's dying statement and stepped over his dead body; that he had started to Oliver's house to pay for milk; again, that he owed Oliver some money for work done for him and went over there to pay him for it; and again, that he had decided to cut some wood and went over to the woods; that he had discovered the presence of cartons of liquor in the woods but in leaving was shot by the mysterious "they."

The main indictment of guilt I find in the evidence is that he came from the scene of a bloody murder, with blood on his garments and first-hand information of the murder, an exclusive secret with which he was loath to part.

"As I was walking all alane
I heard twa corbies making a mane;
The tane unto the t'other say,
'Where sall we gang and dine to-day?'

" 'In behint yon auld fail dyke.
I wot there lies a new-slain Knight;
And naebody kens that he lies there,
But his hawk, his hound, and lady fair.' "
Twa Corbies; Palgrave's Collection,
"Golden Treasury."

A person who has first-hand knowledge of the murder of a neighbor and is guiltless himself does not impart the information in the evasive and reluctant manner carefully chosen by the defendant.

The defendant was near enough Oliver to have witnessed the furious thudding assault that smashed his skull and the bones of his face; broke off the stock of the gun and left fibres of his felt hat upon the hammer and blood upon the barrel; and knew the manner of his death, yet he stepped over his dead body and declared that Oliver had been shot. Apparently he used every device that he could think of to induce somebody to go up to the scene of the killing and discover the body without implicating himself as the murderer. He wanted somebody to go up there to get liquor from a cache. He wanted somebody to go after the law

because there was blockading going on; and failing in this and after over two hours expended in efforts of this kind, he hesitatingly inquired of the witnesses whether they would believe him if he would say that Oliver was lying up there dead in the woods.

The witnesses testified that Coffey exposed his leg to show them a puncture in it that might have been made by a small shot *or a nail.* He called loudly for a doctor and on two occasions widely separated as to time and in the presence of prospective witnesses, collapsed, stating that it was because of loss of blood from this puncture, but quickly recovered. Impressive, indeed, but a clinical marvel. And here I might say that there was no evidence that the overflow of such quantity of the vital fluid had run down into his shoe.

I have gone into the evidence thus far in order to point out the character of the evidence deemed exculpatory, and to pose the question: What part of it is the jury bound to believe under the rule as stated in the main opinion? To believe it all is a mental, moral, and physical impossibility; and to ask the jury to do so does not invite credence, but assumes credulity.

I might conclude by saying that so far as the evidence of guilt is concerned it does not make any difference how many persons were present in the woods prior to the time of the killing or whether whiskey was sold there by the carton or the bottle during the 24 hours preceding the murder. The defendant himself is fixed at the spot by his own admissions at the time of the killing, and by independent evidence shortly preceding it. It is perfectly true that opportunity to commit a crime is not alone sufficient to convict the accused; but no matter whether a motive may or may not be shown, his presence at the scene of the murder with nothing more definite as to the presence of others, together with his subsequent conduct and contradictory and evasive statements with regard to vital facts, have uniformly heretofore been regarded as sufficient.

My vote is to sustain the conviction.

H. A. McKINNON v. HOWARD MOTOR LINES ET AL.
and
ROBERT H. McKINNON v. HOWARD MOTOR LINES ET AL.

(Filed 5 November, 1947.)

1. Automobiles § 18h (3)—Plaintiff's evidence held to disclose contributory negligence as matter of law in hitting unlighted truck on highway.

Plaintiff's evidence tended to show that defendant's trailer-truck, about the color of the pavement with floor 3 to 3½ feet above the surface of

the road, was traveling on its right side of the road without rear lights, G. S., 20-129, when it had engine trouble, and that plaintiff's car, traveling in the same direction, hit the back of the slowly moving or stalled trailer-truck with such force as to demolish plaintiff's car and push the heavy truck some 3 feet up the slight incline. Plaintiff testified that he was completely blinded by the lights of vehicles approaching from the opposite direction and that he drove in the "blinded area" for 3 or 4 seconds at a speed of 35 miles an hour and for a distance of 100 feet before the collision. The drivers of the vehicles traveling in the opposite direction drove completely off the hard surface to their right as they passed the stalled truck in order that plaintiff might have room to pass the truck on its left. *Held:* Plaintiff's evidence discloses contributory negligence barring recovery as a matter of law.

2. Negligence § 11—

It is not necessary that contributory negligence be the sole proximate cause of the injury to bar recovery, it being sufficient if it is the proximate cause or one of the proximate causes.

SEAWELL, J., dissents.

APPEAL by defendants from *Hamilton, Special Judge,* at April Term, 1947, of MONTGOMERY.

Civil actions by H. A. McKinnon and Robert H. McKinnon, father and son, for damages to the father's automobile and for personal injuries to the son when the father's car, driven at the time by the son on Highway No. 27 in Montgomery County, ran into the rear of a truck and trailer owned by Howard Motor Lines, Inc., and operated at the time by an employee, Robert Lee McFadden, it being alleged that the damages in both instances were caused by the negligence or default of the defendants. As both actions arise out of the same circumstances and rest upon the same evidence, by consent, they were consolidated and tried as one case.

Leaving home about dark on the evening of 9 October, 1945, Robert McKinnon, with the knowledge and consent of his father, drove the latter's 1942 model two-door Ford Sedan from Biscoe to Troy, where Miss Jean Nance joined him, and they then started on their way to Mt. Gilead, traveling over Highway No. 27, when the accident under investigation occurred. In front of them, and proceeding in the same direction, was the combination truck and trailer of the corporate defendant, in control of its agent and employee, Robert McFadden. When about a mile and one-half out from Troy, some difficulty developed in the gas feed line of defendant's tractor, necessitating a stop and a switch to an auxiliary gas tank. Just as the tractor was being brought to a stop, or came to a standstill, the McKinnon car ran into the rear of the defendant's trailer, striking it with sufficient force to jam the plaintiff's car some three feet under the rear of the trailer and to push both tractor

and trailer, weighing approximately 13,000 pounds, a distance of three feet up the slight incline of the road. The plaintiff's car was practically demolished, and both occupants sustained serious and permanent injuries.

The scene of the accident was on a straight stretch of road, with the paved portion approximately 22 feet wide. The defendant's equipment was on its right-hand side of the pavement. The witnesses are in disagreement as to whether the clearance lights and rear lights on the defendant's trailer were burning. One passing motorist said the head lights on the tractor were blinking, *i.e.*, giving the truck driver's signal of distress. But the witness saw no running lights or rear lights on the stalled vehicle. The trailer was of stainless steel, marred by dust and dirt, which rendered it about the color of the pavement. The reflectors on the back were covered with dust, if there were any, and the floor of the trailer was elevated from 3 to 3½ feet above the surface of the road.

As the McKinnon car approached the defendant's truck from the rear, there were at least three vehicles—a truck followed by two automobiles—traveling on the other side of the road and headed in the direction of Troy. The head lights on these machines were lighted. The difficulty of driving under these conditions appears to have been heightened by the forward truck slowing down, driving off the hard surface, and coming to a stop about 100 yards or 400 feet, after passing the stalled truck. (Whether this was in response to the signals from the stalled truck is not stated.) However, the head lights on the stalled truck and the rear lights on the other truck, together with the approaching lights on the McKinnon car, presented a situation which caused the drivers of the two cars following the truck traveling in the direction of Troy, to drive entirely off the hard surface as they passed the stalled truck in order that the McKinnon car might have the entire hard surface in passing the defendant's truck on its left.

W. C. Bagwell, who was on the truck going in the direction of Troy, estimated the speed of the McKinnon car at 65 to 75 miles per hour as it passed the truck on which he was riding. Larry Wall, the driver of the car just back of this truck, said the McKinnon car was traveling at a normal speed—not less than 30 nor more than 40 miles an hour. Both witnesses, however, thought the McKinnon car was headed for trouble. Wall says: "The Ford car passed me before it struck and was wrecked. . . . I turned around and watched the impact. Unfortunately, I saw what I was looking for."

Now, viewing the situation as it appeared to the occupants of plaintiff's car, Robert H. McKinnon testified as follows: "We were driving along on Highway No. 27 just outside of Troy where the road makes a slight dip and starts an upgrade. As we began up the grade, I saw approaching lights of the other cars. . . . I was blinded by the lights of

the cars meeting me. . . . I was blinded up until the time the collision happened. I never did see any other object except the approaching headlights. I was so blinded for two or three seconds. I was blinded from the time I first met the lights until the accident. I was keeping a lookout in front of me. I was trying to drive carefully. I was unable to see anything in front of me after I met the cars and had not seen the truck before I met the cars. . . . I was trying to peer through the blind spots—the spots that were brought to my eyes by meeting those lights—and I was unable to see anything immediately in front of me. . . . I'd say around 100 feet, I was completely blinded. I had not seen anything in front of me before I was blinded. . . . Shortly after I was blinded there was a crash. . . . I had taken my foot off the accelerator at the time I was blinded. . . . It was several seconds before the crash. . . . Up until two seconds before the crash I had my foot on the accelerator. . . . . I don't believe I ever put my brakes on. . . . My lights did not pick up the truck. I didn't see it. . . . I possibly was going between 31 and 39 miles an hour. . . . I know that my car hit whatever it was in the road with such force as to completely demolish the car I was driving. . . . I do not know whether I was driving on the right or left for the time I was blinded. . . . I know I was on the right-hand side of the road. I could see the right-hand edge of the road. I ran straight ahead and whatever hit me was on the right-hand side of the road. If it had been a man there, I would not have seen him. . . . I didn't stop while I was blinded. I couldn't see to proceed. . . . I never did get out of the glare of the lights. . . . I was blinded from the time I entered (the glare of the lights) until the crash. . . . I couldn't say whether any car passed me before I had the crash or whether I passed any of the cars with a light before I had the crash. I don't remember passing any. I know I was in a blinded area."

Miss Jean Nance testified that she was in the McKinnon car. "It was being operated around 35 miles an hour. . . . I saw several lights, one or more cars. . . . The cars were coming towards us. . . . The blinding lights were on the left-hand side of the road. The best I could see, there was nothing on our side of the road; nothing to obstruct the vision. . . . There were no lights on our side of the road."

Both complaints allege (1) unlawful parking (G. S., 20-134), and (2) absence of required lights (G. S., 20-129) while defendant's equipment was in operation on the highway. The court being of opinion that no violation of the parking statute had been shown, submitted the case to the jury on the second allegation of negligence only, plus the allegations of contributory negligence on the part of the driver of the McKinnon car.

From verdict and judgment in favor of both plaintiffs (the jury assessing the damage to the car at $1,131.72 and the extent of the personal injuries at $7,500), the defendants appeal, assigning errors.

Currie & Garris and Spence & Boyette for plaintiffs, appellees.
Ehringhaus & Ehringhaus for defendants, appellants.

STACY, C. J. The question for decision is whether the plaintiffs' case is uprooted by the contributory negligence of the driver of the McKinnon car as shown by his own testimony and the undisputed facts appearing of record. A careful perusal of the evidence impels an affirmative answer.

There is ample evidence tending to show negligence on the part of the defendants in operating their equipment on the highway in the nighttime without rear lamps as required by G. S., 20-129. There is also evidence of contributory negligence on the part of the driver of plaintiff's car which bars recovery. *Sibbitt v. Transit Co.*, 220 N. C., 702, 18 S. E. (2d), 203; *Pike v. Seymour*, 222 N. C., 42, 21 S. E. (2d), 884; *Peoples v. Fulk*, 220 N. C., 635, 18 S. E. (2d), 147; *Atkins v. Transportation Co.*, 224 N. C., 688, 32 S. E. (2d), 209.

Conceding the negligence of the defendants in failing to display rear lights on their slowly moving or stalled truck, nevertheless the contributory negligence of Robert H. McKinnon is manifest from his own testimony and the physical facts appearing of record. He says that he ran in a "blinded area" for two or three seconds, at a speed of 35 miles an hour and for a distance of 100 feet—other witnesses put it at 100 yards or 400 feet—when he was completely blinded and could see nothing in front of him except the right-hand edge of the road. Both his vision and his prevision seem to have failed him at one and the same time. Such is the stuff of which wrecks are made. The conclusion seems inescapable that the driver of the McKinnon car omitted to exercise reasonable care for his own and his companion's safety, which perforce contributed to the catastrophe. This defeats recovery in the instant action. *Austin v. Overton*, 222 N. C., 89, 21 S. E. (2d), 887; *Powers v. Sternberg*, 213 N. C., 41, 195 S. E., 88; *Caulder v. Gresham*, 224 N. C., 403, 30 S. E. (2d), 312. Young McKinnon's negligence need not have been the sole proximate cause of the injury to bar recovery, because "contributory negligence" *ex vi termini* signifies contribution rather than independent or sole cause. *Absher v. Raleigh*, 211 N. C., 567, 190 S. E., 897; *Fulcher v. Lumber Co.*, 191 N. C., 408, 132 S. E., 9. See *S. v. Eldridge*, 197 N. C., 626, 150 S. E., 125. It is enough if the plaintiff's negligence contribute to the injury as a proximate cause, or one of them. *Tarrant v. Bottling Co.*, 221 N. C., 390, 20 S. E. (2d), 565; *Godwin v. R. R.*, 220 N. C., 281, 17 S. E. (2d), 137; *Beck v. Hooks*, 218 N. C., 105,

10 S. E. (2d), 608; *Wright v. Grocery Co.*, 210 N. C., 462, 187 S. E., 564. The plaintiff may not recover, in an action like the present, when his negligence concurs with the negligence of the defendant in proximately producing the result. *Davis v. Jeffreys*, 197 N. C., 712, 150 S. E., 488; *Construction Co. v. R. R.*, 184 N. C., 179, 113 S. E., 672.

The cases cited by plaintiffs, *Hobbs v. Drewer*, 226 N. C., 146, 37 S. E. (2d), 121; *Cummins v. Fruit Co.*, 225 N. C., 625, 36 S. E. (2d), 11, are distinguishable by reason of factual differences.

The correctness of the ruling in withdrawing the allegation of unlawful parking is not presented for review. The plaintiffs won below and they are not appealing.

The motion for judgment of nonsuit should have been allowed. *Elder v. R. R.*, 194 N. C., 617, 140 S. E., 298.

Reversed.

SEAWELL, J., dissents.

STATE v. CREED STILES.

(Filed 5 November, 1947.)

1. Bastards § 1—

In a prosecution under G. S., 49-2, the burden is on the State to show that defendant is the father of the illegitimate child and that defendant has intentionally neglected or refused to support such child.

2. Bastards § 6—

Testimony of prosecutrix that defendant is the father of her illegitimate child, together with evidence tending to show that defendant was apprised of her condition and advised of a request to provide for the child, and that defendant thereupon denied paternity and stated he would pay nothing, *is held* sufficient to overrule defendant's motion to nonsuit in a prosecution under G. S., 49-2.

3. Bastards § 6½—

In a prosecution under G. S., 49-2, it is reversible error for the court to instruct the jury that defendant is charged with bastardy or being the father of an illegitimate child.

4. Bastards §§ 1, 6—

In a prosecution under G. S., 49-2, an instruction to the effect that the willful failure to provide medical expenses for the mother and to pay expenses incident to the birth of the child violates the statute, is error, since willful failure to provide payment for such items is not a criminal offense although the court may require provision therefor upon conviction.

5. Bastards § 1—

The offense defined by G. S., 49-2, is not bastardy, but the willful neglect or refusal of a parent to support his or her illegitimate child, the mere begetting of the child not being denominated a crime.

APPEAL by defendant from *Alley, J.*, at August Term, 1947, of CHEROKEE.

Criminal prosecution upon an indictment charging that defendant "did unlawfully and willfully fail, neglect, and refuse to support and adequately maintain his illegitimate child heretofore begotten upon the body of" a certain named woman, etc.

The evidence offered by the State in the trial court, in the light most favorable to the State, tends to show: That defendant is the father of the son of prosecutrix born 14 July, 1942; that when prosecutrix became pregnant she told her father and mother that defendant was the father of her child; that she requested her father "to get in touch with" defendant "and make some arrangements for him to help" her "and the child"; that her father went over and told Mr. Payne, with whom defendant "was staying," "what he was into and it would make it a little lighter on him if he would come and do something about it and keep it out of court," and asked Mr. Payne "to see defendant about it," and Mr. Payne did see defendant and told him about it; that defendant said the child was not his, and he would not pay anything; that defendant was not requested to pay any definite amount; that prosecutrix has never talked with defendant since the baby was born, except one time. She says: "He was going up the road and I hollered and asked if he was going to support the child and I asked him what he was going to do and he did not even look toward the house when I tried to talk to him; he just walked away up the road, he and his father, and that is the only time I ever spoke to him"; that father of prosecuting witness took out a warrant for defendant a day or two after she told him; that when defendant knew he was going to be arrested, he left and went to Asheville; that defendant "has never done anything for the child, and has not paid any part of" prosecutrix' "hospital or doctor bill"; that defendant "has never contributed anything to the support of the child."

The State offered the child in evidence as an Exhibit.

Defendant, reserving exception to the denial of his motion for judgment as of nonsuit at close of State's evidence, offered himself as a witness, and testified in substance: That he had never had any sexual relations with the prosecutrix; that she had never said anything to him about his being the father of her baby; that if she ever hollered to him as he was passing the house in the road and said she wanted him to do something for the baby, he "never heard it"; that Mr. Payne told him that prosecutrix was pregnant and was going to swear the child to him

and he "could settle it now," or words to that effect; that he told Mr. Payne that "it was a damned lie and a black one," that he had "never had any sexual intercourse with this girl" and "wouldn't give him a damned penny"; that this was the only time anybody ever said anything to him about the prosecutrix saying that he was the father of her child; that "Mr. Payne didn't mention any amount,"—just said he could settle it; that he has not paid anything for the child's support; that he knew prosecutrix "was laying the baby" on him from the time Mr. Payne told him; and that he has been called out in court, and had been arrested on capias, and had "made two or three bonds in this case."

Defendant renewed motion for judgment as of nonsuit at close of all the evidence. Denied. Exception.

Verdict: Guilty.

Judgment: Imprisonment, and assigned to do labor under the supervision of the State Highway and Public Works Commission,—sentence not to go into effect except upon motion of the Solicitor within given time "upon satisfactory proof that defendant has failed to pay into the office of the Clerk of the Superior Court" certain sums of money at certain times for certain enumerated purposes, including reimbursement for hospital and medical bills at the time of the birth of the child.

Defendant appeals therefrom to Supreme Court and assigns error.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

F. O. Christopher and Edwards & Leatherwood for defendant, appellant.

WINBORNE, J. The questions of law involved on this appeal, as stated in brief for defendant, are (1) whether there is sufficient evidence to be submitted to the jury, and (2) whether there is error in the court's charge to the jury.

As to the first question, we are of opinion and hold that the evidence is sufficient to take the case to the jury on the charge with which defendant stands indicted. The indictment is under the statute referred to as "An Act Concerning the Support of Children of Parents Not Married to Each Other," G. S., 49-1, which provides that "Any parent who willfully neglects or who refuses to support and maintain his or her illegitimate child shall be guilty of a misdemeanor and subject to such penalties as are hereinafter provided," and that "a child within the meaning of this article shall be any person less than fourteen years of age and any person whom either parent might be required under the laws of North Carolina to support and maintain as if such child were the legitimate child of such parent." G. S., 49-2.

Under this statute, this Court has held that in order to convict defendant, the burden is on the State to show not only that he is the father of the child, and that he has refused or neglected to support and maintain it, but further that his refusal or neglect is willful, that is, intentionally done, "without just cause, excuse or justification," after notice and request for support. *S. v. Hayden,* 224 N. C., 779, 32 S. E. (2d), 333, and cases cited.

Applying the provisions of the statute, as interpreted by this Court, the evidence offered on the trial below would seem to be sufficient for the consideration of the jury on the charge preferred against defendant.

However, as to the second question, we are constrained to hold that there is prejudicial error in portions of the instructions given by the presiding judge to the jury,—the charge of the court.

Among exceptions taken to the charge are these portions: (1) "Gentlemen of the jury, the defendant Creed Stiles is indicted under a bill of indictment charging him with bastardy, of being the father of the illegitimate child of . . ., and the willful failure to provide support to care for his child, either before or after it was born." . . . (2) "Now, we have a statute which makes it a crime for a man to have intercourse with a woman and become the father of an illegitimate child, but the Court has said that that in itself does not constitute a crime, but the statute on which the State is relying, there must be shown a willful failure to provide support and pay for the expenses necessarily incurred for the medical attention and hospital attention when the child was born. Now, the word 'willful,' when used in a statute creating an offense, means the act is done purposely and deliberately in violation of the law; it means an act done without any lawful justification, reason or excuse, and the State contends here that the defendant knew he was the father of the child, and that he admits not supporting the child and admits that he has made no contribution to pay the medical expenses in connection with its birth, and has not paid anything in support of the child. That part of the issue is admitted. The primary question is whether the defendant is the father of the child, and whether the defendant had intercourse with the prosecuting witness and as a result of that the child was born, so I will submit two issues." . . . (3) "And I charge you that if you find from the evidence, beyond a reasonable doubt, that on the occasion in question, the defendant had intercourse with the prosecuting witness, and that as a result of that intercourse she gave birth to this little child introduced in evidence, and if you further find from the evidence beyond a reasonable doubt that the defendant willfully failed to provide medical attention and failed to provide any kind of support for this child, either before or after its birth, that would constitute a violation of that statute, and if you so find from the evidence, beyond a reasonable doubt, it would

be your duty to render a verdict of guilty against the defendant as charged in the bill of indictment."

The errors, in the main, permeating these instructions are these: (a) The charge against defendant is not bastardy, or of being the father of an illegitimate child. The only prosecution contemplated under the statute is that grounded on the willful neglect or refusal of any parent to support his or her illegitimate child,—the mere begetting of the child not being denominated a crime. *S. v. Dill,* 224 N. C., 57, 29 S. E. (2d), 145. See also *S. v. Tyson,* 208 N. C., 231, 180 S. E., 85. The question of paternity is incidental to the prosecution for the crime of nonsupport. *S. v. Summerlin,* 224 N. C., 178, 29 S. E. (2d), 462.

(b) The failure to provide for the mother and to pay expenses incident to the birth of the child are not criminal offenses. These are matters the court may provide for and require upon conviction. *S. v. Summerlin, supra.*

As there must be a retrial for errors indicated, other errors assigned may not recur, and hence need not now be considered.

New trial.

MANLEY J. WILLIAMS ET AL. v. J. EMORY JOINES ET AL.

(Filed 5 November, 1947.)

1. Deeds § 16d—

In this action by grantors to enforce resale and reconveyance of the land pursuant to stipulation contained in the deed poll, defendant grantee pleaded the statute of frauds. G. S., 22-2. *Held:* The deed was competent in evidence as constituting the written contract between the parties, irrespective of whether the statute of frauds precludes the remedy of specific performance, and the judgment of involuntary nonsuit suffered by plaintiffs upon the exclusion of the deed from evidence is reversed.

2. Deeds § 16a: Mortgages § 1—

A clause in the deed which provides for a reconveyance on the conditions stated, nothing else appearing, would seem to stamp the transaction as a conditional sale and not a mortgage.

3. Deeds § 16a—

Grantee in a deed poll, containing covenants and stipulations purporting to bind him, becomes bound for their performance, though he does not execute the deed, since he who takes the benefits of a contract must assume its burdens, or else bear the consequences attendant thereon.

SEAWELL, J., concurring in result.

APPEAL by plaintiffs from *Warlick, J.,* at June Term, 1947, of WATAUGA.

Civil action by grantors to enforce resale and reconveyance of land pursuant to stipulation in deed poll.

It is alleged that on 17 March, 1945, the plaintiffs conveyed to Emory Joines, then unmarried, a lot with buildings, situate in the Town of Boone, by general warranty deed duly registered in Watauga County; and further, that on or about the same day, the grantee agreed to sell the property back to the plaintiffs, one year from date of deed, at plaintiffs' election, and this agreement was inserted in the deed, immediately following the description of the property, in words and figures as follows:

"Provided that said party of the second part agrees to sell . . . said property back to said parties of the first part for the sum of $4,000 one year from date of this deed, provided said parties of the first part so desire."

Plaintiffs further allege that on 15 February, 1946, the defendant was duly notified of plaintiffs' desire to repurchase the property in accordance with the agreement, and the repurchase price was tendered, which the defendants refused, and they still refuse to reconvey the premises as per stipulation in the deed.

Wherefore, plaintiffs asks for specific performance and for such other and further relief as may be meet and proper.

It is alleged in the answer that the purchase price of the property was $4,100; that the stipulation concerning the resale for $4,000 was not in the deed when shown to defendant and approved by him, and was not discovered by him until after the deed had been registered. It is further alleged that this provision was fraudulently inserted in the deed by M. J. Williams, as he knew the defendant intended to improve the property; and in resistance to plaintiffs' demand for specific performance, the defendants plead the statute of frauds. G. S., 22-2.

On the hearing, the plaintiffs were not allowed to offer the deed in evidence, because not signed by the party sought to be charged, or by any other person by him thereto lawfully authorized. Whereupon, the plaintiffs suffered an involuntary nonsuit and appealed.

Louis H. Smith and James C. Farthing for plaintiffs, appellants.

Trivette, Holshouser & Mitchell for defendants, appellees.

STACY, C. J. It is alleged that the deed in question constitutes the written contract between the parties. It was therefore competent for the plaintiffs to offer it in evidence as a part of their case.

The clause in the deed which provides for a reconveyance on the conditions stated, nothing else appearing, would seem to stamp the transaction as a conditional sale. *Poindexter v. McCannon,* 16 N. C., 373; *King v. Kincey,* 36 N. C., 187, 36 Am. Dec., 40; *Waters v. Crabtree,*

105 N. C., 394, 11 S. E., 240; *Gillis v. Martin,* 17 N. C., 470. "Generally, a conveyance of land between parties who do not bear the relation of debtor and creditor, made upon a stipulation that the grantor may repurchase, is a conditional sale and not a mortgage, . . ." 41 C. J., 326. See *Ferguson v. Blanchard,* 220 N. C., 1, 16 S. E. (2d), 414; *O'Briant v. Lee,* 212 N. C., 793, 195 S. E., 15; *S. c.,* 214 N. C., 723, 200 S. E., 865.

It is very generally held for law, here and elsewhere, that a "grantee in a deed poll, containing covenants and stipulations purporting to bind him, becomes bound for their performance, though he does not execute the deed." *Herring v. Lumber Co.,* 163 N. C., 481, 79 S. E., 876; *Henry v. Heggie,* 163 N. C., 523, 79 S. E., 982; *Bank v. Loughran,* 122 N. C., 668, 30 S. E., 17; *Long v. Swindell,* 77 N. C., 176; *Finley v. Simpson,* 2 Zab. (N. J.), 311, cited with approval in *Maynard v. Moore,* 76 N. C., 158.

We are not now concerned with the exact form or extent of recovery, but whether the case as made survives the demurrer. One who would take the benefits of a contract must assume its burdens, or else bear the consequences attendant thereon. *Oil Co. v. Baars,* 224 N. C., 612, 31 S. E. (2d), 854; *Ballard v. Boyette,* 171 N. C., 24, 86 S. E., 175; *Burns v. McGregor,* 90 N. C., 222. Suffice it for present purposes to say the deed should have been admitted in evidence, even if the plaintiffs be limited in their choice of remedies to an annulment of the contract or an assessment of damages. *Oil Co. v. Baars, supra.* It will be time enough, if then necessary, to consider the rights of the parties under the stipulation after the defendants' plea of *non est factum* has been determined. Its effect under the pleadings may well await this determination.

The judgment of nonsuit will be vacated and the cause remanded for further hearing.

Reversed.

SEAWELL, J., concurring in result: I concur in the conclusion that defendants' demurrer should have been overruled, but do not agree with the rationale of the opinion reaching that result. In the court below the deed or document upon which the plaintiff sued was made a part of the complaint; and properly speaking, the judgment was rendered upon the pleadings, the court holding erroneously, I think, that the contract on which the plaintiff sued was a contract for the sale of an interest in land, unsigned by the party to be charged, and, therefore, in contravention of G. S., 22-2, the statute of frauds. The case was tried upon that theory in the court below and so argued here, and I am of the opinion that the contending parties correctly divined the determinative issue in the case, pitched their battle upon the only line which the circumstances justified, and are entitled to a deliverance from this Court which might aid both them and the trial court in determining the controversy.

I do not think it amiss to say that my view of the document in controversy differs widely from that expressed in the main opinion, and the difference is such that compels me, regretfully enough, to express my disagreement. Further discussion may or may not be afforded at a later time, according to the course of events.

GRESHAM PETROLEUM TRANSPORT, INC., v. KEYSTONE MUTUAL CASUALTY CO.

(Filed 5 November, 1947.)

1. Insurance § 9—

An endorsement on a policy of insurance made by the local agent without the knowledge of the insurer and placed on the policy after the happening of the event upon which liability is predicated, can be no part of the insurance contract and in no way binds insurer.

2. Insurance § 43—

A policy describing a trailer covered by the contract by make and year but without serial number is a sufficient description to permit evidence *aliunde* that the trailer involved in the accident was the only one of that description owned and operated by insured at the time the policy was issued so as to identify the trailer as the one covered by the contract.

DEFENDANT'S appeal from *Harris, J.*, at February Civil Term, 1947, of WAKE.

The plaintiff brought this action to recover of the defendant on a policy of insurance issued by it to the plaintiff, covering, as plaintiff alleges, certain expenditures the latter was compelled to make in the defense of a civil action based upon negligence, in which an insured tank trailer was involved. It is alleged that this particular tank trailer was insured by the defendant in such manner that the latter agreed to defend the plaintiff in any suit brought, based upon negligence or accident attributable to plaintiff in the use of said trailer, and to pay any recovery in the said suit.

A frank statement by the parties to the action, sharply outlining the crux of the controversy, renders unnecessary a more tedious statement of detail.

Briefly, the facts are these:

The plaintiff was sued for negligence in causing a fire near the Sir Walter Hotel on 29 January, 1946, by leakage of oil from a tank trailer owned and operated by it, whereby it was permitted to run freely in the street or alley, to become ignited and thereby cause damage to the property of the plaintiff in that suit.

The plaintiff in this action notified the defendant of the institution of the action against it and called upon the defendant to defend the case in accordance with its contract. The defendant company declined to defend the action or to pay the expenses thereof, or any judgment recovered in the action, and disclaimed any liability thereupon. The plaintiff (defendant in that suit) defended the action, paid items of cost and attorney's fees, and the judgment which was obtained against it in said action, all in the amount of $722.10.

In the instant case defendant does not dispute the expenditures of plaintiff or the liability of the defendant therefor, provided the policy sued upon covers the identical tank trailer in question; but it denies such coverage. This is the only point in controversy.

A few days after the fire the owner of the tank trailer in question, described as a "1943 Butler tank trailer," procured from the local agent of the defendant a special endorsement, bearing the date of the original policy, in which the serial number of the particular trailer involved in the fire was definitely stated to be "43101630K," which was in fact the serial number of the trailer in question.

The contention of the defendant is that the defendant company had issued to the plaintiff a policy, under date of December 20, 1945, in which is described on the face of the policy a 1945 Federal tractor (not involved in the controversy) and a 1943 Butler tank trailer, and that there is no serial number listed on the policy with respect to this trailer; and further, that there is in evidence a policy of the Massachusetts Bonding & Insurance Company, dated August 10, 1945, and expiring August 10, 1946 (now transferred to defendant), the insured being S. D. Gresham, Sr., and there is listed in the vehicles covered in this policy a 1944 Butler semi-trailer and tank, serial number 43101630K, being the same serial number as that upon the plaintiff's trailer involved in the fire. In addition to this there is listed the 1943 trailer which plaintiff contended had been wrecked and was a total loss at the time the policy sued upon was issued. In fact the 1943 trailer which had been wrecked never, indeed, belonged to the plaintiff but was operated by Gresham before plaintiff took over the business, and that the trailer involved in the fire was the only one owned by the plaintiff at the time defendant issued its policy thereupon.

This particular situation, necessarily somewhat confused in its statement, amounts to this: The plaintiff contended that the policy of insurance covered the 1943 Butler tank trailer which was then in use and not the one formerly operated by it, and which had become a total wreck at the time the policy was issued. The defendant makes these contentions. The first is that it was impossible to say from the contract which of these trucks had been insured and that the description in the original policy was insufficient to identify the trailer; and second, that the special

endorsement giving the serial number of the truck involved in the fire is of no effect as a contract of insurance, both because it was made after the liability had already matured, and was made without the knowledge of the company.

Upon the trial the plaintiff was permitted, over exception of the defendant, to introduce evidence as to the identity of the 1943 Butler tank trailer, consisting mainly of testimony that it was the only trailer of that description owned and operated by him at the time which might be made the subject of insurance at all.

Also, the plaintiff was permitted, over objection of the defendant, to introduce certain parts of the complaint to which the answers introduced were directed.

At the conclusion of the evidence the defendant demurred thereto and moved for judgment as of nonsuit, which was declined and defendant excepted.

Certain exceptions to the charge as given were also made, but it is not thought necessary to decision to treat them in detail.

The case was submitted to the jury and resulted in a verdict for the plaintiff. From the ensuing judgment the defendant appealed, assigning errors.

Bunn & Arendell for plaintiff, appellee.
Ehringhaus & Ehringhaus for liquidator of defendant, appellant.

SEAWELL, J. Careful examination of the objections to the admission of evidence and the charge to the jury does not, in the opinion of the Court, disclose reversible error. The controversy narrows to two points: The effect of the "special endorsement" on the original policy covering the "1943 Butler tank trailer" and giving the more particular description by serial number, made after the fire in which plaintiff's trailer was involved and upon which liability was predicated; and, supposing that endorsement to be ineffective, whether the description "1943 Butler tank trailer" in connection with the Reo trailer insured also by plaintiff, is a sufficient description.

As to the first question it seems clear that the special endorsement made after the liability on the policy, if any, had matured, or at least the negligence or accident upon which it was predicated had become a *fait accompli,* can be no part of a contract of insurance, since such a contract is prospective in its nature, and, of course, is based upon actuarial experience; and, equally of course, our statute does not recognize any such departure from its standard form of policy. Considered as a stipulation affecting a past transaction, or a compromise of a disputed liability, or an admission, it not only lacks supporting circumstances which would qualify it in any of these respects, but we doubt whether the local agent

might have authority to bind the company in that way by such endorsement.

We need not decide this, however, since we are convinced that the description in the original policy is sufficient to identify the trailer which the defendant insured in the policy sued upon, and that evidence to explain the ambiguity pointed out by the defendant was properly admitted. *Montgomery v. Ring,* 186 N. C., 403, 119 S. E., 561; *Porter v. Construction Co.,* 195 N. C., 328, 142 S. E., 27.

In the record we find

No error.

STATE v. ISOM DEBERRY.

(Filed 5 November, 1947.)

1. Assault § 14b—

Where the court charges the law on defendant's right of defense of himself or any member of his family against unprovoked assault, defendant cannot complain of a subsequent correct instruction, supported by the State's evidence, on the right of self-defense if it should be found by the jury that defendant provoked or willingly entered into the affray.

2. Same: Criminal Law § 81c (1)—

A charge that in order to return a verdict of guilty of assault with a deadly weapon, the jury must find beyond a reasonable doubt not only that defendant committed an assault with a deadly weapon but also that he committed it under facts and circumstances in which he was not entitled to defend himself, is favorable to defendant and his exception thereto cannot be sustained.

APPEAL by defendant from *Carr, J.,* at June Term, 1947, of WAKE.

Criminal prosecution under bill of indictment which charges that defendant feloniously assaulted one John Wilson with a deadly weapon with intent to kill, inflicting serious injury not resulting in death.

The prosecutor, John Wilson, his son Leroy and wife, his daughter and husband Isom DeBerry, the defendant, and another daughter and her husband all live in a settlement on the same farm. On 4 November 1946 "The womenfolks got to fussing" at the home of Leroy Wilson. John Wilson was there. Defendant came and called his wife out and they went home. Defendant's wife called to Wilson, her father, and he went to see what she wanted. The evidence for the State tends to show that as Wilson left defendant's home defendant shot him twice, whereupon Wilson fired back, hitting both defendant and his wife. The evidence for the defendant tends to show that after Wilson got to defendant's house he and defendant "got to arguing," Wilson left, came back,

called defendant, and when defendant came to the door, shot him. Defendant and his wife then ran around the corner of the house and Wilson, continuing to shoot, wounded both of them.

There was a verdict of guilty of an assault with a deadly weapon. The court pronounced judgment on the verdict and the defendant appealed.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

E. D. Flowers for defendant appellant.

BARNHILL, J. The defendant's exceptions are directed to alleged error in the charge of the court. Specifically he challenges the correctness of the charge on the defendant's right of self-defense. This is the only question presented.

On defendant's plea of self-defense the court first fully and correctly charged the jury as to the right of defendant to defend himself or any member of his family against an unprovoked assault. In so doing it did not place the duty on the defendant, under any circumstance, to retreat. To this charge there is no exception.

The court then correctly charged the law as to defendant's right of self-defense if it should be found by the jury that he provoked or willingly entered into an affray in which deadly weapons were used. To this portion of the charge defendant excepts. The exception is without merit.

The evidence for the State tends to show that defendant provoked and willingly entered into a gun battle with Wilson. He pleaded self-defense. It was necessary, therefore, for the court to explain and apply the law of self-defense to this evidence as well as to that which was more favorable to the defendant. This it did in language heretofore approved by this Court. *S. v. Medlin,* 126 N. C., 1127; *S. v. Garland,* 138 N. C., 675; *S. v. Kennedy,* 169 N. C., 326, 85 S. E., 42; *S. v. Koutro,* 210 N. C., 144, 185 S. E., 682; *S. v. Miller,* 221 N. C., 356, 20 S. E. (2d), 674; 4 A. J., 149.

The only other exception is directed to an excerpt from the charge in which the court required the jury, in order to return a verdict of guilty, to find beyond a reasonable doubt not only that defendant committed an assault on Wilson with a deadly weapon but also that he "committed it under facts and circumstances which indicate it was not done while he was entitled to defend himself that it was not done in his proper self-defense . . ." The error here, if any, was favorable to defendant and gives him no cause to complain.

A careful examination of the record leads to the conclusion that defendant has had a fair and impartial trial in which the court fully and

correctly explained and applied the law arising on evidence offered by the State on the one hand and by the defendant on the other. The verdict and judgment must be sustained.

No error.

STATE v. JAMES W. FLINCHEM, JR.,
and
STATE v. JAMES W. FLINCHEM, JR.

(Filed 5 November, 1947.)

1. Automobiles § 30d—

Testimony of witnesses to the effect that while defendant was unconscious from a blow on the head received in the collision they smelled the odor of alcohol on his breath, with testimony of the opinion of one of them from such observation that defendant was under the influence of some intoxicant, though witness would not undertake to say he had enough to intoxicate him while driving, *is held* no substantial evidence that defendant was under the influence of intoxicants as defined by the statute while driving prior to the accident, and defendant's motion to nonsuit in a prosecution under G. S., 20-138, should have been allowed.

2. Automobiles § 29b—

An instruction that if the jury is satisfied beyond a reasonable doubt that defendant is guilty of reckless driving to convict him, otherwise to acquit him, is insufficient in a prosecution under G. S., 20-140, to meet the requirements of G. S., 1-180, since it fails to explain the law or apply the law to the facts as the jury should find them to be.

APPEAL by defendant from *Clement, J.*, at August Term, 1947, of WILKES.

The defendant was indicted in one case for operating a motor vehicle on the highway while under the influence of intoxicating liquor, and in the other for reckless driving. The two cases were tried together.

The State's evidence tended to show that on the night of 1 April, 1947, the defendant was driving his automobile on the highway from North Wilkesboro toward Elkin; and that a collision occurred between his automobile and one being driven in the opposite direction by the witness H. T. Davis. At the point of collision the road was straight and the paved surface 20½ feet wide. As the cars approached both drivers dimmed their lights. In passing the defendant drove his automobile two feet over and beyond the center of the highway and struck or sideswiped Davis' automobile, damaging it, and the defendant himself was thrown out of his automobile and rendered unconscious by the impact, while his automobile rolled 170 feet further before coming to rest. Davis testified

that he himself was on his own side of the road, and that the defendant "was going at a pretty good rate of speed." Davis further testified that he got out of his car, went to where the defendant lay unconscious, and that he smelled "a foreign odor coming from Flinchem—some kind of intoxicating drink," and that in his opinion he was under the influence of some intoxicant. Also, a nurse at the hospital to which the defendant was immediately taken testified she smelled an odor from the mouth of the unconscious man which induced the opinion she expressed that he was under the influence of intoxicants, but she testified she would not undertake to say whether he had enough whiskey to intoxicate him when he was brought to the hospital, or how he was feeling when the collision occurred. He had a deep cut on the head and was bleeding and unconscious from the injury. T. G. Roberts, the highway patrolman who investigated the collision, a State's witness, testified he saw the defendant in the hospital shortly after he was taken there, was near him, but did not smell "a sign of any intoxicating odor."

The defendant testified that he had had nothing intoxicating to drink that day or for sometime prior; that he was driving on his own side of the road, and as Davis' car approached the light from it was flashed in his face, and the next thing he knew he was in the hospital.

The jury rendered verdict of guilty in both cases, and from judgments imposing sentence in each case, defendant appealed.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

Trivette, Holshouser & Mitchell for defendant, appellant.

No. 226: OPERATING MOTOR VEHICLE WHILE UNDER INFLUENCE OF INTOXICATING LIQUOR.

DEVIN, J. A careful examination of the testimony offered by the State in support of the charge of driving an automobile while under the influence of intoxicating liquor, in violation of G. S., 20-138, leads us to the conclusion that it lacks sufficient probative value to warrant submission to the jury, and that defendant's motion for judgment of nonsuit as to this charge should have been allowed.

The testimony of two witnesses to the effect that from the detection of some "foreign" odor of an intoxicant from the mouth of a man whom they had not seen before, and who had been knocked unconscious by a blow on the head, they were of opinion he was under the influence of intoxicating liquor, standing alone, was insufficient to constitute substantial evidence that the man, previously, while driving an automobile on the highway, had been under the influence of intoxicants to the extent held necessary in *S. v. Carroll,* 226 N. C., 237, 37 S. E. (2d), 688, to

constitute violation of the statute. We note also that another State's witness, with apparently equal opportunity, detected no odor of intoxicant from the unconscious defendant.

No. 227: RECKLESS DRIVING.

Upon the evidence offered pertaining to the charge of reckless driving of an automobile, in violation of G. S., 20-140, we think defendant's motion for judgment of nonsuit was properly overruled. However, we think defendant's exception to the court's instructions to the jury in this case must be sustained, entitling the defendant to another trial.

The court in charging the jury as to this case only read the statute and then instructed the jury, "If you are satisfied beyond a reasonable doubt that defendant is guilty of reckless driving you would convict him of that; if not, you would acquit him of that." This charge fails to comply with the requirement of the statute, G. S., 1-180, that the trial judge "shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon." No explanation of the law was attempted nor was any guide given the jury in the application of the law to the facts as they should find them to be. *S. v. Fulford,* 124 N. C., 798, 32 S. E., 377; *Williams v. Coach Co.,* 197 N. C., 12, 147 S. E., 435; *McNeill v. McNeill,* 223 N. C., 178, 25 S. E. (2d), 615.

In No. 226: Reversed.

In No. 227: New trial.

STATE v. LANDRUM CARSON.

(Filed 5 November, 1947.)

1. Husband and Wife § 17—

Separation by consent is not abandonment.

2. Same—

The offense proscribed by G. S., 14-322, is the willful or wrongful separation of husband from his wife coupled with his willful failure to provide adequate support for her according to his means and station in life, and wrongful discontinuance of cohabitation alone is not a criminal offense.

3. Husband and Wife § 22—

Testimony to the effect that defendant and prosecutrix separated and that he had ceased to provide for her support is insufficient to be submitted to the jury in a prosecution for abandonment, since it fails to show an unjustifiable or wrongful desertion, or that the failure to support was willful.

4. Husband and Wife § 19: Criminal Law § 12b—

Our courts have no jurisdiction of a prosecution of a husband for willful abandonment of his wife without providing for her adequate support if the abandonment occurs outside the State.

5. Husband and Wife § 17—

G. S., 14-322, is penal in nature and must be strictly construed.

APPEAL by defendant from *Alley, J.*, at July Term, 1947, of CLEVELAND. Reversed.

Criminal prosecution under warrant charging that the defendant willfully abandoned his wife without providing adequate support for her.

Defendant and his wife lived in Norfolk, Va. They separated in March 1946, and defendant went to Shelby, N. C. She went to Shelby 28 June 1947 and on 5 July issued the warrant herein charging abandonment on 28 June 1947.

There was a verdict of guilty. The court pronounced judgment on the verdict and defendant appealed.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

Horace Kennedy and G. C. Horn for defendant appellant.

BARNHILL, J. The prosecutrix testified: "We were separated in Norfolk, Virginia. . . . We separated in Virginia in March of 1946. . . . I have never lived with my husband in North Carolina since we separated in Virginia. . . . My husband has not given me any support since December 23, 1946, when he gave me $50. I have been living in Shelby over a month and have seen my husband during that time but have not talked with him. He came to my mother's once on Saturday after I got back and asked me to go riding with him but he was intoxicated and I did not go. . . . He has been to see the children one time."

This is the full extent of the testimony tending to establish the crime charged. It is wholly insufficient for that purpose.

Abandonment is more than mere separation. It is desertion—an unjustifiable separation coupled with the discontinuance of the marital obligation to support. *S. v. Smith,* 164 N. C., 475, 79 S. E., 979.

Separation by consent is not abandonment. *S. v. Smith, supra; Witty v. Barham,* 147 N. C., 479. Nor is proof of a wrongful discontinuance of cohabitation alone sufficient. A husband is not compelled to live with his wife and his refusal to do so does not constitute a criminal offense so long as he provides adequate support. *Hyder v. Hyder,* 215 N. C., 239, 1 S. E. (2d), 540. His act becomes criminal when and only when he, having willfully or wrongfully separated himself from his wife, inten-

tionally and without just cause or excuse, ceases to provide adequate support for her according to his means and station in life. *S. v. Hooker,* 186 N. C., 761, 120 S. E., 449.

His separation and failure to provide support must be willful. *S. v. Smith, supra; S. v. Falkner,* 182 N. C., 793, 108 S. E., 756; *S. v. Yelverton,* 196 N. C., 64, 144 S. E., 534; and the burden is on the State to prove the intent or to show facts and circumstances from which the intent may be inferred by the jury. *S. v. Falkner, supra.*

Here the evidence tends to show a separation by consent. Certainly it fails to indicate an unjustifiable and wrongful desertion or abandonment by the defendant. Furthermore, this separation occurred in Virginia. If it was in fact an abandonment then *S. v. Jones,* 227 N. C., 94, is controlling.

On the other hand, if it is contended that the abandonment occurred in this State, then the record is devoid of evidence tending to show a demand for or a refusal to support, or that defendant is employed and able to support, or other facts or circumstances tending to show that he intentionally, without just cause or excuse, failed or refused to discharge his obligation to support. *S. v. Sneed,* 197 N. C., 668, 150 S. E., 197.

The statute is penal in nature and must be strictly construed. *Hyder v. Hyder, supra; S. v. Gardner,* 219 N. C., 331, 13 S. E. (2d), 529. When so construed and applied to the evidence offered by the State in the light of former decisions of this Court, it is apparent the State has failed to make out a case for the jury. The motion to dismiss should have been allowed.

The judgment below is

Reversed.

STATE v. EUGENE EDWARDS AND ROY L. JOHNSON.

(Filed 5 November, 1947.)

1. Criminal Law § 42c—

The limits of legitimate cross-examination are largely within the discretion of the trial judge, and his ruling thereon will not be held for error in the absence of showing that the verdict was improperly influenced thereby.

2. Criminal Law § 53d—

Exceptions to the manner in which the court stated the testimony, not brought to the court's attention, cannot be sustained when it appears that the court, though it may not have used the exact language of the witnesses, fairly stated the substance of their testimony and no harm or prejudicial effect to defendant's cause is discernible.

3. Criminal Law § 81c (2)—

Exceptions to the charge will not be sustained when the charge construed contextually is free from prejudicial error.

4. Criminal Law § 81c (4)—

Where defendants are convicted on two separate charges, and the sentences thereon run concurrently, exception relating solely to the charge carrying the shorter sentence cannot be held prejudicial.

APPEAL by defendants from *Harris, J.,* at March Term, 1947, of WAKE. No error.

The defendants were charged with the larceny of an automobile, the property of Yellow Cab Company, and also with an assault with a deadly weapon with intent to kill upon the person of Jack Wilson.

By consent these cases were consolidated and tried together. The State's evidence tended to show that during a strike of taxicab drivers the defendants at night entered a taxicab driven by the witness Wilson and directed him to drive them to a certain street and number, and on arriving there assaulted him with a deadly weapon, and stole the taxicab. The cab was later found wrecked. The defendants denied guilt of these charges, and offered evidence tending to show that they were elsewhere at the time of the commission of the alleged offenses. The defendants were not strikers or taxi drivers. On cross-examination both defendants admitted they had been previously convicted of other criminal offenses.

There was verdict of guilty of larceny as charged and of assault with deadly weapon. Judgment was rendered sentencing them to not less than two nor more than four years in jail to be assigned to work under the State Highway and Public Works Commission in the larceny case, and in the assault case to two years in jail to be assigned to work under State Highway and Public Works Commission, the sentence in the assault case to run concurrently with the sentence in the larceny case.

The defendants appealed, assigning errors.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

Charles Aycock Poe for defendants.

DEVIN, J. The defendants' assignment of error based upon the ruling of the trial court in permitting extended cross-examination of the defendants and their witnesses in the effort by the State to impeach the accuracy and credibility of their testimony, cannot be sustained. The limits of legitimate cross-examination are largely within the discretion of the trial judge, and his ruling thereon will not be held for error in the absence of showing that the verdict was improperly influenced thereby.

S. v. Stone, 226 N. C., 97, 36 S. E. (2d), 704; *S. v. Beal,* 199 N. C., 278, 154 S. E., 604.

The defendants excepted to the court's charge to the jury in that in several particulars pointed out the court misstated the evidence. But a comparison of the language and expressions used by the court in stating the evidence, of which defendants now complain, with the testimony of the witnesses as shown by the record, reveals that there was no material variance between the two. While the exact language of the witnesses may not have been used, the substance of their testimony seems to have been fairly stated to the jury, and no harm to the defendants' cause or prejudicial effect is discernible. Nor was the court's attention called to any incorrect reference to the evidence. The other portions of the charge excepted to, when considered in connection with the entire charge, do not show prejudicial error. *S. v. Sterling,* 200 N. C., 18 (23), 156 S. E., 96.

The defendants' exception to the failure of the court properly to declare and apply the law relating to the charge of assault with a deadly weapon, cannot avail the defendants on this record, since it appears that the defendants were convicted of the larceny of an automobile, in the perpetration of which the assault was alleged to have been committed, and were sentenced for terms of two to four years, while the sentences for assault were for two years, to run concurrently with the sentences in the larceny case. Thus, no additional punishment was imposed nor other injury sustained by the defendants growing out of the indictment for assault with deadly weapon. *S. v. Smith,* 221 N. C., 400, 20 S. E. (2d), 360; *S. v. Graham,* 224 N. C., 347, 30 S. E. (2d), 151; *S. v. Weinstein,* 224 N. C., 645, 31 S. E. (2d), 920.

There was no motion for judgment of nonsuit. The State's evidence was sufficient to sustain the verdict and judgment. In the trial we find

No error.

LEONARD A. TEEL AND WIFE, MABEL L. TEEL, v. C. I. JOHNSON AND MRS. C. I. JOHNSON, HIS WIFE.

(Filed 5 November, 1947.)

1. Ejectment § 15—

Answer in a possessory action denying plaintiffs' title imposes the burden of proof on plaintiffs of showing title in themselves.

2. Ejectment § 17—

In an action for possession of real property, plaintiffs' evidence of deed to themselves and *mesne* conveyances covering a period of 12 years, without evidence of title by adverse possession, or a common source of title, is insufficient to overrule defendants' motion to nonsuit.

TEEL *v.* JOHNSON.

APPEAL by defendants from *Alley, J.*, at March Term, 1947, of RANDOLPH. Reversed.

This was a suit for the possession of a house and lot in Asheboro on allegations of title and wrongful withholding by the defendants. The defendants denied plaintiffs' title and denied that defendants were in the wrongful possession of the property. Defense bond under G. S., 1-111, was given.

On issues submitted to the jury there was verdict that plaintiffs were owners and entitled to the possession of the described property, that defendants were in the wrongful possession, and that plaintiffs were entitled to recover of defendants damages therefor. From judgment on the verdict defendants appealed.

Smith & Walker for plaintiffs, appellees.

J. G. Prevette for defendants, appellants.

DEVIN, J. The defendants' denial in their answer of plaintiffs' title to the property described in the complaint was sufficient to raise an issue, and to impose upon the plaintiffs the burden of showing title in themselves, in order to maintain their action. On this issue in support of their allegations the plaintiffs offered deed to themselves from Mattie L. Auman, dated 14 January, 1946; deed to Mattie L. Auman from Howard S. Auman and others, heirs of Frank Auman, dated June, 1943; deed to Frank Auman from W. M. Green and wife, dated 1 August, 1938; deed to W. M. Green from Geo. W. Kivett and wife, dated 12 March, 1934. The plaintiff Leonard A. Teel testified that when he and his wife purchased the house and lot in 1946 it was occupied by the defendant Mrs. C. I. Johnson; that he demanded possession and gave her and her husband written notice to vacate. This they refused to do.

There was no evidence of adverse possession of the property on the part of the plaintiffs or those under whom they claim, nor any evidence of title other than the introduction of the deeds mentioned. It is apparent that plaintiffs have failed to offer sufficient evidence to carry the case to the jury on this primary issue, and that defendants' motion for judgment of nonsuit should have been allowed. *Graybeal v. Davis,* 95 N. C., 508; *Mobley v. Griffin,* 104 N. C., 112, 10 S. E., 142; *Prevatt v. Harrelson,* 132 N. C., 250, 43 S. E., 800; *Moore v. Miller,* 179 N. C., 396, 102 S. E., 627; *Smith v. Benson,* 227 N. C., 56, 40 S. E. (2d), 451. The denial of defendant's motion for judgment of nonsuit on the evidence offered must be held for error, and the judgment

Reversed.

STATE OF NORTH CAROLINA, EX REL. T. C. AMICK ET AL. v. W. G. LANCASTER ET AL.

(Filed 5 November, 1947.)

1. Appeal and Error § 40l—

The Supreme Court will not determine a constitutional question, even when properly presented, if there be also present some other ground on which the case may be made to turn.

2. Nuisances § 7—

The statutory procedure to abate a public nuisance, G. S., 19-2, is not appropriate against a municipal alcoholic control board set up under color of legislative authority (Chap. 862, Session Laws of 1947), nor against the lessor of the building used for the purpose of operating a liquor control store.

APPEAL by plaintiffs from *Nimocks, J.*, 22 September, 1947, in Chambers at Louisburg. From FRANKLIN.

Civil action in the name of the State on relation of citizens of Franklin County to padlock premises used in operation of "Town Liquor Control Store" and to enjoin its maintenance as a nuisance.

Pursuant to Chap. 862, Session Laws of 1947, a "Town Liquor Control Store" in the Town of Louisburg was authorized by vote of the people, and is now being operated in a building owned by W. G. Lancaster and leased by him to "The Town of Louisburg Board of Alcoholic Control" for such purpose.

It is alleged that the Act of Assembly under which the defendants have established, and are now operating, the Town Liquor Control Store in question is unconstitutional and all proceedings thereunder are perforce illegal and void. Hence, the plaintiffs invoke the provisions of G. S., 19-1 and 19-2, to have the store declared an offense against public morals, or a nuisance, and its operation as such abated.

After a full hearing, "the court being of opinion that plaintiffs relators are not entitled to the relief prayed for in the complaint," dismissed the action with costs.

Plaintiffs appeal, assigning errors.

G. M. Beam and Hill Yarborough for plaintiffs, appellants.

Malone & Malone for defendants, Allen, Sykes, Wheless, Joyner, and Collins, appellees.

STACY, C. J. It is not stated whether the action was dismissed on procedural or constitutional grounds. Hence, we do not reach the constitutional question, if the remedy be defective or inappropriate. "The

courts will not determine a constitutional question, even when properly presented, if there be also present some other ground upon which the case may be made to turn." *S. v. Lueders,* 214 N. C., 558, 200 S. E., 22.

It would be strange indeed, if the same government which authorizes the establishment of a "liquor control store," should also provide for its padlocking at the instance of a private citizen and thus render all who are connected with its maintenance "guilty of a nuisance." G. S., 19-1. It was never intended that the procedure here invoked to abate a nuisance, G. S., 19-2, should be applied against an alcoholic control board set up under color of legislative authority, or against one who rents a building to such a board for the purpose of operating a liquor control store. The remedy selected seems inappropriate.

There was no error in dismissing the action.

Affirmed.

STATE OF NORTH CAROLINA EX REL. J. C. PHELPS ET AL. v. D. C. HICKS ET AL.

(Filed 5 November, 1947.)

APPEAL by plaintiffs from *Nimocks, J.,* in Chambers at Louisburg, 22 September, 1947. From FRANKLIN.

Civil action in the name of the State on relation of citizens of Franklin County to padlock premises used in operation of "Town Liquor Control Store" and to enjoin its maintenance as a nuisance.

Pursuant to Chap. 911, Session Laws of 1947, a "Town Liquor Control Store" in the Town of Franklinton was authorized by vote of the people, and is now being operated in a building owned or managed by D. C. Hicks and leased by him to the "Town of Franklinton Board of Alcoholic Control" for such purposes.

It is alleged that the Act of Assembly under which the defendants have established, and are now operating, the Town Liquor Control Store in question is unconstitutional and all proceedings thereunder are perforce illegal and void. Hence, the plaintiffs invoke the provisions of G. S., 19-1 and 19-2, to have the store declared an offense against public morals, *i.e.,* a nuisance, and its operation as such abated.

From judgment dismissing the action with costs, the plaintiffs appeal, assigning errors.

G. M. Beam and Hill Yarborough for plaintiffs, appellants.

H. C. Kearney for defendants, Cheatham, Hicks, Parker, Rose, and May, appellees.

STACY, C. J. The decision here is controlled by what is said in No. 451, *State ex rel. Amick v. Lancaster, ante,* 157. That case dealt with a "Town Liquor Control Store" in Louisburg; this one with a similar store in Franklinton. There is no difference in principle between the two cases.

The judgment of dismissal in the present case will be also upheld.

Affirmed.

EUNICE RANDLE, BY HER NEXT FRIEND, CLAUDE L. LOVE, v. DON B. GRADY AND WIFE, MARY M. GRADY.

(Filed 19 November, 1947.)

1. Evidence § 31½—

Where the notary public taking a deposition seals same in an envelope, the fact that the attorney of the party offering the deposition in evidence brings same back with him to this State and drops it in the mail as requested by the notary, does not render the deposition incompetent. G. S., 8-71.

2. Appeal and Error § 29—

Where an exception is not argued in the brief it is taken as abandoned. Rule of Practice in the Supreme Court, No. 28.

3. Evidence § 38—

Where a party offers evidence tending to show that pertinent bank records had been taken to court in connection with another prior action and that they could not be found upon diligent inquiry and search, he is entitled to introduce the portion of the agreed case on appeal in such prior action, as secondary evidence of the bank records.

4. Evidence § 41—

Where ownership of property is in issue, testimony of a witness of a statement of one of the parties, contrary to her position on the trial, that she owned the property, is hearsay and incompetent as substantive evidence.

5. Appeal and Error § 51a—

The decision on a former appeal becomes the law of the case, and a holding on the former appeal that the evidence was sufficient to make out a cause of action, is conclusive in the second trial upon substantially the same evidence.

6. Judgments § 32—

Judgment in an action for damages allegedly resulting from a fraudulent conspiracy to extinguish property rights of plaintiff in lands and furnishings, without seeking recovery of the personalty or realty or for injuries to the realty, does not bar a subsequent action to recover the lands and personalty on the ground of a resulting trust.

7. Election of Remedies § 2—

Plaintiff alleged that during plaintiff's minority, her mother purchased certain property with funds of plaintiff and gave a deed of trust thereon. The deed of trust was foreclosed. *Held:* Plaintiff's suit to recover damages upon allegations of fraudulent conspiracy to extinguish her property rights is not an election of remedies barring her subsequent action to recover the property upon the ground of a resulting trust, since the remedies are co-existing and consistent.

8. Appeal and Error § 39b—

Appellants' exception to the portion of the charge relating to appellee's contention of additional payments is rendered immaterial by a verdict which does not include such additional payments in the recovery.

9. Appeal and Error § 51a—

The decision on a former appeal is the law of the case, and the court properly refuses to sign judgment tendered which is in conflict with the former decision.

APPEAL by both plaintiff and defendants from *Pless, J.*, at March Term, 1947, of HENDERSON.

Civil action for recovery of land and personal property, known as Crystal Springs Manor at Hendersonville, N. C., and of rents and profits therefrom.

When this action was here on former appeal, 224 N. C., 651, 32 S. E. (2d), 20, from judgment as of nonsuit, the allegations of the complaint and admissions of defendant in answer filed were stated in full summary. Hence, rather than be unduly repetitious here, we now refer to that statement.

But defendants further answering aver, briefly stated: That at the times mentioned in the complaint plaintiff Eunice Randle was a minor and had no estate, and that the money paid as cash consideration for the deed from W. B. Hodges and wife to Helen G. Randle, Trustee for Eunice R. Randle, minor, was the property of Helen G. Randle, the mother of Eunice R. Randle, who directed W. B. Hodges to make the deed to "Helen G. Randle, Trustee for Eunice R. Randle, minor," as a means by which her funds would be beyond the reach of persons who might make personal demands upon her, and that she took possession of the property and operated it as a hotel for three years, and out of the profits arising therefrom supported and maintained her minor child for said period and made payments covering all the interest and principal on said purchase money notes, as set out in the complaint, and paid nothing on repairs, and allowed taxes to become delinquent, with the result that as Trustee and natural guardian of her child she sustained no loss on the transaction; and that she has instituted, promoted and engineered all the suits which Eunice R. Randle has brought against defendants, relating to this property, etc.

Defendants further plead as *res judicata* a judgment of nonsuit entered in 1939 at a term of General County Court of Buncombe County in an action therein pending entitled "Harold K. Bennett, Guardian of Eunice R. Randle, minor, *v.* Raymond H. Boyer, doing business in the name and style of Boyer Realty Company, Don Grady, W. B. Hodges, O. B. Crowell and Helen G. Randle," in which defendants here aver that the facts there alleged are substantially identical with the material facts in the present action. Complaint and answer filed in the said county court are attached as exhibits to defendants' answer. The complaint there alleges a cause of action for damages, for fraudulent conspiracy to extinguish the property rights of plaintiff acquired under the deed from W. B. Hodges and wife as aforesaid, expressly alleging that the action is not for the recovery of land or of personal property, or of any interest in either.

Defendants further aver, in their further answer, that if plaintiff had a cause of action against defendants, she had two remedies, inconsistent and in the alternative; and that by her election to sue in the action in the General County Court of Buncombe County, as above recited, for damages alleged to have been sustained by the alleged fraudulent actions set out in the complaint, she ought not to be permitted to maintain the present action to recover the property, and they plead such election of remedies in bar of plaintiff's right to maintain this action.

Upon the retrial in Superior Court, plaintiff offered evidence substantially the same as that introduced on the former trial, details of which are set out in statement of facts on former appeal. 224 N. C., 651.

In addition, plaintiff offered evidence tending to show that the money paid as cash consideration at the time of the execution of the deed from W. B. Hodges and wife to Helen G. Randle, Trustee for Eunice R. Randle, minor, was the property of Eunice R. Randle; and that the money thereafter paid on the notes given for balance of the purchase price was also her property.

On the other hand, defendants offered evidence tending to show that all of the money so paid was the property of Helen G. Randle, and that in the transaction she, Helen G. Randle, was acting for herself. The contest thus arising was, in the main, the ground upon which the case was fought in the trial court.

Such of the evidence as is pertinent to consideration of exceptions presented will be recited in connection therewith. It is unnecessary to a decision on this appeal to set out other evidence offered by the respective parties.

The case was submitted to the jury on these issues,—which the jury answered as shown:

1. What amount of the plaintiff's moneys, if any, were used in purchasing the property known as Crystal Springs Manor? Answer: $3,000.

2. What is the total reasonable rental value per year of said property from February, 1939, to January, 1947? Answer: $1,500.

3. What amount has been expended by the defendants for the necessary and reasonable upkeep, maintenance and repair of the real estate in question? Answer: $6,819.75.

4. Did the defendants, when there was reason to believe the title under which they were holding was good, make permanent and valuable improvements to the said property? Answer: Yes.

5. What amount was expended therefor? Answer: $1,500.

From judgment rendered thereon, both plaintiff and defendant appeal to Supreme Court and assign error.

Don C. Young for plaintiff, appellee.

Don C. Young and Claude L. Love for plaintiff, appellant.

R. L. Whitmire and L. B. Prince for defendants, appellants.

DEFENDANTS' APPEAL.

WINBORNE, J. While consideration of the several exceptions assigned by defendants as errors on their appeal fail to show reversible error, we treat them *seriatim:*

1. The first four exceptions relate to deposition of the cashier of a bank in Knoxville, Tennessee, which plaintiff offered in evidence. The sufficiency of the deposition, as stated in brief of defendants, is questioned (1) because of the way and manner in which it was returned to the Clerk of the Superior Court, and (2) because of the failure of the Clerk to pass upon and allow it. As to the first, it appears from the evidence set out in the case on appeal that after the deposition had been taken it was put in an envelope of the attorney for plaintiff, which had been prepared in his office in Asheville, North Carolina. The notary public sealed and stamped the envelope, and requested the attorney to drop it in the mail when he reached Asheville, and he did as requested. The statute, G. S., 8-71, provides that "depositions shall be subscribed and sealed up by the commissioners or notary public, and returned to the court, the Clerk whereof . . . shall open and pass upon the same . . ." How it shall be returned is not prescribed. But in this case the method pursued is conceded to be free from cause for complaint. As to the second, the record fails to show any objection, exception or assignment of error. Moreover, while the record shows that the exception taken to the exhibits attached to the deposition is assigned as error, no argument in reference thereto is made in the brief filed here. Hence, it is taken as abandoned by him. Rule 28 of the Rules of Practice in the Supreme Court of North Carolina, 221 N. C., 544.

2. The fifth exception is to the overruling of defendants' objection to the introduction of a portion of the agreed case on appeal from the Buncombe County Court to the Superior Court of Buncombe County in the case of Harold K. Bennett, Guardian of Eunice R. Randle, minor, *v.* Raymond H. Boyer, doing business in the name and style of Boyer Realty Company, Don Grady, W. B. Hodges, O. B. Crowell and Helen G. Randle, which included a bank statement of the State Trust Company of Hendersonville showing in said bank an account of Eunice Rosalyn Randle, minor, by Mrs. Helen G. Randle, Trustee, 1 July, 1936, in the sum of $1,173.32, and deposits of various sums in said account during July, August, September and October, 1936,—the largest amount of deposits therein at one time being $2,007.76 on 28 September, 1936. As preliminary to and foundation for offering the above, plaintiff offered testimony tending to show that all the records of the bank pertaining to the Randle account were taken to Buncombe County for the trial of the case there, and that after diligent search of the court papers and records in the courthouse of Buncombe County, and due inquiry of all court reporters, the bank records cannot be found.

A party who seeks to prove the contents of a writing by a copy or oral testimony must first account satisfactorily for his failure to produce the original. He must show that diligent search has been made for it in the places where it would most likely be found. And upon satisfactory proof of loss of a writing, secondary evidence of its contents is admissible. Stansbury on The North Carolina Law of Evidence, Sec. 192, p. 417.

Applying this principle, satisfactory proof of loss of the bank records appears. Hence, secondary evidence of such records is competent and admissible.

3. The seventh exception relates to the exclusion of the testimony of M. F. Toms, a practicing attorney, tending to show that in the Spring of 1939, March, Mrs. Helen G. Randle stated that the Crystal Springs Manor was hers. This testimony comes clearly within the rule prohibiting hearsay evidence. "Evidence, oral or written, is called hearsay when its probative force depends in whole or in part upon the competency and credibility of some person other than the witness by whom it is sought to produce it." 11 A. & E. (2 Ed.), 520, as quoted in *King v. Bynum,* 137 N. C., 491, 49 S. E., 955. See also *Chandler v. Jones,* 173 N. C., 427, 92 S. E., 145, and Stansbury on The North Carolina Law of Evidence, Sec. 138, p. 274. Hence, the court properly excluded the testimony offered.

4. The sixth and eighth exceptions relate to the denial of defendants' motions for judgment as in case of nonsuit. And as the twelfth exception relating to denial of defendants' plea of *res judicata,* and as to election of remedies, which, if tenable, would bar this action,—it may be

considered with those relating to nonsuit. The exceptions in so far as they relate to plaintiff's alleged cause of action present old straw for rethreshing. On former appeal, 224 N. C., 651, it was held that the evidence was sufficient to make out a *prima facie* case, and to establish *prima facie* these propositions: (a) That in the purchase of land a recital in a deed acknowledging receipt of consideration therefor is *prima facie* evidence of that fact and is presumed to be correct. (b) That if the consideration for the deed was the property of the minor plaintiff, her mother had no authority to impress upon the property an express trust, but that where a person *in loco parentis* to a child purchases land with consideration furnished by the child, a resulting trust arises *pro tanto*. (c) A purchaser is charged with notice of the contents of each recorded instrument constituting a link in his chain of title and is put on notice of any fact or circumstance affecting his title which any such instrument would reasonably disclose. And, thereupon the judgment as of nonsuit then under challenge was reversed. The decision there constitutes the law of the case. If it were not so, the case relied upon by defendants is distinguishable from the present action.

Now with respect to the pleas of *res judicata*, and the plea as to election of remedies: The action in the General County Court of Buncombe County was for the recovery of damages allegedly resulting from a fraudulent conspiracy to extinguish the property rights acquired by the plaintiff in the purchase of the Crystal Springs Manor Hotel and furnishings, —alleging, however, "that the plaintiff does not by this action, directly or indirectly seek the 'recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest'; nor does the plaintiff by this action, directly or indirectly seek any manner of redress 'for injuries to real property' nor 'recovery of personal property.'"

Ordinarily the operation of estoppel by judgment depends upon the identity of parties, of subject matter and of issues; that is, if the two causes of action are the same, judgment final in former action would bar the prosecution of the second action. McIntosh, N. C. P. & P. in Civil Cases, Sec. 659, p. 748.

In the case in hand, the purpose of the former action is distinctly different from that of the present action. The former action is based upon allegations of fraud,—and the present is for the recovery of the land and personal property. Hence the plea of *res judicata* is untenable.

Regarding plea as to election of remedies: The "doctrine of election is based on the theory that there are inconsistent rights or remedies of which a party may avail himself, and a choice of one is held to be an election not to pursue the other." But, "the principle does not apply to co-existing and consistent remedies." *Machine Co. v. Owings*, 140 N. C.,

503, 53 S. E., 345, 8 L. R. A. (N. S.), 582, 6 Anno. Cas., 212. *Fields v. Brown,* 160 N. C., 295, 76 S. E., 8; *Bare v. Thacker,* 190 N. C., 499, 130 S. E., 164; *Case v. Ewbanks,* 194 N. C., 775, 140 S. E., 709; see also *Small v. Dorsett,* 223 N. C., 754, 28 S. E. (2d), 514.

And while a party may not both affirm and disaffirm the contract, if a rescission does not place him *in statu quo,* he may still sue for the additional damage for the fraud; and since he may affirm, retain the benefit, and sue for damages for the fraud, he may sue to enforce his rights under the contract, and at the same time maintain an action for the fraud. McIntosh N. C. P. & P. in Civil Cases, Sec. 414, p. 425. See also *Fields v. Brown, supra; Machine Co. v. Owings, supra.*

Applying these principles, the election of the plaintiff to sue in the former action to recover damages upon allegation of fraudulent conspiracy does not bar her right to maintain this action to recover the property or an interest therein.

5. The ninth exception: The court, in the course of instructing the jury, charged as follows: "The plaintiff further offered evidence tending to show that following completion of the transaction based on the deed, deed of trust and notes, that within the next two or three years, a further sum of $2,000 was paid on the deferred payments, making a total, according to the plaintiff's evidence, of some $5,000 that was paid on the purchase price of the property prior to the time the deed of trust and notes were purchased by the defendants, Don B. Grady and Mrs. Mary M. Grady; (and the *prima facie* presumption which I have defined to you applies as to the sum of $5,000, that is, the fact it was paid and that the deed bears the clause to the effect that the consideration was paid by the party of the second part is evidence from which you may find, but are not required to find that the total sum of $5,000 was paid from the funds of and by, or by another for Miss Eunice Randle)." The portion in parentheses is assigned as error.

Without deciding the challenge to this exception, any error in the instruction is rendered harmless by the answer of the jury to the first issue then under consideration "$3,000." The parties admit of record that $3,000 cash was the amount paid at the date of the purchase.

Other exceptions assigned as error on defendants' appeal are formal, and require no discussion.

PLAINTIFF'S APPEAL.

The only exception to which this appeal relates is to the refusal of the trial judge to sign judgment tendered by counsel for plaintiff. The judgment so tendered is in conflict with the decision on former appeal,

224 N. C., 651. The rulings there constitute the law of the case. Hence, the judgment tendered was out of order.

On defendants' appeal—No error.

On plaintiff's appeal—No error.

GERALDINE G. GARVEY v. ATLANTIC GREYHOUND CORPORATION.

(Filed 19 November, 1947.)

1. Carriers § 21b—Evidence held sufficient for jury in action by passenger injured in fall from moving bus.

Plaintiff's evidence tended to show that the bus in which she was riding as a passenger passed several cars traveling in the same direction upgrade, pulled out of the line of traffic to pass another car, but that the driver, apparently seeing a car approaching from the opposite direction, applied his brakes in order to get back in the line of traffic, then quickly accelerated his speed and turned sharply to the left to follow the curve of the road, and that the bus was traveling 40 to 50 miles per hour when it entered the curve. Plaintiff's evidence further tended to show that the door-securing mechanism was defective to the actual or constructive knowledge of defendant, and that the peculiar movements of the bus caused plaintiff, who was standing in the aisle immediately back of the driver, to fall forward, where, to save herself, she caught hold of the rod of the door-securing mechanism, loosening it, then to fall backward, and then, when the bus turned to the left around the curve, to fall out of the bus through the door which had flown open. *Held:* Defendant's motions to nonsuit were properly refused, there being sufficient evidence of negligence on the part of the carrier to be submitted to the jury and the evidence being insufficient to establish contributory negligence as a matter of law on the part of the passenger.

2. Carriers § 21a (1)—

While a carrier is not an insurer of the safety of passengers whom it undertakes to transport, it does owe them the duty of exercising the highest degree of care for their safety consistent with the practical operation and conduct of its business.

3. Automobiles § 18i—

Where plaintiff's evidence tends to show that the driver was operating defendant's bus at a rate of 40 to 50 miles an hour in heavy traffic around a curve on an upgrade, an instruction that a speed of 45 miles per hour, rather than a charge that a speed in excess of 45 miles per hour, is *prima facie* evidence that the speed is unlawful, *is held* not prejudicial in view of the statutory requirement to reduce speed below the *prima facie* limits prescribed in traversing a curve or when special hazards exist with respect to other traffic. G. S., 20-141, prior to amendment by Chap. 1067, Sec. 12, Session Laws of 1947.

GARVEY *v.* GREYHOUND CORP.

APPEAL by defendant from *Carr, J.*, at June Term, 1947, of WAKE. No error.

This was an action to recover damages for a personal injury resulting from a fall from one of defendant's buses, alleged to have been caused by the negligence of the defendant.

It was not controverted that on the occasion alleged, to wit: 16 October, 1946, about 10:30 p.m., the plaintiff was a passenger on defendant's bus en route from Raleigh to her home near Clayton, N. C.; that the bus was being operated on regular schedule by defendant's driver, and that plaintiff suffered a serious and permanent injury as result of being thrown or falling from the moving bus, though the defendant denied that it was negligent in any manner complained of, or that plaintiff's injury proximately resulted therefrom. Contributory negligence also was pleaded by the defendant.

In support of her allegations of negligence the plaintiff offered evidence tending to show that the circumstances and causes of her injury were substantially these: Plaintiff was a passenger on defendant's bus which left Raleigh about 10:15 p.m. traveling east on Highway 70. The bus was crowded when it left Raleigh with all seats occupied and 12 or 15 persons standing in the aisle. Plaintiff secured a seat next to the aisle and immediately in rear of the bus driver. Shortly before she reached her destination she gave her seat to Mrs. Lassiter, whom she knew to be employed on a night shift in a mill, and stood in the aisle at the front, back of the white line, leaning against the front seat on the right and holding the rail which extended over the panel or shield protecting the front of the first seat. She was within 18 inches or two feet of the driver, and to his right and rear. It does not affirmatively appear that any other person was standing in the aisle at this time. The driver had his face turned to his left and was conversing with passengers behind him. The traffic on the highway was unusually heavy incident to State Fair week in Raleigh. The bus was behind schedule on account of frequent stopping to discharge and receive passengers, and was being driven at times 60 miles per hour, passing cars, in and out the line of traffic. Going east between Auburn and Clayton, and approaching the locality of the accident, there was a dip in the contour of the road, with an upgrade on the east side, culminating in a sharp curve to the left near the crest of the grade. In traversing this portion of the road and up this grade, the bus passed three cars going in the same direction and then pulled out of line to pass another, when, apparently, the driver observed a car approaching in the west bound lane and applied his brakes in order to enable him to get back in line, and then quickly accelerating his speed suddenly lunged forward and turned sharply to the left to follow the curve in the road. The result of these maneuvers was first to throw

the plaintiff forward, causing her to lose her hold on the rail and to topple and fall forward on the platform or well which was six or eight inches lower than the aisle. To save herself she caught hold of the rod which connects the lever near the steering wheel with the mechanism for opening and closing the right front door of the bus. Due to the defective condition of this mechanism the door fastening was loosened by the pressure on this rod, and as the bus immediately jerked forward plaintiff was thrown back and endeavored to catch the rail on the panel in front of the right front seat, and then as the bus turned sharply to the left on the curve, the door was thereby caused to open and the plaintiff was thrown out to the ground. Her leg was run over and crushed by the rear wheels of the bus and had to be amputated. According to plaintiff's evidence the driver was oblivious of these happenings and had to be called twice to make him aware that one of his passengers had fallen from the bus. The bus ran 97 steps or yards before it was stopped. There was evidence that the bus in taking this curve (which a witness described as the worst curve between Raleigh and Clayton) was traveling forty to fifty miles per hour. The defect in the door-securing apparatus of the bus was explained to the jury by a witness acquainted with its construction. This witness, who had been seated on the right front seat of bus with two others, testified he had previously noticed the mechanism was loose and would not hold the door against an ordinary jar, and that its condition was such that the driver could have observed it. Another witness had seen a bus door fly open on another occasion, though defendant's driver said that was not on the same bus.

On the other hand, the defendant's evidence tended to show entire absence of negligence on its part in any respect alleged about which testimony was offered, or that there was anything unusual in the operation of the bus. Defendant's evidence tended to show the bus was being driven carefully, was not late, and that immediately prior to the accident the speed was 40 to 45 miles per hour. Defendant's witnesses testified plaintiff was standing up with her purse and a small bundle under her left arm, and that she fell or stumbled forward, and got hold of the door rod and the door came open. The driver said he saw her fall, but, being occupied with operation of the bus, was unable to do anything but pull over carefully to the side of the road and stop; that he went only 25 yards before stopping. He did not know what caused her to fall; that he had not put on brakes or given the bus a jolt or lurch; that he did not recall passing any cars immediately beforehand, and was in the line of traffic; was not talking. He further testified that at the point where plaintiff caught hold of the rod, if it is pulled back hard enough the door will open, and further that there was no defect in the mechanism.

In response to issues submitted the jury returned verdict in favor of plaintiff, finding that plaintiff was injured by the negligence of the

defendant, that she did not by her own negligence contribute to her injury, and assessing damages in sum of $27,500. From judgment on the verdict defendant appealed, assigning errors.

Bunn & Arendell and Thos. W. Ruffin for plaintiff, appellee.
Ehringhaus & Ehringhaus for defendant, appellant.

DEVIN, J. Defendant's appeal from an adverse judgment below presents at the outset the question whether plaintiff's evidence was sufficient to make out a case of actionable negligence on the grounds alleged. Error is assigned in the denial of defendant's motion for judgment of nonsuit and in the refusal of the court to give peremptory instructions in its favor as requested.

However, giving to the plaintiff's evidence that favorable consideration required under the rule as against a demurrer (*Nash v. Royster,* 189 N. C., 408, 127 S. E., 356), we conclude she has offered evidence of negligence in respect to the manner of operation of defendant's bus on the occasion of her injury and in respect to the maintenance of the door fastening for the protection of passengers, and that her injury proximately resulted therefrom, and that this evidence is of sufficient probative value to withstand defendant's motions. "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear." *Lavender v. Kurn,* 327 U. S., 645.

Considering plaintiff's testimony and that of her witnesses, together with the inferences reasonably deducible therefrom, in the light favorable to her, it would seem that the injury of which plaintiff complains resulted from being thrown from the defendant's swiftly moving bus, and that the violent motions of the bus as detailed, due to improper operation, caused her to lose her balance and fall forward on the platform and caused the inadequately secured door to become unfastened and fly open, subjecting plaintiff to the centrifugal force of the motion of the bus in traversing a sharp left curve, and that in consequence she was swept out of the open door of the bus to the ground, and injured.

Further, we think the evidence susceptible of the inference that the attempt of the driver of the bus to pass a car just before reaching the curve and the necessity of a quick turn to the right to avoid an oncoming car and regain the line of traffic and then to follow the curve to the left, tended to accentuate the sharpness of the turns required to be made, first to the right and then to the left, and to increase the centrifugal pull of the bus and occupants to the right in order to follow the perimeter of the curve.

While the defendant in the operation of its bus would not ordinarily be held liable to a passenger for sudden jerking or jolting caused by

changes of speed or direction incident to the operation of the bus on the highway in relation to the traffic then being thereon, we think the plaintiff's evidence tends to go further and to show failure to exercise proper care, under the circumstances, and that defendant's failure in the respects alleged was the proximate cause of the injury.

Note also must be taken of testimony tending to show the loosened condition of the door fastening mechanism, and this, together with evidence of improper operation of the bus, as showing causal connection between the negligence of the defendant in these respects and the injury complained of.

Also must be kept in mind, in considering the evidence on the issue of negligence, that while the carrier is not an insurer of the safety of passengers whom it undertakes to transport, it does owe them the duty of exercising the highest degree of care for their safety consistent with the practical operation and conduct of its business. *White v. Chappell,* 219 N. C., 652, 14 S. E. (2d), 843; *Hollingsworth v. Skelding,* 142 N. C., 246, 55 S. E., 212.

Nor do we think there was evidence of contributory negligence on the part of the plaintiff such as would justify a nonsuit on that ground. Whether she used due care under the circumstances was a question for the jury. *Marzelle v. Mfg. Co.,* 227 N. C., 674, 44 S. E. (2d), 80; *Watkins v. Raleigh,* 214 N. C., 644, 200 S. E., 424; *Cole v. Koonce,* 214 N. C., 188, 198 S. E., 637.

The defendant's motion for judgment of nonsuit was properly denied. While defendant's evidence tended to throw a different light on the circumstances of this occurrence, and to relieve the defendant of the imputation of negligence, and also to show want of due care on the part of the plaintiff, the jury has accepted the plaintiff's view of what happened and found the determinative facts in her favor.

The defendant assigns error in the court's charge to the jury in respect to the statutory regulations of the speed of motor vehicles, for that in referring to G. S., 20-141, the court quoted the statute as declaring that a speed of 45 miles per hour (outside the corporate limits of city or town) was *prima facie* evidence that the speed was not reasonable and prudent, and was unlawful, whereas the statute gives that *prima facie* effect only to speed in excess of the limit stated. This was inferentially corrected by the trial judge in his statement to the jury shortly afterward that it was "for the jury to say under all the facts and circumstances whether or not a speed in excess of 45 miles an hour is an unlawful speed, taking into consideration all the circumstances surrounding the operation of the motor vehicle." And the court then quoted to the jury subsection 5 (c) of G. S., 20-141, which contains the provision that driving within the speed limits set out in the statute "shall not relieve

the driver from the duty to decrease speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, or when special hazard exists with respect to other traffic." The defendant argues that the misstatement of the statute made by the court should be held substantial error in view of the conflicting evidence as to the speed of the bus, some witnesses putting it above, some below, and some at 45 miles per hour. However, we do not think this inadvertence on the part of the court was in any view harmful to the defendant. The speed of the bus in traversing the curve where the injury occurred was variously stated to be from 40 to 50 miles per hour, and the reference to speed of 45 miles per hour under the circumstances shown in this case would not seem to be important, in view of the modifying clause of the statute quoted. So material is the application of this clause to questions of liability arising out of violation of statutory speed regulations where special hazards or unusual circumstances are shown that in *Kolman v. Silbert*, 219 N. C., 134, 12 S. E. (2d), 915, it was held for error that the trial court in that case charged the jury as to the speed limits fixed by the statute without calling attention to the clause above referred to. In the opinion by *Justice Barnhill* it was said: "Whether the speed law is 45 miles per hour depends upon the circumstances at the time. . . . That part of sec. 103 (now G. S., 20-141), which fixes the rate of speed that is lawful when no special hazards exists, is secondary, facilitating proof, and must at all times be considered with proper regard to its relation to the primary and fundamental provisions of the section." We are unable to perceive any harmful result to the defendant consequent upon the court's reference to speed limits now complained of.

It may be noted that this action arose before the speed regulations of G. S., 20-141, were amended by Chap. 1067, sec. 12, Session Laws 1947.

We have examined the other exceptions noted by defendant to the court's instructions to the jury, and brought forward in the assignments of error, and find them without substantial merit.

After a careful examination of the entire record, we conclude that in the trial there was

No error.

MRS. TROY SMITH (ONE AND THE SAME PERSON AS ELIZABETH DAVIS SMITH), AND HER HUSBAND, TROY SMITH; AND WACHOVIA BANK & TRUST COMPANY AND REBECCA W. DAVIS, AS EXECUTORS UNDER THE WILL OF JAMES M. DAVIS; AND WACHOVIA BANK & TRUST COMPANY, AS TRUSTEE UNDER THE WILL OF JAMES M. DAVIS, v. HENRY W. DAVIS AND WIFE, LOUISE W. DAVIS, ALLIE B. WARE RENDLEMAN, AS EXECUTRIX UNDER THE WILL OF JOHN L. RENDLEMAN, SR., TRUSTEE, R. C. BOYCE, GURNEY P. HOOD, COMMISSIONER OF BANKS, ELLEN L. GLOVER, E. B. BANKETT, TRADING AS SALISBURY IGNITION & BATTERY SERVICE; COUNTY OF ROWAN, NORTH CAROLINA, CITY OF SALISBURY, NORTH CAROLINA, DAN NICHOLAS AND FIRST NATIONAL BANK OF SALISBURY.

(Filed 19 November, 1947.)

1. Appeal and Error § 6c (3)—

Where a jury trial is waived and the parties agree that the court find the facts, exceptions to the admission of evidence are ineffectual when there are no exceptions to the findings of fact.

2. Appeal and Error § 40a—

An exception to the signing of the judgment raises the question whether there is error in the conclusions of law upon the facts found.

3. Limitation of Actions § 12a—

A partial payment on the principal of a note under circumstances permitting an inference that the debtor recognizes the debt and his obligation to pay same amounts in law to a revival of the indebtedness and fixes a new date from which the statute of limitations begins to run. G. S., 1-47 (2).

4. Mortgages § 30i (1)—

Where partial payment is made on a note secured by deed of trust, action to foreclose the instrument is not barred until ten years from date of such payment. G. S., 1-47 (3).

5. Statutes § 5—

Where the meaning of a statute is in doubt, reference may be had to the title and context of the act as legislative declarations of its purpose.

6. Same—

The intent and spirit of an act is controlling in its construction.

7. Mortgages § 30i (2)—

Construing the language of G. S., 45-37 (5), with reference to the caption of the original act and the purpose sought to be accomplished, *it is held* the presumption of payment of a mortgage or deed of trust arises in favor of creditors or purchasers for valuable consideration from the mortgagor or trustor who extend credit or purchase after the expiration of the fifteen year period, and does not arise in favor of those who become creditors or purchasers for valuable consideration prior thereto.

SMITH *v.* DAVIS.

APPEAL by defendants R. C. Boyce and First National Bank of Salisbury, N. C., from *Alley, J.*, at March Term, 1947, of ROWAN.

Civil action to recover against defendant Henry W. Davis on two certain promissory notes of hand and under seal dated 15 March, 1927, due one year after date, allegedly executed by him to plaintiff Mrs. Troy Smith and to James M. Davis, respectively,—the latter now being deceased, and testator of plaintiffs Wachovia Bank and Trust Company and Rebecca W. Davis, Executors,—and to foreclose on first deed of trust executed cotemporaneously therewith to John L. Rendleman, Sr., Trustee, conveying as security therefor an undivided one-third interest in certain land in city of Salisbury, North Carolina.

Defendant R. C. Boyce and First National Bank of Salisbury answering the complaint of plaintiffs, deny that any indebtedness is now secured by the deed of trust, for that plaintiffs having failed to comply with the provisions of G. S., 45-37 (5), payment is conclusively presumed, and they plead payment and conclusive presumption of payment, and the ten years statute of limitation in bar of plaintiffs' right to recover in this action.

When the case came on for hearing in Superior Court a jury trial was waived, and the parties agreed in open court that the Judge presiding should find the facts from evidence introduced by the parties, and thereupon enter judgment. In accordance therewith the Judge found facts, in summary pertinent to this appeal, as follows:

I. On 15 March, 1927, Henry W. Davis borrowed the sum of $10,000 each from plaintiff, Mrs. Troy Smith, and from James M. Davis,—who died testate 16 November, 1943, naming Wachovia Bank and Trust Company, Executor and Trustee, and Rebecca W. Davis, Executrix,—and delivered to each his promissory note in said amount bearing interest, and due one year after date, and cotemporaneously therewith he, Henry W. Davis, and his wife, Louise W. Davis, executed and delivered to John L. Rendleman, Sr., a deed of trust conveying as security therefor an undivided one-third interest in and to certain land in the city of Salisbury, N. C., which deed of trust was duly registered on 29 March, 1927, in the mortgage deed records for Rowan County, N. C.

II. Henry W. Davis paid the interest on the note to Mrs. Troy Smith to 1 April, 1928, and on the note to James M. Davis to 1 July, 1929, but made no further payment on principal of or interest on either of said notes until the year 1945, when on 20 January, of that year, he paid to plaintiff Mrs. Troy Smith the sum of $186.50, and when on 19 January, of that year, he paid to the Executors of the estate of James M. Davis the sum of $186.51, upon the principal indebtedness represented by said notes respectively, at which times defendant, Henry W. Davis, acknowledged his indebtedness upon each of said notes and expressed his desire

to pay the same in full as and when his income permitted, and by virtue of said notes, respectively, he is indebted (1) to plaintiff Mrs. Troy Smith in the sum of $10,000, with interest from 1 April, 1928, at rate of 6% per annum, computed semiannually, subject to a credit upon the principal of said indebtedness of $186.50, with interest thereon from 20 January, 1945, and (2) to plaintiffs, Wachovia Bank and Trust Company, and Rebecca W. Davis, Executors under the will of James M. Davis, in the sum of $10,000 with interest from 1 July, 1929, at rate of 6% per annum, computed semiannually, subject to a credit upon the principal of said indebtedness in the sum of $186.51 with interest thereon from 19 January, 1945.

III. The plaintiff, Mrs. Troy Smith, and James M. Davis, he then being alive, failed, within the period of fifteen years after the maturity of the last installment of debt or interest secured by the terms of the deed of trust executed and delivered to John L. Rendleman, Sr., Trustee, that is, within fifteen years after 15 March, 1928, to file an affidavit with the register of deeds of Rowan County, North Carolina, where said deed of trust is registered, specifically stating the amount of debt unpaid secured thereby, or in what respect any other condition of said instrument had not been complied with, and also failed in lieu of such affidavit to enter on the margin of the record of said deed of trust any payments made on the indebtedness secured by it, and the amount still due thereunder,—and no such affidavit or marginal reference has ever been filed or entered in the office of the register of deeds for Rowan County, N. C.

IV. On 7 November, 1933, at time when the deed of trust executed by defendants, Henry W. Davis and his wife, Louise W. Davis, to John L. Rendleman, Sr., Trustee, referred to above, was duly registered, and in full force and effect, the defendant First National Bank of Salisbury, N. C., loaned to defendants Henry W. Davis and wife, Louise W. Davis, the sum of $8,225.00, for which they executed their promissory note in said sum to the Bank, and, upon default in payment of the note, the Bank obtained a judgment against Henry W. Davis and wife, Louise W. Davis, on 21 October, 1935, for the full amount of the note with interest thereon from 1 August, 1935, which judgment was duly docketed in office of clerk of Superior Court of Rowan County, N. C.

V. Thereafter, on 15 June, 1945, defendant First National Bank of Salisbury procured the issuance of a writ of execution upon the said judgment against Henry W. Davis and wife, Louise W. Davis, directed to the sheriff of Rowan County, and commanding the sale of lands and property of Henry W. Davis,—being the same property described in the deed of trust executed to John L. Rendleman, Sr., Trustee, securing the payment of the notes originally executed and delivered to plaintiff, Mrs. Troy Smith, and to James M. Davis. Pursuant thereto the sheriff

exposed the interest of Henry W. Davis and wife, Louise W. Davis, in said lands to public sale at the courthouse door in Salisbury, N. C., on 6 September, 1945, when and where C. A. Mayfield became the last and highest bidder at the price of $7,500. (At the sale and prior to the bidding and in the presence of C. A. Mayfield, and other bidders then and there present, and at the instance of plaintiffs, the sheriff read a notice from plaintiffs that the interest of Henry W. Davis and wife, Louise W. Davis, in the land proposed to be sold under said execution is subject to the prior lien of the deed of trust executed by them to John L. Rendleman Sr., Trustee, as aforesaid, securing the payment of the two notes therein described, the aggregate of principal and interest thereon due as of that date, in the sum of $39,755.90, and that the purchaser at such sale would take title to said premises subject to the lien of the said deed of trust and the notes thereby secured.)

VI. Subsequently C. A. Mayfield transferred and assigned his bid to R. C. Boyce, who, having knowledge of the claim of the plaintiffs that the lien of said deed of trust was still valid and in effect, declined to comply with the terms of the bid, until defendant First National Bank of Salisbury, through its board of directors, adopted a resolution in which it was agreed that in consideration of R. C. Boyce going through with the sale, and paying the purchase price, and taking legal action to clear the title to the property, the Bank would indemnify him in the event he failed to have the deed of trust "declared void and barred by the statute of limitations, or the title affected." Pursuant thereto, R. C. Boyce paid the purchase price and obtained a deed from the sheriff to him dated 18 September, 1945, conveying "all right, title, interest and estate of the said Henry W. Davis and Louise W. Davis, judgment debtors" in the said lands,—which deed was filed for registration on 21 September, 1945, and registered in record of deeds in office of register of deeds for Rowan County, N. C.

VII. And thereafter the net balance of the proceeds from the execution sale were delivered to the Bank, and converted by it on 26 September, 1945, into its cashier's check, which has not been cashed and is now held by the Bank subject to the result of this action.

Upon the foregoing findings of fact, the court being of opinion as matters of law (1) that the plaintiffs are entitled to recover against defendant Henry W. Davis, the amounts due upon the notes executed by him to them, as afore-stated, (2) that the lien of the deed of trust executed by defendants, Henry W. Davis and wife, Louise W. Davis, to John L. Rendleman, Sr., Trustee, is valid and subsisting for the purpose of securing said indebtedness, (3) that each and all of the terms and conditions of the deed of trust have been broken by defendants, Henry W. Davis and wife, Louise W. Davis, and (4) that plaintiffs are entitled

to have said deeds of trust enforced and foreclosed and the lands described sold, and the proceeds arising from the sale applied to and upon the payment of the sums due plaintiffs, entered judgment in accordance therewith (a) for the sale of the lands and the application of proceeds of sale to payment of costs and expenses of sale, including an allowance to the commissioner, and all *ad valorem* taxes upon the premises due the county of Rowan and the city of Salisbury, N. C., and balance into office of clerk of Superior Court of Rowan County to be applied on this judgment, and any "overplus to be paid to the defendant, R. C. Boyce"; and (b) barring defendants and all persons having liens subsequent to the date of deed of trust, etc.

Defendants, R. C. Boyce and First National Bank of Salisbury, appeal therefrom to Supreme Court and assign error.

Linn & Shuford for plaintiffs, appellees.

Coughenour & Coughenour, Craige & Craige, and Walter H. Woodson, Sr., for The First National Bank of Salisbury, N. C., appellant.

D. A. Rendleman for R. C. Boyce, appellant.

WINBORNE, J. The record on this appeal shows that during the course of the hearing in the trial court defendants, appellants, entered numerous exceptions to the admission of evidence, as well as exceptions to the denial of their motions for judgment as of nonsuit,—all of which are grouped in the assignments of error shown. The record also shows that there is no exception to any finding of fact made by the court. There is exception to the signing of the judgment. In the light of this situation, the exceptions to the evidence offered are ineffectual. However, on examination they are found to be without merit. And the exception to the signing of the judgment raises only the question as to whether the facts as found by the court are sufficient to support the judgment. That is, such exception challenges only the conclusions of law upon the facts so found. *Hylton v. Mt. Airy,* 227 N. C., 622, 44 S. E. (2d), 51; *Vestal v. Machine Co.,* 219 N. C., 468, 14 S. E. (2d), 427; *Manning v. Ins. Co.,* 227 N. C., 251, 41 S. E. (2d), 767, and cases cited.

The questions thus raised in the present case are fundamental and tantamount to question presented on motion for judgment as of nonsuit.

The two questions of law arising upon the facts found and presented by appellant for decision and determinative of this appeal are these:

I. Are the two notes executed by Henry W. Davis to Mrs. Troy Smith and to James M. Davis, respectively, sued upon in this action, and the deed of trust to John L. Rendleman, Sr., Trustee, securing the same, sought to be foreclosed, barred by the ten year statute of limitations—G. S., 1-47 (2), and G. S., 1-47 (3), respectively? In the light of the

facts found by the court in respect of the payments made in January, 1945, by Henry W. Davis on these notes the decisions of this Court provide a negative answer to the question. See *Walton v. Robinson,* 27 N. C., 341; *Hewlett v. Schenck,* 82 N. C., 234; *McDonald v. Dickson,* 87 N. C., 404; *Bank v. Harris,* 96 N. C., 118, 1 S. E., 459; *Battle v. Battle,* 116 N. C., 161, 21 S. E., 177; *Supply Co. v. Dowd,* 146 N. C., 191, 59 S. E., 685; *Kilpatrick v. Kilpatrick,* 187 N. C., 520, 122 S. E., 377; *Grocery Co. v. Hoyle,* 204 N. C., 109, 167 S. E., 469.

Those payments had the effect of reviving the liability of Henry W. Davis on these notes. In *Walton v. Robinson, supra,* decided in the year 1845, *Ruffin, C. J.,* states that, "Nothing is plainer than that making a payment on a note repels the statute. It is assuming the payment anew." And this principle is not altered by the provisions of G. S., 1-26, originally enacted as Section 51 of The Code of Civil Procedure of North Carolina (1868), prescribing that a new promise to pay an indebtedness must be in writing, in that it expressly provides therein that "this Section does not alter the effect of any payment of principal or interest." The decisions of this Court treating of this provision hold that the effect of this clause is to leave the law as it was prior to the adoption of The Code of Civil Procedure as regards the effect of a partial payment in removing the bar of the statute of limitations. *Bank v. Harris, supra; Battle v. Battle, supra; Supply Co. v. Dowd, supra; Kilpatrick v. Kilpatrick, supra.*

And in *Hewlett v. Schenck, supra* (1879), *Smith, C. J.,* wrote in reference thereto: "So a partial payment, though the evidence need not be in writing, being *an act* and not a mere declaration, revives the liability because it is deemed a recognition of it and an assumption anew of the balance due. But if at the time such payment is made the presumption arising from the unexplained fact is disproved by the attending circumstances or other sufficient evidence of a contrary intent, the payment will not have such effect."

And in the *Supply Company case,* it is said: "The general principle on which part payment takes the case out of the statute is that the party paying intended by it to acknowledge and admit the greater debt to be due." Also in the *Kilpatrick case* (1924), *supra, Hoke, J.,* declares that "The authorities further hold that, in order to constitute a renewal of an account or obligation otherwise barred by the statutes of limitations, the alleged payment must be made and received 'under circumstances permitting the inference that the debtor did so in recognition of the existence of the debt and of his obligation to pay the same.' "

Tested by these principles, the facts as found here by the court,—that at the times the payments were made the defendant Henry W. Davis acknowledged his indebtedness upon each of said notes and expressed his

desire to pay the same in full as and when his income permitted, in law amount to a revival of the indebtedness,—thereby fixing a new date from which the statutes of limitations begin to run.

Now, as to whether an action for the foreclosure of the deed of trust executed by Henry W. Davis and wife to John L. Rendleman, Sr., Trustee, as security for said note, is barred by the ten year statute of limitations, G. S., 1-47 (3), it is sufficient to point to the statute which provides that such action may be commenced "within ten years after the last payment on the same."

II. We come now to this question: Where the holder of an indebtedness secured by a deed of trust, duly registered, fails, within the period of fifteen years from the date when the conditions of it, by the terms thereof, are due to have been complied with, or from the maturity of the last installment of debt or interest secured thereby, to file and register an affidavit, or in lieu thereof make marginal entry on the record in accordance with provisions of statute, G. S., 45-37 (5), originally P. L. 1923, Chapter 192, is the conclusive presumption of compliance with the conditions of the deed of trust, or of the payment of the debt secured thereby, provided for under the said statute, available thereafter to those who become creditors of the trustor within said period of fifteen years?

The answer is to be found in the proper interpretation or construction of the statute. While the exact question has not been presented previously to this Court, reasonable interpretation and construction of the context of the statute in the light of the caption of the act as originally enacted by the General Assembly and of existing law leads to a conclusion accordant with the holding of the court below predicated upon a negative answer.

This statute as originally enacted by the General Assembly is captioned "An Act to Facilitate the Examination of Titles and to Create a Presumption of Payment of Instruments Securing the Payment of Money After Fifteen Years from the Date of Maturity of the Debts Secured Thereby." And the Act provides that: "The conditions of every mortgage, deed of trust, or other instrument securing the payment of money shall be conclusively presumed to have been complied with or the debt secured thereby paid, as against creditors or purchasers for a valuable consideration from the trustor, mortgagor or grantor, from and after the expiration of fifteen years from the date when the condition of such instrument by the terms thereof are due to have been complied with, or the maturity of the last installment of debt or interest secured thereby, unless the holder of the indebtedness secured by such instrument or party secured by any provision thereof shall file an affidavit with the register of deeds of the county where such instrument is registered, in which shall be specifically stated the amount of debt unpaid, which is secured by said

instrument, or in what respect any other condition thereof shall not have been complied with, whereupon the register of deeds shall record such affidavit and refer on the margin of the record of the instrument referred to therein the fact of the filing of such affidavit, and a reference to the book and page where it is recorded. Or in lieu of such affidavit the holder may enter on the margin of the record any payments that have been made on the indebtedness secured by any such instrument, and shall in such entry state the amount still due thereunder. This entry must be signed by the holder and witnessed by the register of deeds." G. S., 45-37 (5).

The parties to this action differ in their views as to the meaning of this statute. The appellants contend that the Legislature in enacting the statute intended that the conclusive presumption of payment should arise in favor of creditors or purchasers for a valuable consideration irrespective of whether the claims are contracted within, or after the expiration of the fifteen year period. On the other hand, appellees contend that the Legislature in enacting the statute intended that the conclusive presumption of payment should arise in favor of only those creditors or purchasers for a valuable consideration whose claims are contracted after the expiration of the fifteen year period. Stated concisely, to what creditors or purchasers for a valuable consideration did the Legislature intend to afford protection by enacting the statute?

At the time of the enactment of this statute, 1923, the law with respect to the revival and renewal of existing obligations prevailed as it does now and as it is applied here in answer to the first question. No statutory provision had been made for the public in dealing with the mortgagor, trustor or grantor to ascertain whether the indebtedness secured by an old and unsatisfied mortgage or deed of trust or other instrument had been paid. And, in providing a remedy for such difficulty, the Legislature must have passed the act in the light of the well settled principles of the law that an obligation otherwise barred by the statute of limitations could be revived by a payment thereon, as hereinabove held, or by written acknowledgment as provided by statute, G. S., 1-26. The caption of the act would indicate as much. Therefore, if the context of the statute under consideration be not clear as to what the Legislature intended, the caption of the act as originally enacted tends to clarification.

It is a well established rule of construction in this State that when the meaning of an act of the General Assembly is in doubt, reference may be had to the title and context of the act of legislative declarations of the purpose of the act,—the intent and spirit of the act controlling in its construction. *S. v. Woolard,* 119 N. C., 779, 25 S. E., 719; *Machinery*

Co. v. Sellers, 197 N. C., 30, 147 S. E., 674; *Dyer v. Dyer,* 212 N. C., 620, 194 S. E., 278; *S. v. Keller,* 214 N. C., 447, 199 S. E., 620.

In the case in hand, the first clause of the caption or title of the act indicates the primary purpose of the act, that is, to facilitate the examination of titles. "To facilitate" according to Webster's Dictionary, means "to make easy or less difficult, to free from difficulty or impediment." In this light the provisions of the statute in respect to the presumption of payment, are prospective. For whose benefit then did the Legislature intend to make easy or less difficult the examination of titles,—the creditor who wishes to deal with the mortgagor, trustor or grantor on the faith of the presumption of payment created by the statute, or the creditor who becomes a creditor of the mortgagor or trustor, or grantor before the presumption of payment arises?

In this respect, we agree with argument advanced by appellee that the primary purpose sought to be accomplished was to promote freer marketability in cases where old and unsatisfied mortgages and deeds of trust, securing debts, were hampering real estate transaction, and that this economic purpose is adequately accomplished by furnishing protection to parties who extend credit or purchase for a valuable consideration "from and after" the expiration of the fifteen year period.

An analysis of the phraseology of the statute tends to support this view. In brief, the statute declares first that there shall be a conclusive presumption of payment; next, that the presumption applies in favor of creditors or purchasers for a valuable consideration from the trustor, mortgagor or grantor; and then, that the presumption shall take effect "from and after the expiration of fifteen years, etc."

If the Legislature had intended the act to favor creditors, who had extended credit prior to the time when the presumption of payment arises, an ordinary statute of limitation would have been appropriate.

In the case *Hicks v. Kearney,* 189 N. C., 316, 127 S. E., 205, this Court, considering this statute, then P. L. 1923, Chapter 192, now G. S., 45-37 (5), held that the conclusive presumption of payment of a debt secured by a mortgage, as against creditors and purchasers for value, after fifteen years, is prospective in its effect. In this case *Adams, J.,* speaking of the two notes secured by a mortgage, there in question, which antedated the passage of the act, used this expression: "Neither of these debts could have been contracted on the faith of the statutory presumption unless the statute be given retroactive effect." Appellees contend with force that the use of the words "debt . . . contracted on the faith of the statutory presumption" would seem to indicate that the Court had more in mind than the mere retroactive aspect of the statute; that, undoubtedly, the Court was indicating that the statute should apply only in favor of creditors who have a debt which was "contracted on the faith

of the statutory presumption"; and that such faith could not possibly arise prior to the expiration of the fifteen year period,—the presumption under the statute not arising until the termination of fifteen years.

In conclusion, the authorities cited by appellants, and the comparison between the statute in question and the registration statutes advanced by appellants, after careful consideration, fail to carry conviction adverse to the conclusions of law reached by the court below as set forth in the judgment there rendered—both with respect to appellant The First National Bank of Salisbury and to appellant R. C. Boyce.

Hence, the judgment below is

Affirmed.

H. S. CHEW v. H. S. LEONARD AND PIEDMONT WAGON & MANUFACTURING COMPANY, A CORPORATION.

(Filed 19 November, 1947.)

1. Pleadings § 15—

A demurrer *ore tenus* admits the facts alleged in the complaint.

2. Master and Servant § 9—

A bonus offered by an employer to an employee to render more efficient service over a stipulated period of time is not a gratuity or gift, but is a supplementary contract and enforceable, whether the bonus is promised in a fixed sum or is to be measured by the earnings of the business or the efficiency of production.

3. Contracts § 1—

A contract will not be held unenforceable because of uncertainty if the intent of the parties can be ascertained from the language used, construed with reference to the circumstances surrounding the making of the contract, and its terms reduced to certainty under the maxim of *id certum est quod certum reddi potest.*

4. Master and Servant § 9—Agreement to pay bonus if employee saved stipulated amount in manufacture of products held not void for uncertainty.

Plaintiff was employed as production manager for one year at a fixed salary, and promised a bonus if he should save defendant employer more than a stipulated sum "in the manufacture" of defendant's products. Plaintiff instituted action for the bonus upon allegations, admitted by demurrer, that he had saved defendant the stipulated sum. *Held:* The failure of the contract to stipulate the manner in which the "saving" should be effected does not render the agreement to pay the bonus unenforceable on the ground of uncertainty since, construing the agreement with reference to the circumstances under which it was entered, it is obvious the parties contemplated a saving by reduction in production costs, ascertained in accordance with the usual custom, as compared with pro-

duction costs for the previous year. Defendant's demurrer should have been overruled.

APPEAL by plaintiff from *Warlick, J.*, at June Term, 1947, of BURKE.

This is a civil action to recover a bonus under the terms of a written agreement entered into between the plaintiff and the corporate defendant, the Piedmont Wagon & Manufacturing Company, by which said defendant employed the plaintiff as its production manager for a term of one year, beginning 1 January, 1945, at a specified annual salary of $7,000.00, and also promised to pay the plaintiff in addition to his annual salary a $2,000.00 bonus at the end of the year, provided the services of the plaintiff saved the Piedmont Wagon & Manufacturing Company more than $7,000.00 in the manufacture of wagons and other articles. It was also agreed that the plaintiff, as production manager, should "have complete control of all personnel except office personnel, control of engineering, manufacturing and production, answering directly" to the president of the corporate defendant. The plaintiff was also obligated "to act in the same capacity on other projects" the corporation might wish him to handle.

The stipulated annual salary has been paid. The sole question involved is whether or not the provision for the payment of the bonus, is too indefinite, vague and uncertain to be enforced.

In the trial below the defendants demurred *ore tenus,* and the court sustained the demurrer and dismissed the action.

Plaintiff appeals, assigning error.

Theodore F. Cummings for plaintiff.

Aiken, Patrick, Murphy & Harper and S. J. Ervin, Jr., for defendants.

DENNY, J. The plaintiff alleges that he became production manager of the defendant corporation pursuant to terms of the contract referred to herein, and that his services resulted in corporate savings "of more than $7,000.00 in the manufacture of wagons and other articles." For the purpose of testing the sufficiency of the allegations in a complaint, a demurrer *ore tenus* admits the facts to be as alleged. *Eaton v. Doub,* 190 N. C., 14, 128 S. E., 494; *Pearce v. Privette,* 213 N. C., 501, 196 S. E., 843; *Packard v. Smart,* 224 N. C., 480, 31 S. E. (2d), 517, 155 A. L. R., 536; *Morgan v. Carolina Coach Co.,* 225 N. C., 668, 36 S. E. (2d), 263.

Consequently, we must determine whether or not there was error in sustaining the demurrer *ore tenus.* The ruling of the court below was proper if the provision for the payment of the stipulated bonus is too indefinite, vague and uncertain to be enforced, otherwise not.

A bonus offered by an employer to an employee as an inducement to the employee to render more efficient service over a stipulated period of time, is not a gratuity or gift; and, when the employee accepts the offer and enters the service of the employer, "it becomes a supplementary contract of which he cannot be derprived without sufficient cause." *Roberts v. Mills,* 184 N. C., 406, 114 S. E., 530, 28 A. L. R., 338; *Warren v. Mosher,* 31 Ariz., 33, 250 Pac., 354, 49 A. L. R., 1311.

The appellees are relying upon the vagueness of the contract, because it did not spell out how the savings "of more than $7,000.00 in the manufacture of wagons and other articles" was to be ascertained, citing *Van Slyke v. Broadway Ins. Co.,* 115 Cal., 644, 47 Pac., 689; *Petze v. Morse Dry Dock & Repair Co.,* 125 App. Div., 267, 109 N. Y. Supp., 328; *Varney v. Ditmars,* 217 N. Y., 223, 111 N. E., 822; Ann. Cas. 1916 B, 758, and similar cases.

In *Van Slyke v. Broadway Ins. Co., supra,* a contract between an insurance agent and the insurance company for a contingent commission of five per cent, which did not give the facts upon which the contingency depended nor state the sum on which the five per cent was to be computed, was held unenforceable.

Likewise, in *Petze v. Morse Dry Dock & Repair Co., supra,* the Court held that a contract by which an employee, in addition to certain specified compensation was to receive five per cent of the net distributable profits of a business, was unenforceable because the parties also agreed that the method of accounting to determine the net distributable profits should be agreed upon later; and, the defendant would not agree upon a method of accounting to determine such net distributable profits.

In the case of *Varney v. Ditmars, supra,* the contract called for the employee to receive "a fair share of the profits." This provision was held to be too "vague, indefinite, and uncertain" to be enforced.

The appellant, on the other hand, contends that there is nothing vague, uncertain or indefinite in the contract. The time of performance was fixed. The nature of the work to be done under the provisions of the agreement is sufficiently clear. The services have been rendered. The only question which remains to be determined is whether or not such services actually resulted in a savings of more than $7,000.00, as alleged in the complaint. If so, he is entitled to recover, otherwise not.

A contract of employment at a fixed salary, with the promise of a further sum or "bonus," either measured by the earnings of the business or as a fixed sum, is enforceable. Williston on Contracts, Revised Ed., Vol. I, Sec. 130 B, citing *Roberts v. Mills, supra; Kennicott v. Wayne,* 83 U. S., 452, 21 L. Ed., 319, and other authorities.

In the case of *Fruth v. Gaston* (Texas Civil Appeals), 187 S. W. (2d), 581, Fruth was to receive a salary of $42.50 per week and in addition

thereto 1% on gross sales and "between 3% and 5% of the net profits, to be later agreed upon." The Court held although the percentage of net profits to be received by the plaintiff was not definitely agreed upon, but left for future determination, the plaintiff's right of recovery was not defeated. "Such a promise would imply an agreement to pay at least the minimum amount designated."

In the case of *Sutliff v. Seidenberg*, 132 Cal., 63, 64 Pac., 131, it was held: "A contract may be explained by reference to the circumstance under which it was made and the matter to which it relates. . . . Read in the light of these rules, the contract seems to us quite intelligible and certain. Defendants were doing business as cigar manufacturers in New York City, and desired to make a market for their goods in California. Adelsdorfer & Brandenstein, who were merchants in San Francisco, were made their distributing agents, and Simon was to assist them in introducing the goods to the public. Defendants not only spoke in the contract of making their line of cigars a success, but they further explained their meaning in the clause, 'and for all services necessary to represent our interest we agree to pay,' etc., and by the clause, 'this agreement to remain in force as long as our goods find ready sale on this coast.' Whatever of uncertainty there may be in the meaning of the clause 'to make our line of cigars a success in San Francisco' seems to be cleared up, at least sufficiently as against a general demurrer, by the subsequent clauses."

It seems to us the only difficulty here, if there be any, is to determine how the parties contemplated ascertaining the savings of more than $7,000.00 in the manufacture of wagons and other articles, which was made a condition precedent to the right of plaintiff to recover the bonus of $2,000.00.

Evidently the plaintiff held himself out as an expert production manager, at least the president of the defendant corporation who employed him thought him to be so. Doubtless the management of the corporation was not satisfied with production costs. It is a matter of common knowledge that oftentimes the ability of the management of a corporation to reduce its manufacturing costs to a minimum without impairing efficiency in production, spells the difference between success and failure. Savings in the process of manufacturing a product may be effected in many different ways. Sometimes it is brought about by the increased efficiency of labor or by the elimination of antiquated methods in the manufacturing process. There is certainly nothing in the contract under consideration that would justify an interpretation that the parties had in mind any savings in the purchase of raw materials, the sale of the manufactured products of the corporation or by the curtailment of operations. The very terms of the contract exclude such an interpretation.

But we do think the minds of the parties met on what was to be done and where the production manager was to effect the savings and how much the savings had to be before he would be entitled to receive the additional $2,000.00. The savings were to be effected by a reduction in production costs.

It is permissible to consider the nature of the work to be done, the circumstances surrounding the making of such a contract, and the usual custom of arriving at production costs, in the interpretation of this and similar contracts. What did the parties contemplate when they contracted with reference to a saving of more than $7,000.00 in the manufacture of wagons and other articles? The only legitimate answer to that question, if the parties were acting in good faith, and we presume they were, is that if by efficient management a sum in excess of $7,000.00 could be saved in production costs in the manufacture of wagons and other articles manufactured by the corporation in the year 1945, as compared to production costs the previous year in the manufacture of such articles, the plaintiff would be entitled to the additional compensation, otherwise not. *Id certum est quod certum reddi potest.* The law does not favor the destruction of contracts on account of uncertainty, and "the Courts will, if possible, so construe the contract as to carry into effect the reasonable intent of the parties, if it can be ascertained." *Fisher v. Lumber Co.*, 183 N. C., 485, 111 S. E., 857, 35 A. L. R., 1417, 12 Am. Jur., 556; *McCaw Mfg. Co. v. Felder*, 115 Ga., 408, 41 So., 664; *Southwest Pipe Line Co. v. Empire Natural Gas Co.*, 33 F. (2), 248; 64 A. L. R., 1229.

In the case of *McCaw Mfg. Co. v. Felder, supra,* a corporation engaged in the manufacture of boxes, agreed to furnish the defendant "all the boxes which should be rendered necessary to pack the output of the factory of the defendant, and corresponding promise on the part of the defendant to order from the company all such boxes," was held to be an enforceable contract against either party. The Court said: "The promise of the one was a sufficient consideration for the promise of the other. It would have been, perhaps, impossible for the defendant to have specified the exact number of boxes which it would require for the period of one year, but it was doubtless well understood by both parties to the agreement what the approximate number would be, based on the number of boxes the defendant had required during a similar period in the past; and the fact that the exact number of boxes was not specified would not render the contract void for want of mutuality."

We have no doubt but that most well managed corporations keep accurate records on manufacturing costs from year to year. While we are not concerned as to whether or not the plaintiff can make out his case

before the jury, we do think the allegations of the complaint are sufficient to survive the demurrer.

The judgment of the court below is

Reversed.

STATE v. ASA DOWE LOVELACE.

(Filed 19 November, 1947.)

1. Constitutional Law §§ 13, 31—

Regulations relating to the importation of cattle into this State, promulgated by the State Board of Health under statutory authority for the purpose of control of brucellosis or Bang's disease, if reasonable in their scope and incidence and not in conflict with federal regulations or statutes already pre-empting the field, are constitutional and valid.

2. Same—

The provision in the regulations promulgated by the State Board of Health under authority of G. S., 106-307.4, limiting the exception to the requirement of a health certificate for cattle imported into the State solely to those consigned to a slaughter house, is reasonable and valid.

3. Constitutional Law § 13—

A person who transports cattle from out the State to a livestock market operated in this State without a health certificate for such animals is guilty of violating the regulations promulgated by the State Board of Health under authority of G. S., 106-307.4, notwithstanding that the animals are to be segregated at the livestock market and sold by the market for slaughtering. The exception to the requirement of health certificates for cattle brought into this State relates solely to cattle transported immediately to a slaughtering house and the exclusion of mediate delivery thereto is reasonable and valid.

4. Statutes § 8—

A remedial statute operating under the police power will be construed in the light of the evil sought to be remedied.

5. Constitutional Law § 13—

The regulations of the State Board of Health prohibiting the importation of cattle into the State without health certificates unless the cattle are "consigned" to a recognized slaughtering house approved and designated by the State Veterinarian applies whether the cattle are transported into the State by common carrier or brought into the State by the owner in his truck. If the exception relates only to transportation by common carrier, such owner does not come within the exception.

STATE's appeal from *Sink, J.*, at September, 1947, Extra Term, of MECKLENBURG.

The defendant was indicted on a warrant charging him with violating Section 106-307.6 taken in connection with 106-307.4 of the General Statutes, denouncing as a misdemeanor a violation of any "rule or regulation established by the State Board of Agriculture" with respect to the subjects embraced in Article 34 of Chapter 106, by infraction of regulation No. 4 of the State Board of Agriculture relating to brucellosis or Bang's disease.

The regulation requires that cattle brought into the State "shall be accompanied by a health certificate issued by an accredited veterinarian approved by the proper livestock sanitary official of the state of origin." The certificate must state that the cattle are free from any evidence of an infectious or transmissible disease and have not been recently exposed to any communicable, infectious or parasitic disease. With specific reference to Bang's disease it requires that the certificate shall also manifest the brucellosis status of the herd from which the imported cattle originated and the result of brucellosis tests; and shall contain as to each animal imported "the names and addresses of the owner, consignor, and consignee" and that the officially approved health certificate shall be forwarded to the State Veterinarian before arrival of cattle at destination. The regulation, however, is subject to the exception contained in Section 17 which reads as follows:

> "Immediate slaughter. Apparently healthy cattle of strictly slaughter type to be used only for immediate slaughter may be imported into the state without a health certificate or tuberculin or brucellosis test, provided such cattle are consigned for immediate slaughter to a recognized slaughtering establishment or slaughtering center that is approved and designated by the State Veterinarian. Such cattle shall be slaughtered within ten (10) days after arrival at destination, except when the ten-day period is extended by special permit from the State Veterinarian."

Upon the trial in the Superior Court the jury rendered a special verdict, finding substantially the following facts:

The defendant, a resident of South Carolina living near the border of the North Carolina-South Carolina State line, crossed that line with four head of slaughter type cattle on his truck and after getting into Mecklenburg County was stopped by a quarantine inspector who inquired where he was taking the cattle. The defendant replied that he was taking them to the Morris Live Stock Market for sale, which market is located some distance out of the City of Charlotte. Lovelace had no health certificate covering the cattle and the Morris Live Stock Market is not a recognized slaughtering establishment and no cattle are slaughtered at or by said market. Thereupon, the quarantine inspector arrested the

defendant for the violation of the regulation above set out; and after arranging for bond the defendant took the cattle back across the State line to his home, where they remained.

The Morris Live Stock Market to which the defendant was taking the cattle is a licensed public livestock market operated pursuant to North Carolina General Statutes 106-406 to 106-418, observing health regulations relating to the sale of livestock in public livestock markets promulgated by the North Carolina Department of Agriculture and that pursuant to the same regulations slaughter type cattle are segregated from milk or breeding cattle; and that at the public sale of this type of cattle there are representatives present from recognized slaughtering establishments, in addition to other parties who may and do bid at said public auction for said slaughter type cattle.

That with respect to said cattle the Morris Live Stock Market acts only as agent for the seller in the sale of the cattle and that they are sold for immediate slaughter or resale for immediate slaughter. The cattle in question were apparently healthy.

The jury predicated a verdict of guilty or not guilty, accordingly as the court might find the law, G. S., 1-201. Thereupon the court, being of the opinion that the defendant was not guilty under the facts of the special verdict, pronounced judgment in accordance therewith, from which the State appealed (G. S., 15-179), assigning error.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

Henry E. Fisher and Carl Horn, Jr., for defendant, appellee.

SEAWELL, J. As bearing on the importance of the case under review, counsel for the State call our attention to certain historical, scientific and statistical facts concerning Brucellosis and its prevention in North Carolina, some of which may be within the judicial knowledge, while others may be informative; but they illustrate the necessity of adequate regulations for the protection of animal husbandry in the prevention of this disease, and, indeed, the health of the inhabitants of the State in the consumption, as food, of animal products affected by the Brucellosis germ. Some of the suggestions are enlightening as to the terms used in the regulations challenged and the comments made upon them.

Brucellosis, or Bang's Disease (deriving its name from two scientists studying in this field), as it applies to the bovine type of bacillus, is described as being both infectious and contagious. It is spread from animal to animal by the consumption of feed and water soiled or contaminated with brucellosis organisms. By consumption the germs are carried through the blood vessels to the various parts of the animal's

body. The udders of cows are affected, and discharge the germs with the milk. The disease is transmitted to man through the drinking of the milk and contact with the animals, and is known, when so caused, as undulant fever, not usually fatal, but disabling. It can only be eliminated by eradication at the source.

In cattle the disease results in premature birth, lower productivity, and lower birth rate. It is generally understood that the only effective method of eliminating the disease is by slaughter of the animals found infected, and it is often the case that the whole herd must be disposed of.

It is the present view of science that consumers of meat, as food, from animals affected by Brucellosis suffer no ill effects, since the meat is cooked; hence the exception to the requirement of a health certificate for lawful importation of beef cattle discussed *infra,* when done under the conditions prescribed in the statute.

It is pointed out that North Carolina is the only State in the nation accredited with the Federal Government with respect to Bang's disease, which means that the State has an incidence of less than one per cent (1%); and it is further stated that this pre-eminence has cost the State approximately $2,000,000, expended in control and eradication of the disease.

As we understand the contentions of the appellee, he does not question the authority of the State Board of Agriculture under the cited statute to make reasonable regulations respecting the importation of cattle to prevent the introduction and spread of Brucellosis or Bang's disease. He does contend that the transaction for which he is indicted comes within the spirit, if not the letter, of the exception offered by Section 17 of the regulations permitting slaughter type cattle to be brought in for immediate slaughter without requiring a health certificate; and that if Section 17 is construed to give the regulations a more drastic coverage it is invalid as imposing an unconstitutional burden on interstate commerce.

Regulations comparable to those challenged in the present appeal have been in force in many states for several years, and have been sustained in numerous court decisions, both state and federal. When reasonable in their scope and incidence, and not in conflict with federal statutes or regulations already pre-empting the field, they are not, either directly or mediately violative of the federal Constitution. *Oregon-Washington R. & Nav. Co. v. State of Washington,* 270 U. S., 87, 70 L. Ed., 482; *Mintz v. Baldwin,* 77 L. Ed., 1245; *Campoamor v. State Live Stock Board,* 182 So., 277; *S. v. So. Ry. Co.,* 141 N. C., 846, 54 S. E., 294; *S. v. Hodges,* 180 N. C., 751, 105 S. E., 417; *Asbell v. Kansas,* 209 U. S., 251, 52 L. Ed., 778; *Evans v. Chicago & N. W. R. Co.,* 122 N. W. (Minn.), 876; *McSween v. State Live Stock Board,* 122 So., 239; *Rasmussen v. Idaho,* 181 U. S., 198, 45 L. Ed., 820; *S. v. Garner,* 158 N. C., 630, 74 S. E., 458; *A. C. L. R. Co. v. Bahnsen,* 300 Fed., 233.

The regulations above referred to as existing in many of the states of the Union are largely identical in phraseology and are said to follow the form of the model adopted by the United States Live Stock Sanitary Association, upon which our regulations are modeled. They contain, as does our law, provisions for the admission of slaughter type cattle, for immediate slaughter, without certificate of health, but upon conditions intended to safeguard the relaxation of the rule so as to allow traffic of this sort, yet obviate its manifest dangers. There is no substantial difference in principle between the North Carolina regulations, modeled from the same original, and the others referred to as having court approval which would diminish the authority of the cited cases—and particularly the *Mintz case*—as applied to the case at bar, and to the regulations involved. Section 17 of the State regulations differs from most of those mentioned in that it routes the cattle, such as are admitted without health certificate, immediately to a slaughter house, or slaughtering center, to which they must be consigned, instead of deviously to a livestock market, however the latter may be subject to inspection or sanitary supervision. This is a difference in degree—not in *kind*—a further guaranty the Commission thought necessary to prevent unexamined and possibly infected cattle from passing from hand to hand after importation, spreading infection as they go during the 10-day interval, with the probability of untraceable merger with healthy herds. Simply stated, where there is no health certificate the regulation recognizes but one stage in the traffic—from the importer to the slaughter pen. This greater precaution could hardly be held to unduly burden interstate commerce. Here, as in all remedial statutes operating under the police power, a cardinal rule of construction (which also often serves as a test of constitutionality, *Morgan's, Louisiana, etc., R., etc., Co. v. Bd. of Health,* 118 U. S., 455, 30 L. Ed., 237), is that the law must be interpreted in the light of the evil sought to be remedied, and its reasonable adaption to the desired end. We are dealing with the Federal Constitution, it is true, but conceded that the State may, under its police power, act in the premises at all, the principle is the same.

In *Mintz, supra,* it is said: "Much weight is to be given to the practical interpretation of the Act by the Federal Department through its acquiescence in the enforcement of state measures to suppress Bang's disease. This case is governed by the principle on which rests the decision in *Asbell v. Kansas,* 209 U. S., 251, 52 L. Ed., 778, 28 S. Ct., 485, 14 Ann. Cas., 1101."

We are not impressed with the plea that Section 17, having used the word "consigned," is inapplicable to the transaction undertaken by the defendant, or delivery in person. If it applies only to carriers, the defendant is out of the exception but under the law. If, as we apprehend it, it is intended to apply to operations such as the special verdict dis-

closes, and we think the terms employed in the regulation may be so construed, the defendant failed to observe either the letter or the spirit of the law. He was under a duty which he could not delegate to be vicariously performed by the Morris Live Stock Market, or by them in turn redelegated to an auction customer. The duty began at the State line; and the importation of his cattle was accompanied neither by the certificate required, nor evidence of their consignment to, or intention to deliver to, a recognized or approved slaughter house, which would have brought him within the exception provided in Section 17 of the regulations.

The State's appeal must, therefore, be sustained, and the action of the court below on the special verdict must be reversed. The cause is remanded for judgment in accordance with this opinion.

Reversed.

JOHN HARMON WILLIAMS, BY HIS NEXT FRIEND, MRS. MATILDA WILLIAMS, v. QUEEN CITY COACH COMPANY, A CORPORATION.

(Filed 19 November, 1947.)

1. Evidence § 5—

It is a matter of common knowledge that .22 caliber rifles are small firearms three feet or more in length.

2. Carriers § 21a (2)—

Ordinarily a carrier is not responsible for injury to a passenger from the acts of another passenger unless the circumstances are such that, in the exercise of ordinary care, the carrier could have anticipated and guarded against it.

3. Carriers § 21b—

The duty of caring for small baggage rests primarily upon the passenger to whom it belongs, and a carrier can be held liable for injury caused by baggage falling from the baggage rack only if its employees have actual notice that baggage placed in the rack is placed in such manner or is of such size and shape that it is likely to fall and injure someone, or the conditions creating danger must have existed a sufficient length of time to affect the carrier with constructive notice.

4. Same—Evidence held insufficient to show negligence of carrier in respect to fall of baggage from rack.

A passenger entered a bus with a .22 caliber rifle and placed the rifle in the baggage rack. As the bus was moving slowly back onto the pavement the rifle fell and struck plaintiff passenger on the head, causing serious injury. There was no evidence that the baggage rack was defective nor that it was not of the standard type in general use, nor evidence of any unusual jerk or motion of the bus other than those occasioned in normal

operation, nor evidence upon which actual or constructive notice that the baggage was in a precarious position could be imputed to the carrier. There was no allegation or attempt to prove that the rifle was such unusual or dangerous baggage that the driver's attention should have been attracted by it and that he should have ascertained that it was stored in a manner so as not to cause injury to some passenger. *Held:* Defendant carrier's motion to nonsuit should have been allowed.

SEAWELL, J., dissents.

APPEAL by plaintiff from *Patton, Special Judge,* at July Term, 1947, of MCDOWELL. Affirmed.

Civil action for damages alleged to have been caused by the negligence of the defendant.

Defendant is a franchise carrier of passengers for hire and as such operates buses over and upon the highway from Burnsville to Asheville to Marion. Plaintiff is an infant who was approximately four months old at the time he received the injuries alleged. He appears by his next friend who is his mother.

On 27 December 1944, Mrs. Williams, the mother, carrying plaintiff in her arms, boarded the Asheville bus at the Bee Log flag stop west of Burnsville for the purpose of returning to Marion. She found a seat about the middle of the bus. At that time the bus was full, but passengers were not standing in the aisle.

When the bus reached Cane Creek Service Station, another flag stop, it drove off the hard surface and stopped to take on passengers. "Quite a few people got on there and that about filled the bus and they stood in the aisle." Among those who got on was a man carrying a .22 gauge rifle. He placed the rifle in the baggage rack over the seat occupied by plaintiff and his mother and moved on toward the rear of the bus.

As the bus started moving on the pavement the rifle fell, some part of it hitting plaintiff on the head. The bus "was just pulling out and was going very slowly" when the rifle fell.

The baggage rack "was one of those latticed racks." It was made of metal bars two or three inches apart, extending the length of the bus, supported by metal bars attached to the side of the bus. The spacing of these latter bars is not disclosed.

While the doctor testified that there was no evidence of any physical injury to plaintiff's head, there was testimony tending to show that he received serious and permanent injury to the tissues of the brain.

At the conclusion of the evidence for plaintiff the court, on motion of defendant, dismissed the action as in case of nonsuit and plaintiff appealed.

Paul J. Story for plaintiff appellant.

Williams, Cocke & Williams for defendant appellee.

BARNHILL, J. On this record we must consider the rifle which injured the plaintiff not as a firearm but as baggage. It is so characterized by plaintiff in his complaint. So considering it the court below concluded that plaintiff had failed to offer any evidence of actionable negligence on the part of the defendant in respect thereto. We concur in that conclusion.

There is no evidence in the record tending to show that there was any defect in the baggage rack or that it was negligently constructed or that it was not of the standard type in general use in buses. *Saunders v. R. R.*, 185 N. C., 289, 117 S. E., 4; *Williams v. N. J.-N.Y. Transit Co.*, 113 F. (2d), 649.

It is a matter of common knowledge that .22 rifles are small firearms three feet or more in length. *S. v. Vick*, 213 N. C., 235, 195 S. E., 779. While the space between the floor bars of the rack was such that an object of this kind would fall between them if not held by the support or cross bars, the spacing of these supports or cross bars is not disclosed and there is no fact or circumstance to indicate that such object, properly placed in the rack, would not be adequately held and retained by them.

The plaintiff does not allege or attempt to prove that the rifle was such unusual or dangerous baggage that the attention of defendant's employee should have been attracted by it as the passenger entered the bus and that it should have warned him to make sure immediately it would not be stored in such manner that it might inflict injury on some passenger. Instead, he alleges "that defendant knew, or in the exercise of ordinary and reasonable care should have known, that said baggage racks would be used by passengers to store rifles and guns, and knew . . . that such objects would be dislodged by the vibration of said bus when in motion . . ."

So then the question comes to this: Was the baggage dislodged from the rack by the mode of operation of the bus or was it placed in the rack in an insecure manner, of which fact defendant had either actual or constructive notice?

There is no evidence of any unusual jerk or jolt in excess of such as are incident to the ordinary operation of a bus, *Wade v. North Coast Transp. Co.*, 5 P. (2d), 985, and cases cited, or of any unusually sudden or violent stopping or braking of the bus such as would cause or be likely to cause the baggage to fall. *Rosenthal v. N. Y., N. H. & H. R. Co.*, 89 A., 888, 51 L. R. A. (N. S.), 775. To the contrary, "the bus was just pulling out and was going very slowly."

Ordinarily a carrier is not responsible for injury to a passenger from the acts of another passenger unless the circumstances are such that, by the exercise of ordinary care, he could have anticipated the danger and guarded against it. *Adams v. L. & N. R. Co.*, 121 S. W., 419; *L. & N. R. Co v. Rommele*, 154 S. W., 16, Ann. Cas. 1915B, 267. The duty of caring for small baggage rests primarily upon the passenger to whom it belongs. The negligence, if any, of the carrier rests in the fact that its employee did not, in the exercise of ordinary care, see the precarious or dangerous manner in which baggage was placed and either remove it or secure it. Anno. 37 L. R. A. (N. S.), 724.

If the servants of defendant whose duty it is to look after the safety and comfort of passengers see, or have opportunity in the performance of their duties to see, a package or bundle in a rack, and it is of such size or appearance, or is so placed in the rack as that a prudent person in the exercise of ordinary care might reasonably anticipate that the movement of the car would cause it to fall out, it is the duty of such servants to remove it from the rack or to secure it in some way, and if they fail so to do, and the passenger is injured by the fall of the package from the rack, the carrier will be liable. *L. & N. R. Co. v. Rommele, supra.*

Liability rests upon failure to act after notice. In order to make it the duty of an employee to act, he must have actual notice that the baggage is placed in the rack in such manner or is of such size or shape that it is likely to fall and injure some passenger, or the condition creating danger must have existed a sufficient length of time to affect him with constructive notice. *Greer v. Public Service Co-ordinated Transport*, 12 A. (2d), 844; *Burns v. P. R. Co.*, 82 A., 246, Ann. Cas. 1913B, 811; *Adams v. L. & N. R. Co., supra.*

The plaintiff makes no contention that the employee of defendant knew the rifle had been placed in the rack. If there was anything in the appearance of the rifle as so placed to indicate danger of its falling—and there is no testimony tending to so show—this condition of things had not existed long enough for it to be a question for the jury whether by the exercise of ordinary care the defendant's employee should have observed it. *Williams v. N. J.-N. Y. Transit Co., supra; Beiser v. Cincinnati N. O. & T. P. Ry. Co.*, 153 S. W., 742; *Gulf, C. & S. F. Ry. Co. v. Shields*, 29 S. W., 652; 4 Blashfield Cyc. L. & P., pt. 1, 47.

It follows that the plaintiff has failed to make out a case for the jury on the cause of action alleged. Hence the judgment below must be

Affirmed.

SEAWELL, J., dissents.

ROY GLOVER v. ROWAN MUTUAL FIRE INSURANCE COMPANY.

(Filed 19 November, 1947.)

1. **Insurance § 4—**

Waivers inserted in or attached to a policy of fire insurance which have the effect of making the provisions of the standard policy form more restrictive are void. G. S., 58-176 (1) and (2), G. S., 58-177 (c).

2. **Insurance § 19b—**

A waiver attached to a policy of fire insurance which provides that the policy should not cover loss caused by fire originating on the property of a neighbor if the property insured is situate within a stipulated distance of the combustible property of a neighbor, is restrictive of the provisions of the standard policy form, and is void.

3. **Insurance § 4—**

The Commissioner of Insurance has no power to authorize or acquiesce in the issuance of policies unauthorized or forbidden by statute.

4. **Public Officers § 5b—**

Where the right to do a thing is dependent upon legislative authority, approval of a ministerial officer cannot authorize that which is forbidden or unauthorized by statute.

APPEAL by defendant from *Alley, J.*, at March Term, 1947, of ROWAN.

Controversy without action involving claim of plaintiff against defendant upon a policy of fire insurance,—submitted for a determination of the rights of the parties, arising upon an agreed statement of facts substantially as summarized in defendant, appellant's, brief, as follows: Plaintiff, a resident of Rowan County, N. C., is the owner in fee of the unencumbered title to certain property in said county involved in this controversy.

The defendant is a mutual fire insurance company, incorporated under the laws of North Carolina in the year 1902, for the purpose of providing fire insurance for its members upon an assessment basis. Under the terms of its charter the defendant is restricted to the issuance of policies upon rural properties in Rowan County belonging to its members.

The defendant conducts its business under the provisions of its constitution and by-laws, duly adopted by its members. Section III, Article 3, of the constitution, contains the following: "If any building insured under this policy is constructed of wood and covered with wood and situate within two hundred (200) feet of the combustible property of a neighbor, or is constructed of wood and covered with slate, asphalt or metal and situate within one hundred and fifty (150) feet of the combustible property of a neighbor, or is constructed of brick and metal and situate within one hundred (100) feet of the combustible property of a

neighbor, and is damaged or destroyed by fire or lightning from cause arising from adjacent building or buildings, other than outbuildings belonging to the Assured, this policy is null and void and of no effect."

Approximately twenty years prior to the institution of this action the plaintiff erected a garage and two tenant houses situate in an undeveloped area some distance outside the corporate limits of the City of Salisbury, there being no building on adjoining property within 150 feet of any of said structures. Upon completion of said structures the plaintiff became a member of the defendant, and as such member insured said structures against loss by fire in the defendant company in the sum of $1,200, receiving a policy of insurance, upon the face of which was clearly printed Section III, Article 3, of the constitution and by-laws above quoted.

Some ten years later the owner of the adjoining property, one E. A. Goodman, erected a frame dwelling within 150 feet of the plaintiff's property.

Subsequently to the enactment of Chapter 378 of the 1945 Session Laws, which provides (Sec. 58-177) that "No fire insurance company shall issue fire insurance policies in this State other than those of the standard form as set forth in Sec. 58-176," the defendant adopted the standard policy prescribed by said Act and submitted the same for approval to the Commissioner of Insurance of North Carolina, who approved said policy, together with the waiver appearing on page 3 of said policy, which waiver conforms to Section III, Article 3, of the defendant's constitution hereinbefore quoted.

On 6 September, 1946, the plaintiff's garage and tenant houses were totally destroyed by fire which originated in the Goodman building, a frame structure within one hundred fifty (150) feet of the plaintiff's property,—said garage and tenant house having at the time an actual cash value of $1,200.00.

Upon these facts plaintiff prays judgment against defendant in the sum of $1,200, together with costs of the proceeding, and defendant prays that plaintiff take nothing by this proceeding and that it recover of plaintiff its costs, to be taxed by the Clerk.

The court, after having heard argument of counsel for plaintiff, and of counsel for defendant, being of opinion and concluding upon the facts agreed that plaintiff is entitled to recover of defendant the sum of $1,200, together with interest as stated, entered judgment therefor with costs to be taxed.

Defendant appeals therefrom to the Supreme Court and assigns error.

Craige & Craige for plaintiff, appellee.

Linn & Shuford for defendant, appellant.

WINBORNE, J. This is the pivotal question on this appeal: Are the provisions of Section III of Article 3 of the constitution of defendant and incorporated as "Waiver" in the fire insurance policy upon which claim is based, restrictive of the provisions of the form of the "Standard Fire Insurance Policy of the State of North Carolina," adopted by the General Assembly as set out in Chapter 378, 1945 Session Laws of North Carolina?

The judgment below is based, necessarily, upon an affirmative answer and, with it, we are in agreement.

The Insurance Law of this State, Chapter 58 of the General Statutes, pertinent to question here under consideration, provides that: "It is unlawful for any company to make any contract of insurance upon or concerning any property . . . unless and except as authorized under the provisions of this chapter." G. S., 58-29.

The General Assembly amended the Insurance Law in 1945, and, among other things, repealed sections G. S., 58-176, and G. S., 58-177, as they existed, and enacted in lieu thereof new sections of same numbers with subsections. See Chapter 378 of 1945 General Session Laws of North Carolina. In the new section, G. S., 58-176 (1), there is prescribed the printed form of a policy of fire insurance, to be known and designated as the "Standard Fire Insurance Policy of the State of North Carolina"; and in G. S., 58-176 (2), it is provided that "no policy or contract of fire insurance shall be made, issued or delivered by any insurer or by any agent or representative thereof, on any property in this State, unless it shall conform as to all provisions, stipulations, agreements and conditions, with such form of policy."

And in the new section, G. S., 58-177, relating to permissible variations from the standard form, the General Assembly declares that "no fire insurance company shall issue fire insurance policies on property in this State other than those of the standard form as set forth in section fifty-eight–one hundred seventy-six, except as follows . . . (c) A company may write or print upon the margin or across the face of the policy, or upon separate slips or riders to be attached thereto, provisions adding to or modifying those contained in the standard form . . .: Provided, however, such provisions shall not have the effect of making the provisions of the standard policy form more restrictive."

Thus it is seen that the statute permits such rider or waiver as does not have "the effect of making the provisions of the standard policy form more restrictive."

The question here then is whether the "waiver" in the policy issued by defendant to plaintiff, as above quoted, is restrictive of the form of the standard policy. This "waiver," in essential part, reads as follows: "If any building insured under this policy is constructed of wood . . .

and situate within one hundred and fifty (150) feet of the combustible property of a neighbor . . . and is damaged or destroyed by fire or lightning from cause arising from adjacent building . . . other than outbuildings belonging to the assured, this policy is null and void and of no effect."

Manifestly, it is restrictive in character—rather than descriptive of the sole risk classification underwritten by defendant, as suggested by appellant. Moreover, while the statement of agreed facts shows that the form of standard policy was adopted by defendant subsequent to passage of the 1945 Act, and had been approved by the Commissioner of Insurance of North Carolina, together with the said "Waiver" clause, such approval of the "waiver" clause would not validate it, if in conflict with the provisions of the statute. And we do not understand that appellant so contends. The fact that it was submitted indicates good faith. In this connection the Commissioner of Insurance has no power to authorize or acquiesce in the issuance of policies unauthorized or forbidden by the statute. When the right to do a thing depends upon legislative authority, and the Legislature has failed to authorize it, or has forbidden it, the approval of the doing of it by a ministerial officer cannot create a right to do that which is unauthorized or forbidden. See *Dept. of Ins. of Ind. v. Church Members Relief Assn.,* 217 Ind., 58, 26 N. E. (2d), 51, 128 A. L. R., 635. See also 19 Am. Jur., p. 818.

Further, it is a general rule of law that agreements against public policy are illegal and void. And agreements are against public policy when they tend to the violation of a statute. *Cauble v. Trexler,* 227 N. C., 307, 42 S. E. (2d), 77.

Furthermore, as appellant contends that the statute should not be so construed as to require it to write such classification risk as would defeat the purpose of its organization and virtually force it out of existence, it is not inappropriate to say that the effect of the 1945 statute upon the purpose for which defendant was incorporated, may not be so direful after all. If it wishes to insure only such properties as are situated outside the limits set out in the restrictive provisions of the "waiver" clause, no doubt it can insure only that class of property. The provisions of the "waiver" only exclude the properties which are situated within such limits. But the "waiver" inserted in a policy which undertakes to insure property within the limits of the prohibited territory, is restrictive, and void.

The judgment below is

Affirmed.

CLARENCE M. LIGHTNER ET AL. v. DANIEL F. BOONE, TRUSTEE, FOR MARTHA PENELOPE BOONE, A MINOR.

(Filed 19 November, 1947.)

1. Judgments § 27a—

The Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A. appx. 520 (4), is limited by its express terms to judgments entered "on a default of any appearance by the defendant."

2. Judgments § 32—

Adjudication, upon defendant's motion for a continuance under the Soldiers' and Sailors' Civil Relief Act, that defendant had made a general appearance, is *res judicata* upon a subsequent motion to set the judgment rendered aside.

3. Appeal and Error § 40d—

Upon motion to set aside a judgment under the Soldiers' and Sailors' Civil Relief Act, findings, supported by evidence, that defendant has no meritorious defense, is binding on appeal.

4. Judgments § 27a—

A finding that defendant has no meritorious defense is a finding that defendant has no "meritorious or legal defense" within the meaning of the Soldiers' and Sailors' Civil Relief Act.

5. Same—

Upon the hearing of a motion under the Soldiers' and Sailors' Civil Relief Act to set aside a judgment, the findings by the court that defendant had full opportunity to present his defense, that he presented all facts available to him, and that such facts do not establish a meritorious defense, obviates finding that defendant had not been prejudiced by reason of military service in making his defense, since if defendant has no valid defense he has not been prejudiced.

6. Trusts § 24—

Where the complaint alleges maladministration and misuse of trust funds, a court of equity will interpose its protective authority in behalf of the infant beneficiary, and defendant trustee's affidavits which failed to deny misuse of trust funds but controvert only whether the trust was created by will or by letter do not show a valid defense.

APPEAL by defendant from *Pless, J.*, at May Special Term, 1947, of HENDERSON. Affirmed.

Civil action for accounting of trust funds, heard on petition and motion of defendant to vacate the judgment entered at the May-June Term, 1942.

This cause was here on former appeal. *Lightner v. Boone,* 222 N. C., 205. The facts are there fully stated. See also *Boone v. Lightner,* 319 U. S., 561, 87 L. Ed., 1587.

The defendant, on ..... April, 1947, appeared and filed a petition and motion, under the Soldiers' and Sailors' Civil Relief Act of 1940, that the court vacate the judgment entered and permit him to appear and defend said action.

The petition and motion came on for hearing at the May Special Term, 1947, at which time the court, after hearing the evidence and argument of counsel, found the facts, including a finding that defendant's petition and supporting affidavits fail to set forth and allege a meritorious defense and that he has no such defense. It then concluded as a matter of law that (1) the petition and the affidavits in support thereof do not allege a meritorious defense; (2) the facts found at the original hearing as affirmed on appeal correctly state the facts and support the judgment; (3) the defendant has had ample opportunity to contradict the facts upon which plaintiffs rely but has failed to do so; and (4) all defenses available to defendant have been presented and nothing has been presented to show a meritorious defense. Thereupon the motion was denied. The defendant excepted to each and every finding of fact and conclusion of law and also excepted for that the court failed to make any finding of fact or conclusion of law as to whether the defendant has a legal defense within the meaning of the Soldiers' and Sailors' Civil Relief Act and appealed.

J. E. Shipman and M. R. McCown for plaintiff appellees.
Norman Block for defendant appellant.

BARNHILL, J. The section of the Soldiers' and Sailors' Civil Relief Act of 1940 (54 Stat. 1180, 50 U.S.C.A. appx. sec. 520 (4), 11 F.C.A. Tit. 50 appx. 9, sec 200 (4)) upon which defendant relies is limited by its express terms to judgments entered "on a default of any appearance by the defendant." 50 U. S. C. A. Appx. Sec. 520 (1); *Shaffer v. Shaffer,* 42 N. E. (2d), 176; *Reynolds v. Reynolds,* 134 P. (2d), 251; *In re Cool's Estate,* 18 A. (2d), 714; *Russ v. Russ,* 156 P. (2d), 767; *Sharp v. Grip Nut Co.,* 62 N. E. (2d), 774. That there was no "default of any appearance" in this cause has already been decided. *Lightner v. Boone,* 222 N. C., 205, 22 S. E. (2d), 426; *Boone v. Lightner,* 319 U. S., 561, 87 L. Ed., 1587; *Boone v. Boone,* 160 F. (2d), 13. That question is *res judicata.*

Even if we concede, however, that under the Act the remedy sought is, upon a proper showing, available to defendant, he is not entitled to relief for the reason that it is not "made to appear that the defendant has a meritorious or legal defense to the action or some part thereof." *Bell v. Niven,* 225 N. C., 395; *S. ex rel. Comrs. of Land Office v. Warden,* 168 P. (2d), 1010; *Com. Credit Corp. v. Smith,* 187 S. W. (2d), 363.

The defendant has studiously avoided a denial of the facts upon which the judgment was rendered. Apparently he finds it impossible to controvert them. These facts disclose maladministration and misuse of trust funds. His affidavits filed herein fail to disclose facts sufficient to constitute a valid defense thereto. *Combs v. Combs,* 180 N. C., 381, 104 S. E., 656. The court below, upon full consideration, has found and concluded that defendant has no such defense. The finding is supported by the record and is binding on us. *In re Hamilton,* 182 N. C., 44, 108 S. E., 385; *McGuinn v. High Point,* 217 N. C., 449, 8 S. E. (2d), 462; *Yadkin County v. High Point,* 217 N. C., 462, 8 S. E. (2d), 470; *Trust Co. v. Lumber Co.,* 221 N. C., 89, 19 S. E. (2d), 138; *Cotton Mills v. Manufacturing Co.,* 221 N. C., 500, 20 S. E. (2d), 818; *Fish v. Hanson,* 223 N. C., 143, 25 S. E. (2d), 461; Anno. 130 A. L. R., 783.

On a motion of this kind any legal defense is a meritorious defense. Hence a finding that defendant has no meritorious defense is a finding that he has no "meritorious or legal defense" within the meaning of the Soldiers' and Sailors Civil Relief Act.

It is true the court below did not specifically find that defendant has not been "prejudiced by reason of his military service in making his defense" to said action. But it did find that he has had full opportunity to present his defense, that he has presented all facts available to him, and that such facts do not tend to establish a meritorious defense. As he has no valid defense he has not been prejudiced.

The funds held by defendant were received by him in trust for the use and benefit of another. What boots it whether that trust was created by will or by the letter which appears in the record in this case? In either event, upon allegation of misuse of the trust funds by the trustee, the court will inquire into the alleged maladministration thereof and "interpose its protective authority" in behalf of the infant beneficiary. *Lightner v. Boone, supra,* and cases cited.

As to the defendant's allegation that there has been a studied effort, bordering on a conspiracy, among the petitioner's wife and others to harass, molest, embarrass, and disgrace him while he was serving as an officer in the United States Army, it might be well for him to look to his own conduct in handling trust funds and his persistent efforts to evade accounting therefor to discover the real source of his embarrassment. See *Lightner v. Boone,* 221 N. C., 78, 19 S. E. (2d), 144; *Lightner v. Boone, supra; Lightner v. Boone,* 222 N. C., 421, 23 S. E. (2d), 313; *Boone v. Lightner, supra; Boone v. Boone, supra.*

The judgment below is

Affirmed.

MRS. JENNIE FERN POSTON, WIDOW, v. A. F. BOWEN AND WIFE, MARY E. BOWEN.

(Filed 19 November, 1947.)

1. Reformation of Instruments §§ 3, 4—

Where there is no evidence that grantors were unable to, or were prevented from, reading the deed absolute in form signed by them, it will be assumed they signed the instrument they intended to sign, and they are not entitled to have it reformed for mutual mistake of the parties or mistake of the draftsman.

2. Reformation of Instruments § 2—Mere fact that an employer aids an employee in financial distress is no evidence of fraud or undue influence.

Evidence that an employer, at the instance of an employee in financial distress, gave the employee a certain sum of money and took an absolute conveyance of the employee's property, that the employee remained thereon as tenant, paying rent to the employer, and that the employer promised the employee that he could get the property back upon payment of the amount plus expenditures by the employer, without evidence that the employee was unable to, or was prevented from, reading the instrument, *is held* insufficient to be submitted to the jury upon the contention that defeasance clause was omitted from the deed by mistake of the grantors induced by fraud or undue influence on the part of grantees.

3. Trusts § 2a—

A parol trust in favor of grantors may not be engrafted upon a deed absolute in form.

APPEAL by plaintiff from *Carr, J.*, at February Term, 1947, of JOHNSTON. Affirmed.

Civil action to have a deed declared in fact a mortgage and to compel the reconveyance of the property therein described.

In October 1940, Clem Poston and his wife, the plaintiff herein, owned a house and lot in Smithfield as tenants by entirety, subject to mortgage. Poston had been for many years an employee of defendant. Due to unusual medical expense and the cost of keeping his daughter in college, he became financially embarrassed. He appealed to the defendant, his employer, for assistance, seeking to borrow $500. Defendant told him he would let him have the money but would want security therefor and for the $100 already owing. Plaintiff theretofore had been seeking a purchaser for his property.

Finally, as a result of negotiations, he and his wife executed and delivered to defendant a deed in fee simple with full covenants of warranty, conveying said property to defendant. They, the grantors, remained in possession of the premises as tenants of defendant, paying $22.50 per month rent therefor which plaintiff contends was to cover taxes and repairs.

On .... April 1946, Poston died. Thereafter plaintiff offered to pay all amounts due under an alleged oral agreement and demanded a reconveyance of the premises. Defendant declined to reconvey. Thereupon, plaintiff instituted this action to have said deed declared a mortgage and to compel reconveyance. At the conclusion of the evidence for plaintiff the court, on motion of defendant, dismissed the action as in case of nonsuit and plaintiff appealed.

Hooks & Mitchiner for plaintiff appellant.

Abell, Shepard & Wood and Paul D. Grady for defendant appellees.

BARNHILL, J. Plaintiff and her husband could read and write. Whether Poston did in fact read the instrument before signing is not made to appear. Plaintiff says that she did not. There is no fact or circumstance tending to show that either was prevented from so doing. It is presumed they knew the contents and, in the absence of proof to the contrary, it must be assumed they signed the instrument they intended to sign.

While plaintiff alleges that a defeasance clause was omitted therefrom "due to mistake or inadvertence on the part of plaintiff and her husband and to the mistake, inadvertence, fraud or undue advantage on the part of the defendants," the evidence most favorable to the plaintiff tends to show only that Bowen agreed that whenever Poston was able he could get his place back, that whenever he "was able to pay back the $600, plus the amount that Mr. Bowen had paid on it, that he could get his property back." Possession was surrendered contemporaneously with the delivery of the deed and the grantors became tenants, paying the rent agreed upon at the time.

We do not consider the mere fact an employer aids and assists a faithful employee who finds himself financially embarrassed is a circumstance tending to establish fraud or undue advantage. To so hold would deprive many worthy people of their principal source of help in the time of financial distress.

Hence there is no sufficient evidence that a defeasance clause was omitted from the deed by mutual mistake of the parties or of the draftsman or by mistake of the grantors, induced by the fraud of the defendant.

The plaintiff on this record in effect seeks to prove a contemporaneous oral agreement by defendant to reconvey to the grantors upon the repayment by them of certain stipulated sums. In short, she in fact seeks to engraft a parol trust in her favor upon her deed to the defendant. This she cannot do.

"All inconsistencies that may exist between the contract of sale and the deed are to be determined by the deed alone. The prior oral nego-

tiations cannot be set up for the purpose of contradicting the deed." 2 Devlin, Real Property, 3rd Ed., 1572-3.

The grantor in a deed absolute, in the absence of proof of mental incapacity, mistake of the parties, undue influence, or fraud, is bound by the terms of his deed. He may not convey a fee and then recover the premises or any interest therein upon parol evidence in contradiction of or in conflict with the terms of his deed. This is established law in this jurisdiction as evidenced by a long line of decisions among which are: *Gaylord v. Gaylord,* 150 N. C., 222, 63 S. E., 1028, and cited cases; *Walters v. Walters,* 172 N. C., 328, 90 S. E., 304; *Newton v. Clark,* 174 N. C., 393, 93 S. E., 951; *Williamson v. Rabon,* 177 N. C., 302, 98 S. E., 830; *Perry v. Surety Co.,* 190 N. C., 284, 129 S. E., 721; *Tire Co. v. Lester,* 192 N. C., 642, 135 S. E., 778; *Waddell v. Aycock,* 195 N. C., 268, 142 S. E., 10; *Briley v. Roberson,* 214 N. C., 295, 199 S. E., 73; *Davis v. Davis,* 223 N. C., 36, 25 S. E. (2d), 181.

Since we conclude that the plaintiff has failed to prove an enforceable agreement, it is unnecessary for us to discuss questions relating to the admissibility of evidence which appellant seeks to present.

The judgment below is

Affirmed.

PERCY B. HOLDEN v. W. L. TOTTEN AND H. K. COBB, SHERIFF OF GREENE COUNTY.

(Filed 19 November, 1947.)

1. Judgments § 23—

A party may not enjoin execution on a judgment until the statute of limitations has run and then plead the bar of the statute against the judgment.

2. Judgments § 32—

A judgment may not be attacked on the ground that defendant was released by the release of his co-debtor, who was not a judgment debtor, when such defense could have been raised prior to the final judgment.

3. Judgments § 25—

A judgment rendered on a *supersedeas* bond is of independent force and may not be attacked on the ground that the original judgment was void except for fraud or essential invalidity of the original judgment.

PLAINTIFF'S appeal from *Burney, J.,* at June Term, 1947, of GREENE.

The question immediately before the Court involves the validity of an order of Burney, J., dismissing the action brought by plaintiff to have a judgment formerly rendered against him canceled as a cloud upon his

title and dissolving an injunction against execution thereon which had been continued to the hearing.

The controversy stemmed from a judgment by default rendered in the Superior Court of Durham County against Holden and others, in favor of the North Carolina Joint Stock Land Bank at the October, 1934, Term, purporting in the original minute record to have been rendered by Judge G. V. Cowper, but signed by E. H. Cranmer, "Clerk Superior Court." On 12 July, 1935, a transcript of this judgment was sent to the clerk of the Superior Court of Greene County, where the present plaintiff was, and is, a resident, and execution thereon issued for enforcement of the judgment by levy upon his personal and real estate. The defendant therein—the present plaintiff, brought an action to have the judgment declared void and removed as a cloud upon his title, and procured a temporary injunction against the defendant Totten to prevent levy and sale under the execution.

The matter came up for a hearing before Judge Frizzelle at Chambers 29 April, 1944, upon the question of continuing the restraining order to the hearing in the Superior Court. At this hearing before Judge Frizzelle it was made to appear by affidavit of the Clerk of the Superior Court of Durham County that Judge Cowper held the Superior Court of Durham County for the week beginning 22 October, 1934, and ending 27 October, and that Judge E. H. Cranmer held the court for the following week, and in order that the record might speak the truth he had eliminated the name of Judge Cowper from the body of the writing, and struck out the designation "Clerk of the Superior Court" under Judge Cranmer's signature and substituted therefor the designation "Judge"; further testifying that the transcript to Greene County was from the minute docket. Judge Frizzelle continued the injunction to the hearing on the merits.

On appeal of defendant Totten, the Supreme Court, expressing no view upon what should be the final outcome upon the merits, affirmed Judge Frizzelle's judgment continuing the restraining order and passed upon certain jurisdictional questions not now at issue, 224 N. C., 547, 551, 31 S. E. (2d), 635.

When in due course the case was called for trial it was made to appear that a motion was pending in the original suit in Durham County to correct the record and "that the plaintiffs in this case have set up their rights before the court in this motion," and plaintiffs asked for a continuance until the motion could be heard. The motion to continue was overruled; and upon the ensuing hearing the trial court found the judgment challenged to be void, and ordered it canceled from the record as a cloud upon the plaintiffs' title. On appeal of defendant Totten to this Court, it was held that the apparent irregularity in the original judgment

was correctable under the pending motion in Durham County, and that the defendant ought to be permitted to pursue his legal remedy there "before asking further aid from a court of equity"; and that the lower court was in error in proceeding to judgment before the motion to correct the record could be heard. *Holden v. Totten,* 225 N. C., 558, 35 S. E. (2d), 635.

The motion to correct the record was heard before Grady, Emergency Judge, at March Term, 1946, of Durham Superior Court, who found the facts, without objection, and entered an order correcting the judgment in accordance with the facts found. Holden, defendant in that case, excepted and appealed to the Supreme Court, giving a *supersedeas* bond to stay execution in the sum of $7,000, with R. A. Mewborn, surety. In an opinion of the Court written by *Mr. Justice Devin,* the order of the lower court correcting the record was affirmed, the opinion, in appropriate language, confining decision to the subject matter of the appeal. 227 N. C., 105.

After this decision came down, at January Term, 1947, and upon notice served on defendant and R. A. Mewborn, his surety, upon motion of Totten, successful appellant, Judge R. Hunt Parker, finding the facts and including in them a *verbatim* quotation of the *supersedeas* bond, rendered judgment against Holden and his surety thereupon, limiting recovery to $2,263.39, with interest from 10 January, 1933, the sum found to be due, and costs. There appears to be no appeal from this judgment.

Totten caused execution to be issued on this judgment, and Holden, instituting the present suit, procured an order from Judge Frizzelle, returnable before Judge Burney, and set up in his complaint that the original judgment had become barred by the statute of limitations and that he was in law released from it by the release of Warren, a co-debtor but not a judgment debtor, by Totten's assignor, the Joint Stock Land Bank.

The whole matter came on for a hearing before Judge Burney at June Term, 1947, of Greene County Superior Court, who found the facts, dissolved the restraining order, and dismissed the action. Plaintiff appealed.

J. Faison Thomson and K. A. Pittman for plaintiff, appellant.
Bennett & McDonald and R. M. Gantt for defendant, appellee.

SEAWELL, J. When we follow the record step by step, in this protracted litigation we are left with few comments on the result.

The challenge to the original judgment went into the archives with its approved correction and the intervention in due course of a problem

more vexing to the present appellant in the later judgment on the *supersedeas* bond with the enforcement of which the present appeal is concerned. Singularly enough, in the present action, the plaintiff harks back to the judgment in the original suit, leaving the judgment on which execution has been issued practically unassailed, although it is of independent force.

If the original judgment were at this time open to challenge, it would be a strange sort of equity that would permit the defendant in execution to stay proceedings by successive injunctions until, in the ripeness of time, he could effectively plead the statute of limitations. In a similar connection *Judge Storey* said: "A party shall not avail of a legal right for the purpose of fraud, oppression, injustice, or injury." In *Marshall v. Minter,* 43 Miss., 666, from which the above quotation is taken, it is said: "Where a party gains a legal advantage by the act or omission of the court, equity ought not to allow him to avail of it; that if the advantage consists in the bar of the statute of limitations, accrued pending an injunction, although the creditor might have had, on motion, a modification of the restraining order, so as to save his right, his omission to make the application shall not prejudice him." See Anno., 21 A. L. R., 1057, (VI).

The plea that plaintiff in that action was released by the composition of Warren with the original creditor—the Joint Stock Land Bank,—or his release by the bank, should have been made in the original action, if available at all; in other words, it was his duty to put that matter in litigation at the first opportunity; and he has suffered two judgments to be entered against him fixing his liability and the amount due, one by default and the other without appeal.

The present plaintiff has brought two independent actions relating to his supposed matters of defense in the original action brought by the Joint Stock Land Bank Co. The first of these actions was for the purpose of having the former judgment declared void; and an independent action for that purpose is within the law and the practice. In this he failed. The present action stands upon a different footing. The plaintiff cannot, through the instrumentality of an independent action, instigate a review of the various processes, orders, and judgment validly made by a court in the exercise of its jurisdiction in another proceeding, and final in their nature, where neither fraud nor essential invalidity appears. *Development Co. v. Bearden,* 227 N. C., 124; *Privette v. Morgan,* 227 N. C., 264.

We find no error in the record and the judgment of the court below, dissolving the injunction and dismissing the action, is

Affirmed.

STATE v. EUGENE CHILDRESS.

(Filed 19 November, 1947.)

1. Homicide § 27h—

Defendant testified to the effect that he was a taxicab driver and carried a pistol in his taxi, that upon reaching home he took the gun in the house, and that the pistol accidentally discharged, inflicting fatal injury to his wife, as he was throwing it on the bed. *Held:* It was error for the court to fail to submit to the jury the question of defendant's guilt of manslaughter, and a new trial is awarded upon his appeal from conviction of murder in the second degree.

2. Criminal Law § 53g—

Where there is evidence of defendant's guilt of a less degree of the crime included in the bill of indictment, defendant is entitled to have the question submitted to the jury. G. S., 15-170.

3. Criminal Law § 81c (4)—

Error in failing to submit the question of defendant's guilt of a less degree of the crime is not cured by a verdict of guilty of a higher offense, since it cannot be known whether the jury would have rendered a milder verdict if permitted to do so.

4. Homicide § 16—

The rebuttable presumptions that the killing was unlawful and that it was done with malice do not arise from the mere fact of a killing with a deadly weapon, but it is also necessary that the killing be intentional in order for the presumptions to obtain.

5. Same—

The intensity of proof required to establish an intentional killing with a deadly weapon, where not admitted, is "beyond a reasonable doubt." The degree of proof required to rebut the presumption arising from an intentional killing with a deadly weapon, when established or admitted, is "to the satisfaction of the jury."

APPEAL by defendant from *Bobbitt, J.*, at July Term, 1947, of SURRY.

Criminal prosecution on indictment charging the defendant with the murder of Mary Childress.

When the case was called for trial, the solicitor announced that he would not prosecute on the capital charge, but would seek a verdict of murder in the second degree, or manslaughter, as the evidence might warrant. The defendant entered a plea of not guilty.

The evidence discloses that in the Spring of 1947, the defendant was a taxicab driver in the Town of Mount Airy. He lived with his wife at the home of his mother-in-law on Elm Street.

On 29 April, 1947, at about 5:45 p.m., the defendant's wife and her mother were in the kitchen of their home eating supper, when the defend-

ant arrived. The mother testified: "When Gene came home Mary got up from the table and went to the door to meet him; . . . they went into their room where they stayed. I did not hear any conversation between them. They were in there four or five minutes and I heard a gun fire and she called me and I went in there and found her standing there in the floor and Gene ahold of her by the arm and his pistol in his hand pointing in the direction of her stomach."

Mary Childress was shot in the pit of the stomach, and died as a result of the gunshot wound without ever speaking or making any statement.

There is also evidence that about three days prior thereto, the defendant was heard to say to his wife: "If you don't do what I told you, by G——, I will kill you."

The defendant testified that he usually carried a pistol in his taxicab. On the occasion in question, "after I got out of the car I reached in and got the gun and carried it on in. . . . My wife met me at the door . . . threw her arms around me and kissed me; . . . that was the usual occurrence and greeting when I went home. . . . We walked from the door to almost the foot of the bed . . ., she had her left arm around me, . . . and I started to pitch the gun on the bed and it went off. . . . She threw her arms up around my shouders at that time; I didn't think she was hit; she screamed and her mother came in the room."

The court instructed the jury that one of two verdicts might be returned on the evidence—guilty of murder in the second degree or not guilty.

Verdict: Guilty of murder in the second degree.

Judgment: Imprisonment in the State's Prison for not less than 17 nor more than 29 years.

The defendant appeals, assigning as principal error the failure of the court to submit to the jury the less degree of the crime charged, to wit, manslaughter.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

Folger & Folger and Woltz & Barber for defendant.

STACY, C. J. The defendant is charged with the murder of his wife. He pleads uxoricide by misadventure. There is evidence to support the charge and there is evidence to support the defendant's plea. There is also evidence of manslaughter, *i.e.*, of an unlawful killing without malice. *S. v. Staton*, 227 N. C., 409. In these circumstances, the statute, G. S., 15-170, requires that the "less degree of the same crime" be submitted to the jury with proper instructions. *S. v. Ratcliff*, 199 N. C., 9, 153 S. E., 605; *S. v. Sheek*, 219 N. C., 811, 15 S. E. (2d), 282.

The general rule of practice is, that when it is permissible under the indictment, as here, to convict the defendant of "a less degree of the same crime," and there is evidence to support the milder verdict, the defendant is entitled to have the different views arising on the evidence presented to the jury under proper instructions, and an error in this respect is not cured by a verdict finding the defendant guilty of a higher degree of the same crime, for in such case, it cannot be known whether the jury would have convicted of the lesser degree if the different views, arising on the evidence, had been correctly presented in the court's charge. *S. v. Lee,* 206 N. C., 472, 174 S. E., 288; *S. v. Newsome,* 195 N. C., 552, 143 S. E., 187; *S. v. Merrick,* 171 N. C., 788, 88 S. E., 501.

An intentional killing with a deadly weapon raises two presumptions against the killer, first, that the killing was unlawful, and, second, that it was done with malice; and an unlawful killing with malice is murder in the second degree. *S. v. Floyd,* 226 N. C., 571, 39 S. E. (2d), 598; *S. v. DeGraffenreid,* 223 N. C., 461, 27 S. E. (2d), 130; *S. v. Burrage,* 223 N. C., 129, 25 S. E. (2d), 393. It should be noted that these presumptions arise only from an intentional killing with a deadly weapon; and, even then, they may be rebutted—in part by showing no malice which would reduce the offense to manslaughter, and altogether by showing self-defense, unavoidable accident or misadventure, which would excuse the homicide and deprive it of any unlawfulness. *S. v. Snead, ante,* 37; *S. v. Prince,* 223 N. C., 392, 26 S. E. (2d), 875; *S. v. Keaton,* 206 N. C., 682, 175 S. E., 296. The presumptions do not arise from the mere fact of a killing with a deadly weapon. *S. v. Debnam,* 222 N. C., 266, 22 S. E. (2d), 562; *S. v. Gregory,* 203 N. C., 528, 166 S. E., 387; *S. v. Horton,* 139 N. C., 588, 51 S. E., 945. The deadly purpose of the use of the weapon, when accomplished, is what gives rise to the presumptions; and, unless admitted, this must be established by proof. *S. v. Ellison,* 226 N. C., 628, 39 S. E. (2d), 824; *S. v. Baker,* 222 N. C., 428, 23 S. E. (2d), 340; *S. v. Redman,* 217 N. C., 483, 8 S. E. (2d), 623.

The intensity of proof required to establish an intentional killing with a deadly weapon, where not admitted, is "beyond a reasonable doubt." The degree of proof required to rebut the presumption arising from an intentional killing with a deadly weapon, when established or admitted, is "to the satisfaction of the jury." *S. v. Harris,* 223 N. C., 697, 28 S. E. (2d), 232.

The exception addressed to the failure of the court to submit to the jury the lesser degree of the crime charged, *i.e.,* manslaughter, is well interposed and must be sustained.

New trial.

HELEN MYRTLE HAWLEY McCALLUM CANNON, EXECUTRIX OF THE ESTATE OF JAMES CANNON, JR., DECEASED, v. EDWARD L. CANNON.

(Filed 19 November, 1947.)

1. Executors and Administrators § 9—

Where a note payable to decedent matures before his death, an action for the collection of such note must be instituted by the representative of the estate in his representative capacity. G. S., 28-176.

2. Same—

A foreign executrix cannot maintain an action in the courts of this State against a debtor of the estate residing here to recover on the debt, even though the debt be evidenced by a note, maturing prior to testator's death, payable to testator in the state of his residence and of the appointment of the executrix.

3. Same—

A debt is an asset where the debtor resides even though a note has been given therefor, without regard to the place where the note is held or where it is payable, and therefore the debt constitutes a sufficient asset upon which to base a proceeding for the appointment of an ancillary administrator in the state of the debtor's residence.

APPEAL by defendant from *Carr, J.*, at June Term, 1947, of WAKE.

Civil action instituted by the plaintiff in her representative capacity as Executrix of the last will and testament of James Cannon, Jr., deceased, to recover upon a negotiable note executed by the defendant and made payable to James Cannon, Jr., in the State of Virginia, which note fell due prior to the death of plaintiff's testator. Plaintiff is the duly qualified and acting Executrix of the estate of James Cannon, Jr., having qualified in the Probate Court of the State of Virginia, in the City of Richmond.

The defendant demurred to the plaintiff's complaint on the ground that a foreign executrix does not have the legal capacity to maintain an action in North Carolina.

From an order overruling the demurrer, the defendant appeals, assigning error.

R. O. Everett and Kathrine R. Everett for plaintiff.
Joseph B. Cheshire, Jr., for defendant.

DENNY, J. The only question presented is whether or not the court below committed error in overruling defendant's demurrer. We think it should have been sustained.

It is provided in G. S., 28-176: That "All actions and proceedings brought by or against executors, administrators or collectors, upon any

cause of action or right to which the estate is the real party in interest, must be brought by or against them in their representative capacity." But we have no statutory authority which authorizes a foreign executor or administrator to come into our courts and prosecute or defend an action in his representative capacity. *Bank v. Pancake,* 172 N. C., 513, 90 S. E., 515; *Glascock v. Gray,* 148 N. C., 346, 62 S. E., 433; *Scott v. Lumber Co.,* 144 N. C., 44, 56 S. E., 548. Ordinarily when an estate administered in a probate court of another State, and a debtor of such estate resides in this jurisdiction, an action for the collection of such debt cannot be maintained in our courts except by a duly appointed ancillary administrator of such estate. *Bank v. Pancake, supra.* The case of *Stephens's Ex'rs. v. Smart's Ex'rs.,* 4 N. C., 83, cited by the appellee, has not been followed, and *Beckham, Ex'rs. v. Wittkowski,* 64 N. C., 465, also relied upon by the appellee, involved a different factual situation.

It has been held that a foreign representative may maintain an action on a bill or note belonging to his decedent's estate, where such representative has the right to sue for the collection of such bill or note in his individual capacity. 34 C. J. S., 1259. However, there seems to be no exception to the rule, that where a note was made payable to the decedent and matured before his death, as in the instant case, an action for the collection of such note must be instituted by the representative of the estate in his or her representative capacity. And in the absence of statutory authority, an administrator or executor cannot maintain an action in his representative capacity in the courts of any State other than the one from which he derived his appointment. 108 A. L. R. Anno., 1282; 34 C. J. S., 1259; 21 Am. Jur., 857; McIntosh N. C. Practice & Procedure, 234; Restatement of the Conflict of Laws, Chap. 11, Sec. 507; Woerner on American Law of Administration, Vol. 1, 558; Schouler on Wills, Executors and Administrators, Vol. IV, Sec. 3501. "A foreign executor or administrator cannot sue in this State, although we have one old case to the contrary" (citing *Stephens's Ex'rs. v. Smart's Ex'rs., supra*); Mordecai's Law Lectures, Chap. 36, p. 1194.

Even so, a simple debt due a decedent's estate, which is being administered in a foreign jurisdiction, constitutes a sufficient asset upon which to base a proceeding for the appointment of an ancillary administrator. *In re Warburg's Estate,* 223 N. Y. S., 780; *Hensley v. Rich,* 191 Ind., 294, 132 N. E., 632; *Vogel v. New York Life Ins. Co.,* 55 F. (2), 205. The debt is an asset where the debtor resides, even though a note has been given therefor, without regard to the place where the note is held or where it is payable. *Wyman v. United States,* 109 U. S., 654, 27 Law Ed., 1069.

The demurrer should have been sustained, and the ruling of the court below is

Reversed.

ALBERT W. COWPER, ADMINISTRATOR D. B. N. OF THE ESTATE OF PAUL ROUSE, DECEASED, v. JESSE G. BROWN AND JOHN K. DAWSON,

and

HENRY BELL, ADMINISTRATOR OF THE ESTATE OF LEE BELL, DECEASED, v. JESSE G. BROWN AND JOHN K. DAWSON,

and

GEORGE ROUSE, A MINOR, BY HIS NEXT FRIEND, ALBERT W. COWPER, v. JESSE G. BROWN AND JOHN K. DAWSON.

(Filed 19 November, 1947.)

Automobiles §§ 15, 18h (2) (3)—Evidence held sufficient for jury on issue of negligence and not to disclose contributory negligence as matter of law on part of cyclist hit by truck.

The evidence tended to show that defendant driver turned to his left to pass two cars traveling in the same direction and struck two bicycles traveling in single file in the opposite direction on their right side of the highway. Defendants' evidence was that the collision occurred on the paved portion of the highway and that the bicycles were without lights; plaintiffs' evidence was to the effect that the bicycles had turned off the highway to their right and were traveling on the shoulder, and that the person riding on the cross-bar of the lead bicycle was holding a lighted flashlight. Defendant driver testified that he did not see the lead bicycle at all and did not see the second bicycle until he was within five yards of it although his lights were in fair condition. *Held:* Defendants' motions to nonsuit should have been overruled both in respect to the issue of negligence and the issue of contributory negligence.

APPEAL by plaintiffs from *Morris, J.*, at June Term, 1947, of LENOIR.

Civil action instituted to recover damages for the alleged wrongful death of Paul Rouse and Lee Bell, and damages for personal injuries to George Rouse. The three cases were consolidated for trial.

Paul Rouse and Lee Bell were killed and George Rouse was injured when a truck owned by the defendant, Jesse G. Brown, and driven by his codefendant, John K. Dawson, collided with the bicycles on which Paul Rouse, Lee Bell and George Rouse were riding. The collision occurred between 5:30 and 6:00 p.m., 8 January, 1947, on the highway leading from Kinston to Pink Hill by way of Caswell Street Bridge.

According to the evidence offered in the trial below, Paul Rouse and Lee Bell were both riding the leading bicycle, and George Rouse was riding singly and following behind the other boys about the length of the bicycle. The boys were proceeding westwardly from Kinston, on the paved highway about 5:30 in the afternoon, riding on their right-hand side of the paved portion of the highway, near the right edge of the pavement. Lee Bell was riding on the cross-bar of the leading bicycle, and was holding in his hand a lighted flashlight; and as the boys observed

two cars and a truck meeting them, they turned off the paved portion of the road to their right and were proceeding on the shoulder of the road "about 2 to 2½ feet" from the pavement. The driver of defendant's truck, in attempting to pass the two automobiles, drove his truck over on the left side of the highway and off the paved portion thereof onto the shoulder along which the boys were riding. The truck and the bicycles collided, resulting in the death of Paul Rouse and Lee Bell, and the serious injury of George Rouse. The body of Paul Rouse was knocked about 50 feet from the point of impact and the body of Lee Bell was thrown over the cab of defendant's truck and fell in the back of the truck.

The defendant Dawson testified he was driving about 35 miles an hour when he started to pass an automobile just before the collision; that his lights were fair and his brakes were good, that he could see about 150 feet ahead of him, but he did not see the bicycle on which Paul Rouse and Lee Bell were riding, until he was about 5 yards from it, and never did see but one bicycle and one boy. He further testified: "When you pull out from a car in front your lights don't shine down the highway then; and by the time my lights came back on the highway there were those boys; I didn't go completely off the highway. As I turned to the left I could see not over 15 or 20 feet down the highway. . . . You could see a human being 25 feet; that was as far as I did see him with my lights as they were that night. I could see 50 feet if I had had the bright lights on, I must have had the dim lights on." Defendant offered evidence tending to show the collision took place on the paved portion of the road and that the bicycles were not lighted.

At the close of the evidence offered in behalf of the respective plaintiffs, the defendants moved for judgment as of nonsuit. The motion was denied, but upon renewal of the motion at the close of all the evidence, the motion was allowed as to each action, and judgment was entered accordingly.

Plaintiffs appeal, assigning error.

J. A. Jones for plaintiffs.

Sutton & Greene for defendants.

DENNY, J. The evidence offered by the respective plaintiffs in the trial below is sufficient to carry these cases to the jury on the issues of defendants' alleged negligence. *Phillips v. Nessmith,* 226 N. C., 173, 37 S. E. (2d), 178; *Wall v. Bain,* 222 N. C., 375, 23 S. E. (2d), 330; *Pearson v. Luther,* 212 N. C., 412, 193 S. E., 739; *Lincoln v. R. R.,* 207 N. C., 787, 178 S. E., 601.

The defendants contend that if it be conceded that the defendant Dawson was operating the truck of his codefendant in a negligent manner

at the time of the collision referred to herein, these plaintiffs are not entitled to recover as a matter of law, by reason of the contributory negligence of George Rouse and the intestates as shown by the evidence.

Conceding, but not deciding, that there is evidence of contributory negligence on the part of George Rouse and the intestates, it is not of such a character as would justify holding it to be so as a matter of law. The evidence offered on this record justifies the conclusion that these cases should be submitted to the jury on the proper issues raised by the pleadings. *Wall v. Bain, supra; Manheim v. Blue Bird Taxi Corp.*, 214 N. C., 689, 200 S. E., 682; *Pearson v. Luther, supra.*

The judgment of the court below is

Reversed.

IN RE WILL OF BELL EDDLEMAN KESTLER.

(Filed 19 November, 1947.)

1. Wills § 23b—

It is competent for the natural object of testatrix' bounty to testify on the issue of mental incapacity that, something less than two years prior to the execution of the instrument caveated, testatrix told the witness that papers had been prepared leaving the property to her, or at least the admission of such testimony is not sufficient ground for reversal.

2. Appeal and Error § 39e—

The admission of testimony over objection cannot be held for prejudicial error when testimony of like import is admitted without objection.

3. Wills § 25—

The use of the phrase "at the approximate time" of executing the instrument, in charging upon the question of mental capacity, will not be held for prejudicial error when the evidence tends to show a probable variation of several days between the preparation of the paper and its publication, and in other portions of the charge and in the issue submitted the question of mental capacity is directed to the time of the execution of the instrument.

4. Appeal and Error § 39b—

Where in a caveat proceeding there is no reversible error relating to the jury's finding of mental incapacity, exceptions relating solely to the issue of undue influence become immaterial and need not be considered.

APPEAL by propounder from *Alley, J.*, at February Term, 1947, of CABARRUS.

Issue of *devisavit vel non,* raised by a caveat to the will of Bell Eddleman Kestler, late of Cabarrus County, based on alleged mental incapacity and undue influence.

The will of the deceased was probated in common form on 17 October, 1946, having been offered for such purpose by Hamp Russell, principal beneficiary and executor named therein. The propounder is a stranger in blood to the deceased.

Thereafter, on 12 November, 1946, Odessa S. Williams, a niece of the testatrix, filed a caveat to the will, alleging mental incapacity and undue influence on the part of the propounder. Interested parties were listed and duly cited. The issue was transferred to the civil issue docket; and upon the hearing, the caveat was sustained on both grounds, the jury answering that the testatrix was incapable of making a will at the time of its execution, and that the paper writing propounded was procured by the undue influence of the propounder.

From judgment setting the will aside, the propounder appeals, assigning errors.

Hartsell & Hartsell for propounder, appellant.

Z. A. Morris, Jr., and John Hugh Williams for caveator, appellee.

STACY, C. J. Only two exceptions need engage our attention, the one relating to the competency of opinion evidence, the other to the correctness of the charge.

1. The will under caveat is dated 18 March, 1946. The lawyer who drew it says it was prepared on that date, and it "might have been signed a day or two later." The testatrix died nearly eight months thereafter. Her husband, Simon Kestler, predeceased her by more than a year. He died sometime after 14 June, 1944 (on which date he and his wife executed a deed to Maude Gibson).

Odessa Williams was reared in the home of the Kestlers. She came there when she was 3 years old and stayed until she was 28. She says she spent a week with her aunt after her Uncle Simon's funeral. It was during this visit, according to the witness, that Aunt Bell "told me they had papers made out that I would get what they had—if anything happened to me my niece would get it." The purpose of this evidence was to lay, in part, the foundation for her opinion that her aunt was consciously incapable of making a later will totally at variance with this declaration. *In re Will of Lomax,* 226 N. C., 498, 39 S. E. (2d), 388; *In re Will of Craven,* 169 N. C., 561, 86 S. E., 587. While objection was interposed to the question which elicited the testimony, there was no objection to the answer and no motion to strike. Nevertheless, passing the sufficiency of the challenge, the evidence is competent on the issue of mental incapacity. *In re Will of Brown,* 203 N. C., 347, 166 S. E., 72; *Bissett v. Bailey,* 176 N. C., 43, 96 S. E., 648. At least its admission

would not work a new trial according to our previous decisions. *In re Will of Hinton,* 180 N. C., 206, 104 S. E., 341.

Nor does it appear to be too remote in point of time. *In re Will of Hargrove,* 206 N. C., 307, 173 S. E., 577. The exact length of time is not given. It must have been something less than two years. *In re Will of Brown,* 194 N. C., 583, 140 S. E., 192. However, the testimony of Arey Gray, a neighbor, quotes the same declaration of purpose without objection. Likewise, in full accord with the above testimony is that of the sister of the deceased: "If I may say it in my own way. She would talk good; she was as nice as she could be at times and you would walk over to that corner and she would cuss you out. That don't appear to me that her mind was sound. Russell waited on her; did nice things for her. She said, 'He is just like all the rest of the damn niggers, trying to trim me and get what I have got.' "

2. The following excerpt from the charge forms the basis of propounder's principal exception: "If it is proved to you by the evidence that she did not have a sound mind and disposing memory at the approximate time of making the alleged will, then it would be your duty to find that she did not have testamentary capacity to make the will in question."

Of course, testamentary capacity at the time of the making of the will is the test, *In re Will of Hargrove, supra,* but here the record shows a probable variation of several days between its preparation or date, and its publication. "Ordinarily, the question of a few days might not be capitally important, but this would depend entirely upon the circumstances of the given case." *In re Will of Ross,* 182 N. C., 477, 109 S. E., 365. There is no evidence on the instant record of any marked change in the mental condition of the testatrix around the time the will was made. Some of the witnesses speak of the condition of her mind on "the date of the execution, or about that time." Then, too, in other portions of the charge the jury's attention is directed to the "making and execution of the will" and "at the moment." The use of the word "approximate," while inexact, is regarded too slight a departure to be held for reversible error in the light of the present record. The issue speaks "at the time of the execution of said paper writing." The jury could hardly have been misled by the instruction. *In re Will of Stocks,* 175 N. C., 224, 95 S. E., 360.

3. The propounder is named as the principal beneficiary and executor of the will. He was a stranger in blood to the deceased and often ministered to her wants after her husband's death. He joined with a nephew in hiring Willie Miller to stay with her. He was a constant visitor in her home. The jury has found that the will was procured by his undue influence. *In re Will of Mueller,* 170 N. C., 28, 86 S. E., 719. Though charged with overreaching, he did not take the witness stand. *In re Will*

of Hinton, supra. However, as the issue of mental incapacity was answered in the affirmative, which sustains the caveat, the exceptions addressed to the issue of undue influence may be put to one side. *Winborne v. Lloyd,* 209 N. C., 483, 183 S. E., 756. They need not be considered.

If the deceased were incapable of making a will, the manner of its procurement would seem to be immaterial.

The validity of the trial will be sustained.

No error.

C. J. McCONNELL v. R. M. JONES.

(Filed 19 November, 1947.)

1. Trial § 31c: Sales § 27—

The purchaser admitted he owed a portion of the balance of the purchase price but contended that he was entitled to a reduction of the amount on account of breach of implied warranty. The seller contended he was entitled to recover the full balance of the purchase price. *Held:* An instruction to answer the issue for the full amount claimed by the seller or to answer the issue nothing, in accordance with the finding upon the question of breach of warranty, must be *held* for reversible error.

2. Sales § 15—

While under the doctrine of *caveat emptor* there is no implied warranty of quality in the sale of personalty, there is an implied warranty that the goods be not worthless for the purpose for which intended.

APPEAL by plaintiff from *Patton, Special Judge,* at April Term, 1947, of MECKLENBURG.

Suit by plaintiff to determine the balance due on 56 tons of hay purchased by him from the defendant. The jury returned verdict that plaintiff was indebted to the defendant in the sum of $859.13 with interest, and from judgment in accord therewith the plaintiff appealed.

McRae & McRae for plaintiff, appellant.

McDougle, Ervin, Fairley & Horack for defendant, appellee.

DEVIN, J. Some controversy having arisen between plaintiff and defendant as to the balance due on a quantity of hay purchased from the defendant, the plaintiff adopted the procedure of instituting an action to determine the amount he owed. However, the defendant having answered and set up the amount he claimed was due, questions as to the form and sufficiency of the complaint are not presented.

The plaintiff bottomed his action on breach of implied warranty in the sale of the hay, in that a portion of it was unfit for the use for which it was intended. He offered evidence tending to show that much of the hay delivered contained sticks, stones and rubbish unfit for food for cattle and had to be thrown away. He testified one-third of the hay was good, one-third was passable, and one-third no good. Said he: "Cattle will not eat it. . . ., it can't be classified as hay." A number of truck loads of this worthless material was hauled away and thrown in the gulleys. He testified he contracted for good lespedeza hay; that the hay was delivered in installments (ten) over a period of several weeks; that the first deliveries were all right, and that he did not have opportunity to inspect all later deliveries. Plaintiff paid $825, about half of the contract price, and admitted he owed a portion of the balance, but claimed reduction in the amount on account of breach of implied warranty as to a substantial part of the hay delivered.

The defendant's evidence was sharply contradictory and tended to show that plaintiff had gotten what he contracted to buy; that it was received without objection, part of it used, and $825 paid on account without criticism, and that only when defendant began to press him for the balance was any complaint made.

Plaintiff assigns error in the court's instructions to the jury, in that it was stated that the plaintiff claimed he owed nothing, and the case was in effect presented as one in which the defendant must recover all he claimed or nothing. The court stated the contentions of the parties as being that plaintiff contended he owed the defendant nothing, and that defendant contended plaintiff owed him $859.13. After charging the jury if they found that plaintiff purchased the hay in question from the defendant, and that plaintiff inspected the hay and accepted the same, they should answer the issue $859.13 with interest, the court said, "If, on the other hand, gentlemen of the jury, you find that the hay in question was purchased by plaintiff from defendant, and that said hay was not reasonably fit for the purpose for which it was sold and purchased, then it would be your duty to answer the issue nothing." This instruction was repeated in substantially similar form.

It is apparent that plaintiff's case that he owed part but not all was not properly presented to the jury, nor was the jury instructed that the purpose of plaintiff's suit was to reduce the amount claimed as balance due on the contract price of the hay, in proportion to the amount of hay delivered which was unfit for use, if they found any substantial portion of it was unfit. The jury should have been given opportunity, if they found in accordance with plaintiff's evidence, to award less than the whole of defendant's claim. *Davis v. Morgan, ante,* 78.

Athough, under the maxim of the common law *caveat emptor,* there is no implied warranty as to quality in the sale of personal property, the seller is nevertheless held to the duty of furnishing property in compliance with the contract of sale and such as shall be capable of being used for the purpose intended. *Ashford v. Shrader,* 167 N. C., 45, 83 S. E., 29; *Furniture Co. v. Mfg. Co.,* 169 N. C., 41, 85 S. E., 35; *Swift & Co. v. Aydlett,* 192 N. C., 330, 135 S. E., 141; *Williams v. Chevrolet Co.,* 209 N. C., 29, 182 S. E., 719. In the expressive language of *Lord Ellenborough* in *Gardner v. Gray,* 4 Campbell, 143, "the purchaser cannot be supposed to buy goods to lay them on a dunghill." In the *Ashford case, supra,* the contract was for 600 boxes of oranges. Proof that one-third of them were unusable was held sufficient to support recovery *pro tanto* on the ground of breach of implied warranty.

Other exceptions noted and brought forward in plaintiff's appeal have not been considered, as, for the reasons stated, there must be a new trial, and the questions therein raised may not be again presented.

New trial.

MARY O. STAFFORD ET AL. v. R. M. YALE.

(Filed 19 November, 1947.)

1. Ejectment § 7—

In an action in summary ejectment proof of notice given the 14th of the month to quit the premises on or before the first of the following month is insufficient to show the statutory notice terminating the term, G. S., 42-14, when it appears that the original occupancy was taken on the 18th of the month and plaintiff offers no evidence as to the date of the month the term began or when the monthly rentals became due, G. S., 42-26, and upon failure also of proof of plaintiff's averment of nonpayment of rent, defendant's motion to nonsuit is allowed in the Supreme Court. G. S., 1-183.

2. Trial § 21—

A fatal variance between allegation and proof justifies nonsuit, as it amounts to a total failure of proof on the declaration or the cause alleged.

APPEAL by defendant from *Sink, J.,* at April-May Term, 1947, of WILKES.

Summary proceeding in ejectment commenced before a justice of the peace and tried *de novo* on defendant's appeal to the Superior Court.

The defendant is a merchant in the Town of North Wilkesboro. On 18 March, 1930, he took possession, as tenant, of a brick store building belonging to E. F. Stafford. The agreed rental was payable monthly at the rate of $49.00 a month.

In July, 1945, the rent was increased to $75.00 per month by agreement between the defendant and one of the heirs of E. F. Stafford, and the defendant has been paying this amount ever since. The parties are in disagreement as to the term or duration of the lease then agreed upon. The plaintiffs say it was to be on "a monthly rental basis." The defendant says it was to be for three years in consideration of the increase in rent.

Thereafter, on 14 February, 1947, the plaintiffs gave the defendant written notice to vacate the premises "on or before the 1st day of March, 1947." Ths summary proceeding was instituted on 3 March, 1947, to evict the defendant from the demised premises for "that said defendant has failed to comply with the terms of said lease and has failed to pay the rentals specified therein." It is further alleged in the plaintiffs' oath that demand for possession of the premises has been made of the defendant, "who refuses to surrender it, but holds over." Wherefore, plaintiffs pray that they be put in possession of the premises.

There was a judgment in the justice's court for the plaintiffs, from which the defendant appealed to the Superior Court, where the matters were tried *de novo* at the April-May Term, 1947, and again resulted in a verdict and judgment of eviction.

From this judgment the defendant appeals, assigning errors, insisting chiefly upon his demurrer to the evidence.

Whicker & Whicker for plaintiffs, appellees.
Trivette, Holshouser & Mitchell for defendant, appellant.

STACY, C. J. After the defendant's renewed motion for judgment of nonsuit had been overruled and exception duly entered, the case was submitted to the jury to ascertain whether the lease was from month to month or for a term of three years.

The issue was clearly stated in the following instructions: "You, gentlemen of the jury, understand what the differences between these parties are. That is to say, their differences in what kind of contract it was, and it is the duty of the jury to determine what kind of rental contract exists between these parties. If you find by the greater weight of the evidence with the plaintiff's contention relating to these issues, you will answer it Yes. If you fail so to find, you will answer it No."

The jury answered simply that the plaintiffs were entitled to the possession of their property, which, under the charge, means that the lease was on "a monthly rental basis." This alone is not enough.

In the first place, there is no evidence to support the conclusion that the term had ended, whatever its length, and that the defendant was a tenant in possession holding over. G. S., 42-26. Secondly, there has been

no failure to pay the rent when due, and there is neither allegation nor proof to show when the term began or when the monthly rentals became due. The defendant entered into possession on the 18th of the month. The notice to quit designated the time as "on or before the 1st day of March, 1947." G. S., 42-14. The record is silent as to whether this was sufficient to terminate the tenancy. *Simmons v. Jarman,* 122 N. C., 195, 29 S. E., 332; *Cherry v. Whitehurst,* 216 N. C., 340, 4 S. E. (2d), 900.

A diligent search of the transcript fails to reveal any evidence to support the claim as set out in the plaintiff's oath. A fatal variance between allegation and proof usually results in a dismissal of the proceeding, as this amounts to a total failure of proof on the declaration or the cause alleged. *Sycamore Mills v. Veneer Co., ante,* 115; *S. v. Harbert,* 185 N. C., 760, 118 S. E., 6. "Proof without allegation is as unavailing as allegation without proof." *Talley v. Granite Quarries Co.,* 174 N. C., 445, 93 S. E., 995; *S. v. Law,* 227 N. C., 103, 40 S. E. (2d), 699.

There was error in overruling the defendant's motion for judgment as in case of nonsuit after all the evidence on both sides was in. The defendant has the benefit of the exception on appeal. G. S., 1-183. It will be allowed here.

Reversed.

WILLIE BELLE NICHOLS, ADMINISTRATRIX OF JAMES STARKEY NICHOLS, DECEASED, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 19 November, 1947.)

Negligence § 4b—

Maintenance of a circular unenclosed pool 6½ feet in diameter and 24 inches deep on railroad property across the street from a baseball ground or park where children were accustomed to play, does not impose liability for the death of a 2½ year old child found drowned in the pool, since such unfortunate occurrence was not one which reasonably should have been anticipated and guarded against.

APPEAL by plaintiff from *Stevens, J.,* at May Term, 1947, of BERTIE. Affirmed.

Action to recover damages for wrongful death of plaintiff's intestate alleged to have been caused by the negligence of the defendant. It was alleged that defendant negligently failed properly to safeguard a small pool which it permitted to be maintained on its right of way near its station in Aulander, N. C., and that in consequence plaintiff's intestate, a child of less than three years, was drowned.

At the close of plaintiff's evidence motion for judgment of nonsuit was allowed, and from judgment dismissing the action plaintiff appealed.

J. W. Parker and S. R. Lane for plaintiff, appellant.
Rodman & Rodman for defendant, appellee.

DEVIN, J. Near its railroad station in Aulander, the defendant had permitted the construction and maintenance of a small circular unenclosed pool, six and one-half feet in diameter and twenty-four inches deep. There were some goldfish in the pool. Across the street or road from the pool was an open baseball ground or park in which children were accustomed to play. On the morning of 30 June, 1946, the plaintiff's intestate, aged two years and seven months, in company with four other small children whose ages ranged from five to ten years, left the home of the plaintiff, with her consent, crossed the railroad track and went to the ball ground, some two hundred and forty feet distant. After the children had played a while, the intestate said he was going home and left, going in that direction. Sometime afterward this child was found in the pool, drowned.

The plaintiff asks recovery for the death of the child on the principle enunciated in *Barlow v. Gurney,* 224 N. C., 223, 29 S. E. (2d), 681; *Cummings v. Dunning,* 210 N. C., 156, 185 S. E., 653, and *Brannon v. Sprinkle,* 207 N. C., 398, 177 S. E., 114. But here the record is lacking in evidence that the small shallow pool described was the common resort of children, or that small children played in and around it to such an extent as to impose upon the defendant the duty of exercising due care to safeguard it. Nor is the evidence such as to invoke the principle of liability for injury to children from the maintenance of inherently dangerous instrumentalities which are attractive and alluring to them as discussed by *Justice Walker* in *Ferrell v. Cotton Mills,* 157 N. C., 528, 73 S. E., 142. See also *Harris v. R. R.,* 220 N. C., 698, 18 S. E. (2d), 204; *Boyette v. R. R.,* 227 N. C., 406, 42 S. E. (2d), 462, and cases cited. There was nothing to put the defendant on notice of any danger reasonably to be apprehended from the maintenance of the pool. Indeed, the plaintiff, the mother of the child, testified: "It did not occur to me that it was dangerous, or that the child would drown." It was said in *Lee v. Upholstery Co.,* 227 N. C., 88, 40 S. E. (2d), 688, that "It must be made to appear that the injury was the natural and probable consequence of the negligent act and ought to have been foreseen in the light of attending circumstances."

Deplorable as was the death of the child by drowning in the shallow pool, the evidence does not make it appear that this unfortunate occurrence was one which reasonably should have been anticipated and guarded against by the defendant. *Boyette v. R. R., supra; Hedgepath v. Durham,* 223 N. C., 822, 28 S. E. (2d), 503.

The judgment of nonsuit will be upheld.

Affirmed.

H. B. OWSLEY AND R. P. OWSLEY, TRADING AS H. B. OWSLEY & SON, V. A. L. HENDERSON AND STANDARD ACCIDENT INSURANCE COMPANY.

(Filed 26 November, 1947.)

1. Evidence § 36—

Objection to the admission in evidence of an itemized, verified statement attached to the complaint is untenable when the statement is not admitted as such but is admitted only after a witness competent to testify is examined and testifies of his own knowledge concerning the matters therein contained.

2. Principal and Surety § 18a—

In an action on a surety bond for public construction, statements or admissions of the principal contractor made in the course of his dealings with those protected by the bond, which tend to prove the debt or the amount thereof, are competent against the surety. The rule that such statements are not binding on a surety simply means the surety is not precluded from offering evidence in contradiction thereof.

3. Trial § 17—

Exception of one defendant to the general admission of evidence competent solely against the other defendant, is untenable in the absence of a request at the time that its admission be limited.

4. Appeal and Error § 40d—

Findings of fact of the trial court when supported by competent evidence, even though there be evidence *contra*, are binding on appeal.

5. Principal and Surety § 7—

A bond for public construction conditioned upon the satisfaction of "all claims and demands incurred" in the performance of the contract . . . and payment for labor and material, *is held* to include rental cost of pneumatic machinery or equipment hired to do mechanical work in furtherance of the contract. G. S., 44-14.

6. Insurance § 4—

The rule that insurance contracts must provide the protection required by law and that if statutory provisions are not therein included they are incorporated therein by operation of law, does not preclude the parties from contracting for protection in addition to the minimum prescribed by statute.

7. Principal and Surety § 7—

The contention of the surety on a bond for public construction that its liability for rental charges for equipment used in the performance of the contract should be limited to the time such equipment was in actual operation is untenable, since the presence of such equipment at the job for use when needed is in furtherance of the performance of the contract.

APPEAL by defendant Standard Accident Insurance Company from *Armstrong, J.*, March 31 Term, 1947, MECKLENBURG. Affirmed.

Action to recover for rental of pneumatic machinery and equipment furnished individual defendant in the construction of public improvements.

On 20 December 1944, defendant Henderson contracted with the City of Charlotte to install two raw water pumping units at the Catawba River Pumping Station. In connection therewith Henderson, pursuant to the requirements of G. S. 44-14, executed indemnity bond in the sum of $10,432 with defendant insurance company as surety. The condition of the bond is as follows:

"NOW, THEREFORE, the condition of this obligation is such, that, if the Principal shall faithfully perform the said Contract on his, its or their part, and satisfy all claims and demands, incurred for the same, and shall fully indemnify and save harmless the City from all costs and damage which the City may incur in making good any such default, and shall pay all persons who have contracts directly with the Principal, or any Sub-Contractor of the said Principal for labor or material, or both, then this obligation shall be null and void; otherwise, it shall remain in full force and effect."

There is also a stipulation in the bond that it is executed under and pursuant to G. S., 44-14, which section is by reference incorporated therein.

The contract necessitated boring holes through a dam. The contractor did not possess the equipment required to do this work. He contracted with plaintiffs for the rental of certain pneumatic machinery and incidental equipment to be used in fulfilling the contract. Rentals were charged in accord with the contract and OPA regulations then in force. Monthly invoices were furnished Henderson to which he voiced no objection. He remitted for the invoices until the first week in October but thereafter defaulted. There is, as plaintiffs allege, $992.10 due and unpaid.

The statutory notice to other creditors has been published.

When the cause came on for hearing, the parties waived trial by jury and agreed that the court should hear the evidence, find the facts, and render judgment on the facts found.

The court below found the facts in detail, the facts found being in substance that plaintiffs, under contract with Henderson, rented him certain jack hammers and like labor-saving pneumatic equipment for use on the City of Charlotte job; that there is now due and unpaid on said contract of rental $992.10 with interest. It concluded that the defendant insurance company is liable for the payment thereof. Judgment was entered accordingly. Defendant insurance company excepted to each and every finding of fact and conclusion of law and to the signing of the judgment and appealed.

J. Spencer Bell for plaintiff appellees.

Frank H. Kennedy and Nathaniel G. Sims for defendant Standard Accident Insurance Company, appellant.

BARNHILL, J. The itemized, verified statement attached to the complaint was not admitted in evidence as such. It was admitted only after a witness competent to testify was examined and testified of his own knowledge concerning the matters and things therein contained. Exception thereto cannot be sustained.

Before the plaintiffs can recover against defendant surety company they must establish a debt against the contractor incurred in the fulfillment of his contract with the City of Charlotte. Hence, any evidence, including statements of the contractor, a party defendant, made in the course of his dealings with the plaintiffs and tending to prove the debt or the amount thereof, was competent. Furthermore, the two defendants are represented by the same counsel. The objections to the testimony of H. B. Owsley were general in nature and there was no request that the court limit it to the defendant Henderson. The exceptions thereto now pressed by the defendant surety company are, on this record, untenable.

Nothing in *Chozen Confections v. Johnson,* 221 N. C., 224, 19 S. E. (2d), 866, is in conflict with this conclusion. The admissions of the principal debtor, at least in a joint action such as this, are competent to prove the debt. The rule that such statements are not binding on the surety simply means the surety is not precluded from offering evidence in contradiction thereof.

The findings of fact made by the court below are supported by competent evidence and are binding on us. *Lightner v. Boone, ante,* 199, and cited cases. There is very slight evidence, if any, that any part of the equipment was diverted to other jobs. If we concede there is some testimony to that effect then it was a controverted fact which has been settled by the findings of the court below.

This disposes of the incidental questions, worthy of note, which arose during the course of the trial and brings us to the pivotal question upon which the appellant's case must stand or fall. Is the rental cost of pneumatic machinery or equipment hired to do mechanical work in furtherance of the contract within the terms of the bond?

To answer the question it is not necessary for us to decide whether the rental cost of such equipment is labor or material. The answer does not rest on such narrow ground, but rather is to be found in the broad and inclusive language of the bond itself. But see *Town of Cornelius v. Lampton,* 189 N. C., 714, 128 S. E., 334; *Wiseman v. Lacy,* 193 N. C., 751, 138 S. E., 121, and cited cases.

The contract of insurance constitutes a general indemnity or faithful performance undertaking. The appellant assures the faithful performance of the contract and guarantees the satisfaction of "all claims and demands, incurred for the same" as well as contracts "for labor or material, or both." A contract for the rental of equipment is included.

No doubt the surety fixed its premium on the basis of the risk assumed. Now that liability has arisen it must pay in accord with the terms of its contract.

But the appellant, citing and relying on *Louisiana Highway Commission v. McCain,* 1 So. (2d), 545, and *Royal Indemnity Co. v. Day & Maddock Co.,* 150 N. E., 426, insists that "The bond involved herein is a statutory bond and we must look to the statute to find the conditions of the bond; for whatever is written in it, not required by statute, must be read out of the bond, and whatever is not expressed in it, but which ought to have been incorporated, must be read into it."

The cited cases so hold, but we do not adhere to any rule prevailing in other jurisdictions which prohibits parties to a contract of insurance executed pursuant to statute from inserting provisions which assure protection above and beyond that required by the statute.

The statute, G. S. 44-14, was designed and intended to provide protection for laborers and materialmen furnishing labor or material for the construction of public works commensurate with that afforded them while engaged in private construction. It prescribes the minimum protection that must be furnished but does not undertake to stipulate the maximum. It provides a floor but not a ceiling. As to that the parties are free to contract.

The contract must provide the protection required by law. To that end the provisions of the statute, if not actually included in the written agreement, are incorporated therein by operation of law.

Subject to this limitation the parties are free to contract. The indemnity company will not be permitted to afford protection less than that required by law. On the other hand it may assume any additional liability and provide any additional protection it and the assured may agree upon. Certainly this Court will not read out of the contract protective provisions voluntarily incorporated therein by the defendant.

But the defendant insists that if it is liable at all its liability "must necessarily be restricted to rental of the equipment for the time that it was actually in use on the job, and that the Surety Company cannot be held for idle time of the equipment."

Liability for rental was incurred by contract of the principal debtor and it was incurred in the performance of the contemplated work. Henderson owes the same as a part of the cost of construction and appellant has assured its payment Those who spread the cement must at times

wait on the mixer. The mixer squad must await those who haul the material and the haulers must abide the loaders. Surely no one would seriously contend that such employees must have their wages docked for such idle time. Neither is it reasonable to say that the contractor may refuse to pay the rental for "mechanical labor equipment" when not in actual use. It must be "on the job," ready at hand when needed and the contractor must pay for the time it thus serves his purpose. In the event he defaults, his surety has agreed to pay.

For the reasons stated the judgment below must be

Affirmed.

STATE v. RICHARD RANDOLPH.

(Filed 26 November, 1947.)

1. Assault § 10—

"A certain knife" is a sufficient description of the weapon in an indictment for assault with a deadly weapon with intent to kill. G. S., 14-32.

2. Indictment § 9—

An indictment which follows substantially the language of the statute as to its essential elements meets the requirements of law.

3. Assault § 12—

The introduction in evidence of the weapon used is not requisite to the admission of testimony as to the manner of its use and the injuries inflicted in establishing the character of the weapon as deadly.

4. Criminal Law § 79—

Exceptions not set out in the brief and in support of which no argument is given, are deemed abandoned. Rule of Practice in the Supreme Court, No. 28.

5. Assault § 8d—

The deadly character of a weapon used in an assault may be inferred by the jury from the manner of its use and the injury inflicted, and evidence of slashes with a knife across the upper arm and lower back along the belt line, producing cuts requiring 16 stitches to close, is sufficient for the jury to infer that the knife was a deadly weapon.

6. Assault § 9a—

The surrounding facts and circumstances, and not defendant's belief, constitute the determinative factors as to whether defendant acted on the defensive and not as an aggressor.

7. Same—

A person is an aggressor if he enters the fight willingly in the sense of voluntarily and without lawful excuse.

3. Assault § 14b—

The facts and circumstances surrounding the assault in this case, with defendant's testimony that as prosecuting witness opened the door of his cab and attempted to come on him with a tire tool, defendant pulled out his knife, opened it, and jumped out of his truck and met prosecuting witness in the street, *is held* to show that defendant entered the fight voluntarily and without lawful excuse, and therefore there was no error in the refusal of the trial judge to submit to the jury defendant's plea of self-defense.

APPEAL by defendant from *Olive, Special Judge,* at 17 March, 1947, Extra Criminal Term of MECKLENBURG.

Criminal prosecution upon indictment charging that defendant and another "unlawfully, willfully, maliciously and feloniously with intent to kill, did assault, beat and wound one Clyde Bolton with a deadly weapon, to wit, a certain knife, to the great damage and serious injury of said Clyde Bolton, which injury did not result in the death of the said Clyde Bolton, contrary to the statute," etc.

The evidence offered by the State in the trial court tends to show substantially this account of the pertinent particulars of the difficulty between defendant and one Clyde Bolton, a taxi driver. It took place on 10 March, 1947, Monday morning between the hours of one and two o'clock, on Graham Street, just north of the intersection between that street, which runs in north-south direction, and Trade Street, which runs in an east-west direction, in the city of Charlotte, N. C. Clyde Bolton, traveling in his taxicab east on West Trade Street, and reaching said intersection, made a left turn into North Graham Street. A truck driven by defendant backed up into North Graham Street to permit the Bolton taxicab to pass on through the intersection into North Graham Street. As the taxicab passed the truck Bolton hearing someone call out "Cab," stopped the taxicab just a few feet into North Graham Street. Defendant got out of the truck and came up to the taxicab, took hold of the left front door and jerked it open and said to Bolton, "You white s.o.b.," according to Bolton, or "You white s.o.b. I'll kill you," according to passenger in the taxicab, and stabbed Bolton in the left upper arm with a knife. Whereupon, Bolton turned in his seat and kicked at defendant in order to keep defendant "off of him," and defendant then cut Bolton again by slashing him with the knife across the upper left arm. Bolton had nothing in hand then, but got out of the taxicab and turned around and reached under the front seat for a tire tool, and as he did so, defendant cut him again across the left side of the lower back, along the belt line—saying, "You G—d— s.o.b., I'll lynch you here in the street." The witnesses for the State differed in testimony as to whether Bolton hit one of defendants. One witness testified that Bolton attempted to keep defendant "off of him with the tire tool, but at no time did he hit . . .

defendant." Another testified that he saw Bolton "beating one of the defendants over the head with the tire iron." To sew up the wounds on Bolton, six stitches were taken in his back and ten stitches in his left arm. The knife and tire iron were taken by the police. Defendants, through their counsel, requested the production of the knife and tire iron, and, not being produced, defendants objected to any reference thereto by the witnesses. Objection overruled. Exception.

Defendant, reserving exception to denial of his motion for judgment as of nonsuit, and as witness for himself, gave this version: That as his truck entered Trade Street, Clyde Bolton rapidly drove his cab, going east on Trade Street, and suddenly started to turn into Graham Street, and if he, defendant, had not pulled his truck sharply to the left, the taxi would have run into him and damaged the truck or the taxi or both; that the taxi ran on around the truck and into Graham Street and stopped; that he, defendant, had to back his loaded truck back into North Graham Street, so as to straighten the truck to go on across; that as he backed into Graham Street to go across Trade, his engine choked and caused him to stop; that as soon as his engine choked down, Bolton got out of his cab, opening the cab door on the side next to the truck, with a tire iron in his hand, and said: "You tried to wreck my cab, you black s.o.b.," and as Bolton opened the door and attempted to come on him with the tire iron, he, defendant, pulled out his knife, opened it, and jumped out of his truck and met Bolton in the street; that Bolton drew the tire iron on him and was in the act of coming down on his, defendant's head, when defendant grabbed with one hand the upraised arm of Bolton, and cut Bolton several times on the shoulder with a small knife in the other. Then being asked on cross-examination whether he fought willingly, defendant said: "Yes, but I fought in my own self-defense. He was coming on me with a tire iron and threatening to kill me."

Defendant renewed motion for judgment as of nonsuit. Denied. Exception.

There is no exception to the charge of the court as given. However, the court declined, in response to request of defendant, in apt time and in open court, to charge the jury upon the right of defendant to self-defense, under the evidence,—stating that there is no evidence of self-defense. Defendant excepted.

Verdict: The defendant, Richard Randolph, guilty as charged in the bill of indictment.

Judgment: Imprisonment for a period of six months, etc., pronounced.

Defendant named appeals to Supreme Court and assigns error.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

Thaddeus A. Adams for defendant, appellant.

WINBORNE, J. The brief of defendant, appellant, as we understand it, assigns error in four respects in the trial court: I. Denial of his motion in arrest of Judgment. II. Admitting testimony as to the use of the alleged deadly weapon, "a certain knife," without requiring the production of it in court. III. Denial of his motions for judgment as of nonsuit. IV. Refusal to submit to the jury his plea of self-defense.

In connection with these: The bill of indictment against defendant appellant is founded on the statute, G. S., 14-32, which provides in pertinent part, that "any person who assaults another with a deadly weapon with intent to kill and inflicts serious injury not resulting in death, shall be guilty of a felony, etc."

I. Defendant, appellant, bases his motion in arrest of judgment upon the ground that the bill of indictment is fatally defective in that the only description of the deadly weapon therein alleged is "a certain knife." The exception to denial of the motion is untenable. The bill of indictment, as it appears in the record, follows substantially the language of the statute as to the essential elements. And where this is done, the bill of indictment, in conformance with the rule ordinarily applied in the decisions of this Court, meets the requirements of law. *S. v. Gibson,* 221 N. C., 252, 20 S. E. (2d), 51; *S. v. Jackson,* 218 N. C., 373, 11 S. E. (2d), 147; *S. v. Cole,* 202 N. C., 592, 163 S. E., 594, and numerous other cases.

II. As to this assignment: We know of no rule of law, and counsel for defendant, appellant, cites none, that requires the production of the alleged deadly weapon on the trial of a criminal prosecution for an assault with a deadly weapon with intent to kill, etc., as a condition on which depends the competency and admissibility of testimony as to the use made of the weapon. Indeed, this Court recognizes that the weapon may not be produced. We find this in *S. v. Collins,* 30 N. C., 407, in the following declaration of pertinent principle: "Whether the instrument used was such as is described by the witnesses, where it is not produced, or, if produced, whether it was the one used, are questions of fact, but these ascertained, its character is pronounced by the law." Moreover, the actual effects produced by the weapon may aid in determining its character, and in showing that the person using it ought to be aware of the danger of thus using it. *S. v. West,* 51 N. C., 505.

III. While the record discloses that exceptions were taken to the denial of defendant's motions for judgment as of nonsuit, and that they are incorporated in the assignments of error, they are not stated in defendant's brief as the subject of any question involved on this appeal. Nor are they discussed as such in the brief,—unless, perchance, the statement therein that "the effect of the use of the knife, as testified to by the prosecuting witness and his own conduct and condition immediately

thereafter, are not sufficient to establish the fact or to allow the jury to infer that the knife used was a deadly weapon,"—was intended as argument on these exceptions. "Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authorities cited, will be taken as abandoned by him." Rule 28 of The Rules of Practice in the Supreme Court of North Carolina, 221 N. C., 544. Nevertheless, this Court, speaking of a situation where the evidence failed to detail the size and character of the weapon used, has declared in *S. v. Watkins,* 200 N. C., 692, 158 S. E., 393, that "any instrument which is likely to produce death or great bodily harm under the circumstances of its use, is properly denominated a deadly weapon. *S. v. Craton,* 28 N. C., 165, at page 179. But where it may or may not be likely to produce such results, according to the manner of its use on the part of the body at which the blow is aimed, its alleged deadly character is one of fact to be determined by the jury. *S. v. West,* 51 N. C., 505." To like effect, quotations from, and citation of other cases follow. And it may not be cause for surprise that the jury found a knife, which when slashed by defendant across the upper arm and lower back, along the belt line, of the assailed, produced cuts requiring sixteen inches in all—is "a weapon likely to produce death or great bodily harm."

IV. As to defendant's plea of self-defense: The surrounding facts and circumstances, and not his simple belief, constitute the determining factors as to whether he acted on the defensive, and not as an aggressive participant in the fight, *S. v. Harrell,* 107 N. C., 944, 12 S. E., 439, that is, whether he entered the fight willingly in the sense of voluntarily and without lawful excuse. *S. v. Crisp,* 170 N. C., 785, 87 S. E., 511. In this respect all the evidence shows that the cab of Bolton was on one side of the street, and the truck operated by defendant, on the other. And, taking defendant's version "as Bolton opened the door and attempted to come on him with the tire iron, the defendant . . . pulled out his knife, opened it, and jumped out of his truck and met Bolton in the street." In the light of this admission, it is clear that he entered the fight voluntarily and without lawful excuse. Hence, there is no error in the refusal of the trial judge to submit this plea of self-defense to the jury.

In the trial below, we find

No error.

ELBIA CAMP SIMMONS v. G. T. SIMMONS.

(Filed 26 November, 1947.)

1. Process § 7—

Averment in the affidavit for service by publication that plaintiff has a "good" cause of action is addressed to the "satisfaction" of the issuing court and is to be determined upon the trial on the merits, and alleged falsity in the averment does not invalidate the order for service by publication or subject the judgment rendered to attack on the grounds of want of jurisdiction.

2. Same—

Averment in the affidavit that "defendant . . . after diligent inquiry cannot be found in the State of North Carolina" is in substantial compliance with the statute and supports an order for service by publication. G. S., 1-98.

3. Judgments § 25—

This action was instituted to set aside a divorce decree obtained on service by publication. Plaintiff alleged that the averments in the affidavit for service by publication that affiant had a good cause of action and that the facts therein alleged as constituting grounds for divorce had existed to affiant's knowledge, were false. *Held:* The remedy for the defects alleged is by motion in the original cause, and defendant's demurrer to the independent action brought in another county was properly sustained.

4. Same—

An independent action, even on the grounds of fraud, may be treated as a *motion in the cause* if brought in the county where judgment was rendered, but not if brought in another county.

5. Same—

Allegations that in defendant's prior action for divorce he testified falsely that the parties had lived separately and apart more than two years prior to the institution of the action, and that he knew of the falsity of such testimony, charge intrinsic fraud, and the remedy to attack the judgment is by motion in the cause and not by independent action.

PLAINTIFF'S appeal from *Pittman, J.*, at May Term, 1947, of STANLY.

This action was brought by the plaintiff to vacate a judgment of absolute divorce rendered against her in a former action by her husband, the present defendant, instituted and heard in Anson County. It comes here upon appeal of the plaintiff from an adverse judgment on defendant's demurrer to the jurisdiction of the court. The judgment is assailed on the ground that it was procured by the plaintiff in that action by his own fraud in the following particulars: (a) That in his affidavit to procure notice by publication he falsely and fraudulently swore that he had a good cause of action for absolute divorce on the ground of two years separation, and that the defendant could not be found in Anson County or

in the State of North Carolina after diligent inquiry, and that her whereabouts was unknown to him; (b) that the plaintiff in his affidavit accompanying and verifying the complaint, falsely represented that the facts therein stated were true and that he had known "the facts . . . alleged for absolute divorce for more than six months prior to the commencement of the action"; and (c) that the then plaintiff testified falsely and fraudulently upon the hearing of the cause before Judge Clement and a jury at November Term, 1945, of Anson Superior Court that he and the defendant therein (the present plaintiff) had lived separate and apart for more than two years prior to the commencement of the action, whereas, he well knew the falsity of such statement, and knew that they had, within the said two-year period, lived together as man and wife.

In addition to these charges of fraud the plaintiff attacks the validity of the order of publication for that it does not state, in the language of the statute, that the defendant "cannot, after due diligence be found in the state," or any equivalent statement. The statement found in the affidavit reads as follows: "That the defendant, after diligent inquiry cannot be found in the State of North Carolina."

The defendant demurred to the jurisdiction of the court to entertain an independent action upon the grounds asserted, which was sustained. From the ensuing order dismissing the case plaintiff appealed.

Morton & Williams for plaintiff, appellant.

R. L. Smith & Son for defendant, appellee.

SEAWELL, J. To avoid confusing definitions which may or may not be controlling in plaintiff's selection of an available remedy, we must turn to applicable precedents and established rules of practice in our own jurisdictions. Guided by these we are of the opinion that the plaintiff in this action must seek her remedy by motion in the cause in Anson County, where the proceeding was had and the judgment assailed was rendered, rather than by independent suit in Stanly County.

Certainly the affidavit on which the order of service by publication is made is jurisdictional, and the omission therefrom of those averments on which service of notice by publication is substituted for personal service would be fatal to the proceeding, G. S., 1-98; *Rodriguez v. Rodriguez,* 224 N. C., 275, 29 S. E. (2d), 901; *Groce v. Groce,* 214 N. C., 398, 199 S. E., 388. But we have never seen the statement in the affidavit that the applicant has a "good" cause of action, of a certain character, so classed. Addressed as it is to the issuing court and its "satisfaction," its truth or falsity must abide the trial on their merits, and any other holding would result in authority for the defendant, at any time, at his or her pleasure, to demand a retrial in the vestibule of the court rather than

at the bar. Besides, neither G. S., 1-98, nor G. S., 1-99, requires the applicant to swear to the merits of his cause of action—only to say that he has one and the purpose thereof.

The appellant, as we take it, relies more strongly on the objection that the affidavit does not comply with the statute, G. S., 1-98, in respect to the diligence used in the effort to secure personal service; citing *Rodriguez v. Rodriguez, supra,* in support of her position. The language employed in the statute is as follows:

> "Where the person on whom the service of the summons is to be made cannot, after due diligence, be found in the state, and that fact appears by affidavit to the satisfaction of the court . . ."

The language of the affidavit reads:

> "That the defendant . . . after diligent inquiry cannot be found in the State of North Carolina."

While it is always best to use the form suggested in the statute, the language used seems to be identical in meaning, or substantially so, indicating the same degree of diligence. Words and Phrases, Vol. 13, p. 476; *Id.,* p. 484.

In *Rodriguez v. Rodriguez, supra,* the affidavit simply stated "that the plaintiff after due diligence has been unable to locate the defendant and that her whereabouts is not known." Whether his diligence was confined to his own town or neighborhood, or what territory he perused, did not appear. Under the statute it should have been statewide. It is noteworthy that the present plaintiff, simultaneously with this attack, states that she was at the time in the State of California.

However that may be, we are considering only the question of procedure and the limitations which the law and the practice have set upon the choice of remedies—not what may be the ultimate result of a properly directed attack. There can be no question that for an alleged defect of this kind the remedy is by motion in the original cause, since there is no equitable principle involved. *Fowler v. Fowler,* 190 N. C., 536, 130 S. E., 315; *Long v. Rockingham,* 187 N. C., 199, 121 S. E., 461; *Craddock v. Brinkley,* 177 N. C., 125, 127, 98 S. E., 280. An independent action, even on grounds of fraud, may be treated as a motion in the cause if brought in the county where the judgment was rendered (*Fowler v. Fowler, supra; Craddock v. Brinkley, supra,* p. 127), but not if the action is brought in another county.

We turn to the other allegations of fraud.

The fact that the plaintiff's attack is grounded in fraud does not necessarily give her the right to pursue it in an independent action. Such

was the case in *Young v. Young,* 225 N. C., 340, 341, 34 S. E. (2d), 154; and *Woodruff v. Woodruff,* 215 N. C., 685, 3 S. E. (2d), 5, cases parallel with the instant case in factual situation, and involving like jurisdictional features of the proceeding. The fraud charged was found sufficient to vitiate the proceeding and invalidate the judgment, but the cases hold that the remedy must be by motion in the cause. In both these cases, as here, there was an attack on the affidavit accompanying the complaint as fraudulent in particulars distinctly jurisdictional.

The plaintiff cannot avail herself of intrinsic fraud consisting of perjury upon the trial, under the facts of the case. *Horne v. Edwards,* 215 N. C., 622, 3 S. E. (2d), 1. It is true that a judgment void upon its face, may be attacked anywhere, at any time, directly or collaterally; and an independent action may be maintained for fraud which is *extrinsic and collateral;* but the fraud alleged by the plaintiff is not of that character. *Young v. Young, supra; Woodruff v. Woodruff, supra.* The judgment of the court below dismissing the action is

Affirmed.

MRS. POTA LAMPROS v. F. G. CHIPLEY AND MRS. F. G. CHIPLEY, TRADING AND DOING BUSINESS AS CHIPLEY REALTY COMPANY, A PARTNERSHIP.

(Filed 26 November, 1947.)

Parties § 3—

In an action by the purchaser against the real estate brokers to recover earnest money paid on the ground that the purchaser was induced to execute the contract by the brokers' fraudulent misrepresentations as to the property, in which the brokers by cross-action allege breach of the contract of purchase in which they had an interest for the amount of their commission in a sum less than the earnest money paid, with consequent damage to them and the seller, and that they were holding the earnest money to protect their interest and the interest of the seller, *held:* The seller is a necessary party to a complete determination of the controversy, and denial of defendant brokers' motion for his joinder as additional party defendant is reversible error. G. S., 1-73.

APPEAL by defendants from *Patton, Special Judge,* at 10 March, 1947, Extra Term, of MECKLENBURG.

Civil action to recover damages allegedly resulting from fraudulent representation upon which contract between D. L. Morrell, seller, and plaintiff, purchaser, was made for sale and purchase of a certain house and lot at 428 Hermitage Court in the city of Charlotte, North Carolina, —the property of D. L. Morrell, heard upon motion of defendants, made in February, 1947, for an order to make D. L. Morrell a party defendant

to this action, and that he be served with summons and with copies of the original complaint, the original answer and cross-action, and a copy of the amended cross-action.

The terms of the contract, in so far as here pertinent, are these:

"Through Chipley Realty Company, agent, D. L. Morrell, has this day sold and Mrs. D. J. Lampros has this day purchased that certain parcel of property known as 428 Hermitage Court at price of Twelve Thousand Five Hundred Dollars, upon the following terms:

$ 1,000—this day deposited with agent
11,500—upon delivery of title

$ 12,500

"It is agreed that Seller shall furnish good and marketable title to said property and Purchaser shall have ten days in which to investigate same, unless an extension shall be agreed upon. In the event the title is objected to, the Seller shall be furnished with a written statement of all objections and be allowed a reasonable time thereafter in which to furnish a valid title.

"It is agreed that such papers as may be legally necessary to carry out the terms of this contract shall be executed by the principals to said contract and delivered to said agent as soon as the Purchaser has satisfied himself as to the validity of the title to said property.

"Special Stipulations: . . .

"The Seller agrees to pay Chipley Realty Company a fee of 5% or $625 Dollars when sale is closed . . .

"The above proposition is hereby accepted, this 24th day of May, 1946.

(Seller) D. L. MORRELL (Seal)
(Purchaser) POTA LAMPROS (Seal)
(Witness) MARY LAMPROS."

Plaintiff alleges in her complaint, in summary, these facts: That she was induced to enter into the above contract, and to deposit "in trust" with defendants $1,000 "as a binder," and "as evidence of good faith" on her part, and when sale is completed to be applied as a credit on purchase price, upon certain material representation made to her by defendants in respect to the house; that the representations so made to her were false and fraudulent, and calculated to deceive, and did deceive her "to her hurt and damage"; that upon learning of the fraud so imposed upon her, she demanded of defendants the return of the $1,000 deposit, and defendants refused to return same and wrongfully and fraudulently con-

tinue to retain same; and, that by reason of matters and things alleged, plaintiff is entitled to recover of defendants the sum of $1,000.

And plaintiff also alleges incidentally that D. L. Morrell, the owner of the said property, has sold and conveyed the same to another.

Defendants, answering the complaint, admit that they refused to comply with plaintiff's demand for the return of the $1,000 deposited with them by her, but deny any wrongdoing in any respect on their part.

Defendants, by way of further answer and defense, and as a cross-action against plaintiff, and in bar of her right to recover in this action, aver: (1) That plaintiff refused to accept deed from D. L. Morrell in accordance with the contract, when duly tendered to her, and refused to carry out her agreement to purchase; (2) that defendants had contract with D. L. Morrell, the owner, for the sale of the property for a period of thirty days only from 18 May, 1946; and thereafter D. L. Morrell sold the property to another for $875 less than plaintiff had agreed to pay—he, thereby, sustaining loss in the sum of $875.00; (3) that they, the defendants, have a beneficial interest in the contract between plaintiff and Morrell to the extent of $625 as commissions,—since they secured a *bona fide* purchaser for said property, and had earned their commissions, but had been prevented from collecting same by the willful and wrongful breach of the contract by plaintiff, to their damage in said amount; (4) that they "have retained the $1,000 in good faith to protect their interest and the interest of the seller," and are paying same to Clerk of Superior Court "to be retained by him subject to the orders of the Court hereinafter signed," and (5) that in order that D. L. Morrell may be advised of his right to interplead or to take such other action as his judgment dictates to protect his interest in said sum of $1,000, "a copy of this answer be served upon D. L. Morrell." Upon these averments, defendants pray that the complaint "be dismissed" and that they recover of plaintiff the sum of $625.00 and costs to be taxed.

And the record shows that the sheriff delivered a copy of the answer to "D. C. Morrell."

When the motion of defendants to make D. L. Morrell, the owner of the property, a party defendant, came on to be heard, and being heard, the court finding as facts that the allegations and averments of the parties are substantially as set out above; that defendants have paid into court the $1,000 deposit to await the termination of this action; that defendants caused a copy of their answer to be served upon D. L. Morrell, but that he has made no appearance in the case; that the case was calendared for trial in Superior Court in the December Term, 1946, but was not reached for trial and the case has remained on the calendar for trial continuously since said term; and that on ..... February, 1947, defendants, through their attorneys, filed motion in the cause praying that

D. L. Morrell be made a party defendant in the action and that he be served with summons and cross-action,—copy of which cross-action is attached. (It may be noted here that the amended cross-action is against both plaintiff and D. L. Morrell, and the averments are substantially the same as the allegations of the complaint in *Chipley v. Morrell and Lampros, post,* 240. And the Judge Presiding, being of opinion that D. L. Morrell is neither a necessary nor a proper party to this action, and that defendants' rights against Morrell are in an independent action, and that he should not be made a party to this action,—"certainly at this late date,"—entered an order denying the motion to make him a party.

Defendants appeal therefrom to Supreme Court, and assign error.

McDougle, Ervin, Fairley & Horack for plaintiff, appellee.
Jones & Small for defendants, appellants.

WINBORNE, J. Can a complete determination of the controversy at issue in this action be made without the presence of D. L. Morrell, the seller of the property to which his contract with plaintiff relates? If not, the court must make him a party to the action. G. S., 1-73.

From the pleadings, it appears (1) that the contract itself, made through defendants, sets out the amounts which make up the purchase price, and when same shall be paid,—specifying "$1,000 this day deposited with agent"; (2) that defendants received the $1,000 from plaintiff "as deposit on 428 Hermitage Court," and "as a binder of the foregoing contract, and as evidence of good faith on the part of the purchaser"; (3) that defendants allege breach of contract by plaintiff, with consequent damages to D. L. Morrell and to defendants; (4) that defendants have retained the $1,000 "to protect their interest and the interest of the seller"; and (5) that the $1,000 is paid to Clerk of Superior Court to abide the orders of the Court in this action.

In the light of these allegations, we are of opinion that the controversy at issue in this action cannot be completely determined without the presence of D. L. Morrell. The answer to the issue raised by defendants' denial of the allegations of fraud set out in the complaint will determine the disposition of the $1,000 earnest money. If the jury should find that plaintiff was induced to enter into the contract with D. L. Morrell for the purchase of the property by reason of false and fraudulent representations made to her by defendants, as alleged in the complaint, she would be entitled to the return of the earnest money. But if the jury should find that no such fraud was perpetrated upon her, plaintiff would not be entitled to the return of the money. In either case it would seem that such rights as D. L. Morrell, the seller, may have in respect to the earnest money, would be affected. Hence the order below denying motion for an

order to make him party defendant, and to serve him with process, is improvident and is

Reversed.

Defendants' demurrer *ore tenus* to complaint entered in this Court is not sustained.

F. G. CHIPLEY AND MRS. LEOLA P. CHIPLEY, PARTNERS, T/A CHIPLEY REALTY COMPANY, v. D. L. MORRELL AND MRS. POTA LAMPROS.

(Filed 26 November, 1947.)

Brokers § 13: Contracts § 19—

A real estate broker may maintain an action against the purchaser for alleged wrongful breach of the contract of sale even though the contract stipulates that the seller agrees to pay the commission and there is no contractual relationship between the broker and the purchaser, since the broker has a beneficial interest in the contract to the extent of his commissions.

APPEAL by plaintiffs from *Edmundson, Special Judge,* at 6 October, 1947, Extra Term, of MECKLENBURG.

Civil action to recover of defendant D. L. Morrell $625 as broker's commission under contract for sale of certain real estate, to defendant Mrs. Pota Lampros, and of defendant Mrs. Pota Lampros $625 as damages for breach of contract to purchase said real estate from defendant D. L. Morrell, and to declare same a lien upon the $1,000 earnest money paid by defendant Mrs. Pota Lampros, heard upon demurrer to complaint entered by defendant Mrs. Pota Lampros.

This action relates to the same contract of sale and purchase of real estate that is involved in and as set out in *Lampros v. Chipley, ante,* 236.

In connection therewith, plaintiffs here allege in their complaint substantially these facts: That, acting under an exclusive agency given to them by D. L. Morrell, they caused to be executed on 24 May, 1946, a valid and binding contract for the sale by defendant D. L. Morrell to defendant Mrs. Pota Lampros of a certain house and lot known as 428 Hermitage Court in the city of Charlotte, North Carolina, at price of $12,500,—with deposit of $1,000 as a binder, and providing that "the seller agrees to pay the Chipley Realty Company a fee of 5% or $625 Dollars when sale is closed"; that on 25 May, 1946, plaintiffs caused to be prepared, executed and acknowledged a deed from D. L. Morrell and his wife to defendant Lampros, which they tendered to defendant Lampros; that she refused to accept the deed, and pay the balance of pur-

chase price and carry out said contract of 24 May, 1946; that at times therein mentioned defendant Lampros was financially able to purchase said property and perform said contract; that on 16 August, 1946, defendant Morrell sold said property to others than defendant Lampros; that for and on account of services rendered as therein set out defendant D. L. Morrell is indebted to plaintiffs in the sum of $625 for commissions; that defendant, Mrs. Pota Lampros, willfully and wrongfully breached said contract of 24 May, 1946, and thereby damaged plaintiffs in the sum of $625; that plaintiffs are entitled to a lien upon the earnest money of $1,000, referred to in said contract, for the satisfaction of any judgment rendered herein in favor of them; and that the said $1,000 has been deposited with Clerk of Superior Court of Mecklenburg County, N. C., and is subject to the orders of the court in this action.

Defendant, Mrs. Pota Lampros, demurred to the complaint, on the ground that same does not allege a cause of action against her in that: (A) Under the allegations of the complaint, plaintiffs had no contract whatever with her, and if they have been damaged at all, it has been by defendant D. L. Morrell, and not by her. (B) The contract relied upon by plaintiffs, which is incorporated into the complaint by reference specifically states, "The seller agrees to pay the Chipley Realty Company a fee of five per cent of $625 when sale is closed," and thus the sole party obligated to pay any commissions to the plaintiffs in the transaction alleged is defendant, D. L. Morrell.

Upon hearing of demurrer, the court, being of opinion that same should be sustained, accordingly entered judgment to that effect.

Plaintiffs appeal therefrom to Supreme Court and assign error.

Jones & Small for plaintiffs, appellants.

McDougle, Ervin, Fairley & Horack for defendant, appellee.

WINBORNE, J. The challenge to the sufficiency of the allegations of the complaint on the ground upon which demurrer is based cannot be sustained.

While plaintiffs are not parties to the contract between defendants, they are beneficiaries under it to the extent of their commissions. And if the contract was not carried out by reason of wrongful act of *feme* defendant, plaintiffs would have a cause of action against her for recovery of damages.

It is well settled that where a contract between parties is made for the benefit of a third party, the latter is entitled to maintain an action for its breach. *Boone v. Boone,* 217 N. C., 722, 9 S. E. (2d), 383. See also *Gorrell v. Water Supply Co.,* 124 N. C., 328, 32 S. E., 720; *Parlier v. Miller,* 186 N. C., 501, 119 S. E., 898; *Land Bank v. Assurance Co.,* 188

N. C., 747, 125 S. E., 631; *Thayer v. Thayer,* 189 N. C., 502, 127 S. E., 553. See also *Ins. Co. v. Stadiem,* 223 N. C., 49, 25 S. E. (2d), 202.

While it is true the interest of the plaintiffs in the subject contract may be incidental rather than basic, or secondary rather than primary, nevertheless it specifically provides for their commissions, and we think the principle just stated applicable to the extent of their interest therein. *Jones v. Realty Co.,* 226 N. C., 303, 37 S. E. (2d), 906.

We make no intimation as to what the facts are. Yet most likely the controversy will be solved, on all sides, by the finding of the jury as to the issue of fraud raised in *Lampros v. Chipley, ante,* 236.

The order below sustaining the demurrer is

Reversed.

CHARLES B. NOE, TRADING AND DOING BUSINESS AS NATIONAL BEAUTY AND BARBER SUPPLY COMPANY, AND CHARLES B. NOE, TRADING AND DOING BUSINESS AS NATIONAL SALES COMPANY, v. J. A. MCDEVITT AND ELLIOTT'S BEAUTY SUPPLY COMPANY, INC.

(Filed 26 November, 1947.)

1. Contracts § 7a—

A contract of employment of a salesman stipulating that the employee should not work as salesman for a competitor for five years after its termination within the States of North and South Carolina, *is held,* upon evidence tending to show that the employer operated only in eastern North Carolina, too extensive in territory for the reasonable protection of plaintiff's business, and is void as against public policy.

2. Same—

Where the facts are established, the reasonableness of a covenant restraining an employee from working in competition with the employer after termination of the contract, is a matter for the court.

3. Same—

Where in a covenant in a contract of employment restraining the employee from engaging in employment in competition with his employer for a certain period of time after termination of the employment, the territory proscribed is too extensive for the reasonable protection of the employer, the entire covenant must fail, since the court cannot make a new covenant for the parties by restricting the territory.

4. Same—

In a suit for injunction the burden is on plaintiff employer to show that the covenant restraining the employee from entering other employment in competition with the employer in proscribed territory for a stipulated time after termination of the employment, is reasonable.

PLAINTIFF's appeal from *Burney, J.*, in Chambers, 9 May, 1947. From NEW HANOVER.

The plaintiff, trading as National Beauty and Barber Supply Co., and also as National Sales Co., was engaged in the business of sale and distribution of equipment used in the operation of beauty "salons" and with the sale and distribution of chemicals, soaps, perfumes and other supplies used in the operation and conduct of beauty parlors and kindred activities. Sometime in August, 1945, the plaintiff employed the defendant McDevitt as a "route salesman and solicitor" in this business in the States of North Carolina and South Carolina and "particularly throughout the eastern parts of said States." The contract was terminable by either party upon notice.

Pertinent to the controversy now before the Court, the contract contains the following provisions:

> "13—The Salesman agrees that, upon the termination of this contract of employment he will not own or operate any company or business selling the same type of merchandise as that sold by the Companies within the stipulated territories as herein set out, for a period of five (5) years, and that he will not contact any account handling this same type of merchandise, either in person, by writing, or by telephone, and by the acceptance of employment under this contract, he thereby binds himself to these stipulations and agreements."

The defendant entered into the duties of his employment and remained with the plaintiff until about 5 April, 1947. The defendant gave notice as required by the contract and withdrew from the connection. Thereafter the defendant McDevitt entered into a contract of employment with Elliott's Beauty Supply Co., Inc., which is engaged in sale and distribution of products identical with those sold by the plaintiff herein, and is engaged in soliciting business from those engaged in the operation of beauty shops within North Carolina and South Carolina, including customers of the plaintiff.

It is specified in the complaint:

> "That during the course of his employment with the plaintiff, the defendant McDevitt acquired valuable trade information concerning the plaintiff's business, such as a list of the plaintiff's customers, the price that the plaintiff charged for his supplies, the manner in which the plaintiff's business was conducted, and other valuable trade information and, in violation of his agreement with the plaintiff, is now actively engaged in soliciting business for a competitor from the plaintiff's customers, and is doing vast and irreparable injury to the plaintiff's business."

It is further averred that the defendant McDevitt is insolvent and that his service with his codefendant will do plaintiff large and heavy damages if he is allowed to continue. It is averred that the defendant Elliott's Beauty Supply Co., Inc., knew of the contract existing between plaintiff and McDevitt and conspired with him to violate the agreement and enter its employment.

Plaintiff prays judgment "that the defendant J. A. McDevitt be restrained and enjoined for a period of five years from the 5th day of April, 1947, from working for himself, for the defendant Elliott's Beauty Supply Co., Inc., or for any other person, firm or corporation engaged in the same or in a similar business to that of the plaintiff in the territory specifically set out in the contract of employment herein alleged, to wit, in the States of North Carolina and South Carolina," and that the defendant Elliott's Beauty Supply Co., Inc., be restrained from employing him.

The defendant answered, setting up the defense that the restrictive provisions above quoted are contrary to public policy and void as an unreasonable restraint of employment.

Plaintiff asked that the defendants be temporarily restrained and the matter came up for a hearing before Judge Burney in Chambers at Wilmington on an order to show cause issued by Judge Williams. At this hearing the plaintiff's complaint and the defendant's answer were offered as evidence upon the trial, the plaintiff introducing no further evidence. After consideration of these documents and the argument of counsel, the judge found the facts, including the following, pertinent to decision: That McDevitt, during his employment by plaintiff called upon various persons, firms and corporations in eastern North Carolina, selling beauty parlor equipment, products and supplies, thereby learning who plaintiff's customers were and their credit and financial ability; that after he quit the service of plaintiff he entered the employment of his codefendant Elliott's Beauty Supply Co., a competitor of plaintiff selling a similar type of merchandise, and since his said employment with his codefendant has been calling on customers and accounts that he had theretofore contacted as employee of plaintiff in the eastern section of North Carolina. And, further:

> "That the territory embraced in said contract, that said defendant J. A. McDevitt agreed as hereinbefore set out, not to own or operate a business in or contact accounts of the plaintiff, embraces the entire States of North and South Carolina, and the Court finds as a fact that said area is unreasonable in which an employer could by contract restrain an employee of earning a livelihood in, as a salesman selling goods, wares and merchandise of the type and kind handled by the plaintiff, and that by reason of said contract embracing all

the territory of both North and South Carolina, the said contract is void as against public policy."

The judgment concludes:

"Upon foregoing facts, the Court is of the opinion and so holds as a matter of law that the said contract hereinbefore referred to, a copy of which is attached hereto, is void and against public policy."

The court thereupon dissolved the restraining order and dismissed the action. The plaintiff appealed, assigning as error "His Honor's ruling and order dismissing said action and denying the plaintiff's prayer for a restraining order, as shown by Exception No. 1." The exception was to the signing of the judgment.

J. H. Ferguson for plaintiff, appellant.

E. C. Brooks, Jr., for defendants, appellees.

SEAWELL, J. Judge Burney predicated his judgment denying plaintiff injunctive relief and dismissing his action on a holding that under the evidence the territory named in the contract—North Carolina and South Carolina—was too extensive to come within the reasonable requirement of plaintiff's protection, supposing him to be entitled to such relief anywhere upon the facts found, and was an unreasonable restraint on employment. We concur in this conclusion. Giving the plaintiff the benefit of very generous inferences, while he may have shown the conduct of a business to some extent in eastern North Carolina, he has not definitely shown any clientele throughout the much broader territory here involved such as would correlate the protection sought with any need of his business. *Comfort Spring Corp. v. Burroughs,* 217 N. C., 658, 9 S. E. (2d), 473; *cp. Moskins Bros. v. Swartzberg,* 199 N. C., 539, 155 S. E., 154, cited by appellant. Where the facts are established, reasonableness of restraint is a matter for the court. The court cannot by splitting up the territory make a new contract for the parties—it must stand or fall integrally.

Since the contract is in partial restraint of employment, the burden was on the plaintiff to establish its reasonableness and this he failed to do. *Kadis v. Britt,* 224 N. C., 154, 29 S. E. (2d), 543, 152 A. L. R., 405; Benjamin on Sale, Seventh Ed., p. 535; *ibid.,* p. 538.

Other features of the case which the plaintiff sought to present are fully discussed in *Kadis v. Britt, supra,* which in factual aspect closely parallels the case at bar, and we forbear needless repetition.

In view of the conclusion reached, it is unnecessary to discuss the status of the codefendant company.

The judgment of the Superior Court is

Affirmed.

IN RE WILL OF MARGARET CHATMAN.

(Filed 26 November, 1947.)

Wills § 17½: Courts § 14—

A caveat to the recordation of the exemplification of a will and the proceedings had in connection with its probate in another state, G. S., 31-27, alleging fraud in the procurement of the will and of its probate, is not subject to dismissal on the ground of want of jurisdiction of our court so far as it affects realty situate here, and when the caveat also challenges jurisdiction of the court of probate on the ground that testatrix was a resident of this State, there is no want of jurisdiction of the caveat proceedings in regard to personalty situate within this State.

APPEAL by movent, Agnes Cobb, from *Williams, J.*, at May Term, 1947, of NEW HANOVER.

Caveat with successive amendments to recordation of certified copy of will of Margaret Chatman and foreign certificate of probate, heard on motion to dismiss the caveat and amendments for want of jurisdiction.

The facts are these:

1. Margaret Chatman died in New Hanover County, this State, on 17 March, 1943, leaving her surviving a brother and a sister, residents of New Hanover County, and a brother and two sisters, residents of Sumter County, South Carolina.

2. About a week after her death, George W. Allen, Jr., was appointed administrator of her estate by the Clerk of the Superior Court of New Hanover County on the representation that she was a resident of the County and died without leaving a will, none having been discovered up to that time. She owned both real estate and personal property, situate in New Hanover County, at the time of her death.

3. Thereafter, on 8 May, 1943, a paper writing purporting to be the last will and testament of the deceased was found and delivered to Agnes Cobb, the executrix and beneficiary named therein. This instrument was dated 24 November, 1933, and in it the testatrix declares herself to be a resident of Sumter, S. C., "temporarily staying in Wilmington, N. C." She describes her beneficiary as "my beloved cousin and companion."

4. On 10 May, 1943, the above paper writing was probated in common form in the Probate Court of Sumter County, S. C., as the last will and

testament of Margaret Chatman, deceased; and on 27 May, 1943, an authenticated copy thereof, together with duly signed certificate of probate, was presented to the Clerk of the Superior Court of New Hanover County and ordered by him to be recorded as provided by G. S., 31-27.

5. Thereupon, George W. Allen, Jr., previously appointed administrator, was discharged; and ancillary letters testamentary were issued to Agnes Cobb under the above recordation.

6. Then, on 19 September, 1944, Lillie Newman, sister of the deceased, resident in New Hanover County, filed a caveat to the recordation of the certified copy of the will of Margaret Chatman and foreign certificate of probate, alleging fraud on the part of Agnes Cobb in procuring execution of the paper writing and order admitting it to probate in Sumter County, South Carolina. Two amended caveats were later filed, one signed by Leona Scott, sister of the deceased, and the other by Willie Newman, relation or interest not shown. In these it is alleged that Margaret Chatman was a resident of, and domiciled in, New Hanover County at the time of her death; that the South Carolina court was without jurisdiction to probate her will, and that a fraud was practiced on said court when it received the paper writing and admitted it to probate. The caveats were answered and charges of fraud denied by Agnes Cobb, first reserving the right, however, to interpose motion to dismiss the entire proceeding for want of jurisdiction.

The motion to dismiss was heard at the May Civil Term, New Hanover Superior Court, and overruled. From this ruling the propounder, Agnes Cobb, appeals, assigning errors.

Poisson, Campbell & Marshall and G. C. McIntire for propounder, appellant.

John D. Bellamy & Sons and Rodgers & Rodgers for caveators, appellees.

STACY, C. J. The record indicates: (1) apparent due probate of will of Margaret Chatman in Sumter County, South Carolina, (2) certified and authenticated copy or exemplification of such will and of the proceedings had in connection with the probate thereof, produced or exhibited before the Clerk of the Superior Court of New Hanover County, and (3) by him, allowed, filed and recorded in the same manner as if the original will had been produced and probated here in common form. G. S., 31-27; *Coble v. Coble,* 227 N. C., 547, 42 S. E. (2d), 898.

Then appears a caveat to the recordation of the exemplification of the will and the proceedings had in connection with its probate, the caveators alleging fraud in the procurement, both of the will and of its probate,

and specifically averring want of jurisdiction in the South Carolina court to entertain the application for the probate of the will.

It is clear from what was said in *McEwan v. Brown,* 176 N. C., 249, 97 S. E., 20, that the motion to dismiss the caveat was properly overruled in so far as it affects the real estate situate in New Hanover County. We are inclined to sustain the denial of the motion to dismiss as it affects the personal property in New Hanover County also, in view of the challenge to the jurisdiction of the South Carolina court to probate the will. 11 Am. Jur., 484; Anno. 13 A. L. R., 498.

The whole subject is discussed, with full citation of authorities, in *McEwan v. Brown, supra,* and little can be added to what was then written. There the demurrer to the complaint, treated in the nature of a caveat, was sustained as to the personalty and overruled as to the realty, but no challenge to the jurisdiction of the domiciliary probate court was made in that case. 13 A. L. R., 502.

The motion to dismiss the proceeding for want of jurisdiction was properly denied.

Affirmed.

IN RE LYON SWAMP DRAINAGE AND LEVEE DISTRICT.

(Filed 26 November, 1947.)

1. Drainage Districts § 4—

The statutes authorizing the creation, maintenance and improvements of drainage districts provide flexible procedure which may be modified and molded by decrees from time to time to promote the beneficial objects sought by the creation of the district, subject to the restrictions that there should be no material change or any change that would throw additional costs upon landowners except to the extent of benefit to them.

2. Same—

The correct procedure to secure additional authority for proper maintenance and improvements in a drainage district is by motion or petition in the original cause.

3. Same: Drainage Districts § 5—

Where proposed improvements and repairs will primarily benefit lands embraced in one section of a drainage district and would be of no substantial benefit to landowners in another section thereof, the drainage commissioners have power under statutory authority to issue bonds and make assessments applicable only to the section benefited. G. S., Chap. 156, Session Laws of 1947, Chap. 732.

APPEAL by C. S. Potter from *Burney, J.,* at Chambers, 18 September, 1947. From PENDER. Affirmed.

IN RE DRAINAGE DISTRICT.

Petition in the cause by the Board of Drainage Commissioners of Lyon Swamp Drainage and Levee District for authority to issue bonds and make assessments for improvement and maintenance of the canal in the District below what is known as the Vollers line.

Upon appeal from an order of the Clerk, the Resident Judge, at chambers, upon the record and the facts agreed, confirmed the order of the Clerk authorizing the issue of bonds and assessments for the purposes prayed for applicable to lands below the Vollers line, with provision that landowners above said line be allowed to drain water from their lands into the main canal without additional cost to them, but that, if they desired to extend the canal through their lands above the Vollers line, such extension to be at their own cost. C. S. Potter, the owner of lands within the District and below the Vollers line, excepted and appealed to this Court.

John S. Butler for C. S. Potter, appellant.

H. H. Clark for Lyon Swamp Drainage and Levee District, appellee.

DEVIN, J. The Lyon Swamp Drainage and Levee District came into being as a *quasi*-public corporation, by virtue of final decree in accordance with the provisions of the statutes then in force, 10 August, 1910. *Sanderlin v. Luken,* 152 N. C., 738, 68 S. E., 225. The District contains within its territorial boundaries a large body of land in Pender and Bladen Counties. Since its creation legal questions pertaining to this District have found their way to this Court, and decisions thereon will be found reported in *In re Lyon Swamp Drainage District,* 175 N. C., 270, 95 S. E., 485; *Drainage Commissioners v. Bordeaux,* 193 N. C., 627, 137 S. E., 716; and *Newton v. Chason,* 225 N. C., 204, 34 S. E. (2d), 70.

The statutes authorizing the creation, maintenance and improvement of drainage districts provide flexible procedure which may be modified and molded by decrees from time to time to promote the beneficial objects sought by the creation of the district (*Staton v. Staton,* 148 N. C., 490, 62 S. E., 596; *Adams v. Joyner,* 147 N. C., 77, 60 S. E., 725), "subject, however, to the restriction that there should be no material change or any change that would throw additional costs upon the other landowners except to the extent of benefit to them." *In re Lyon Swamp Drainage District, supra.* And the correct procedure to secure additional authority for improvements and proper maintenance is by motion or petition in the original cause. *Newton v. Chason,* 225 N. C., 204, 34 S. E. (2d), 70.

The question now presented by this appeal is whether the Drainage Commissioners have power to issue bonds and make assessments applicable to a designated portion of the lands embraced in the District. It seems that from the beginning the lands contained in the District have

been unofficially and by common consent and usage divided into two sections by a line known as the Vollers line, the necessity, character and benefits of drainage, and the improvements needed therein, being in some respects different in the two sections. Shortly after the formation of the District, bonds to provide funds for making improvements in drainage affecting only lands below the Vollers line were issued, and in due time paid and canceled. In 1918, upon petition, authority was granted for issue of bonds and assessments upon lands in the section above the Vollers line. *In re Lyon Swamp Drainage District,* 175 N. C., 270, 95 S. E., 485.

In the petition in the cause with which we are now concerned it was alleged that the improvements and repairs now thought necessary, with respect to the canal and control of flood waters, primarily affected lands below the Vollers line, and that these improvements would not be of substantial benefit to landowners above this line. The Clerk found the facts as alleged in the petition and made the decree accordingly. It was conceded that the proceedings incident to petitioners' motion were in all respects regular and in accordance with the provisions of the statutes. The only exception of appellant is based on the ground that the Commissioners of the District did not have authority to make the improvements contemplated within a part of the District and to impose the burden of expense thereof on lands below the Vollers line without requiring contribution from the owners of lands above that line. However, it appears from the facts agreed and from the findings of the Board of Viewers, approved and confirmed by the Clerk, that the improvement and maintenance of the canal in the lower section would be advantageous to land there located and would not be of substantial benefit to owners of lands above the Vollers line, and in the judgment provision is made that if owners of upper-lands desire extension of the canal through their lands they may do so at their own expense without additional cost to landowners below.

We note also that the General Assembly of North Carolina has given authority and validity to the issuance of bonds and the levying of assessments as herein decreed by Chap. 732, Session Laws 1947. This statute is based upon a declaration in the preamble of the facts substantially as found by the court below, and these facts are given legislative sanction as constituting sufficient grounds for the grant of power in the premises to the Board of Commissioners of the District.

We see no reason why this Court should deny to the Drainage Commissioners, petitioners here, the exercise of the authority conferred by this Act as well as by the General Statutes, Chapter 156, to make the improvements and to impose the burden of the expense thereof in accordance with the benefits to be derived. We think the bonds when issued and the

assessments to be made as decreed would constitute valid obligations, and that the judgment below should be upheld.

Judgment affirmed.

STATE v. GRANT RIDDLE AND EMORY RIDDLE.

(Filed 26 November, 1947.)

1. Homicide § 2: Criminal Law § 8—

Where the State's evidence tends to show that defendants were the aggressors and acted in concert in making an armed attack, it is immaterial which one of them fired the shot inflicting the fatal wound.

2. Homicide § 27f: Criminal Law § 53d—

Defendants introduced evidence that deceased was a man of violent character. *Held:* An instruction during the trial to the effect that such evidence was competent upon the plea of self-defense, without any instruction in the charge or elsewhere applying such evidence to the question of defendants' reasonable apprehension of death or great bodily harm from the attack which their evidence tended to show deceased had made on them, is insufficient to meet the requirements of G. S., 1-180, notwithstanding the absence of a request for special instructions.

DEVIN, J., dissenting.

BARNHILL, J., concurs in dissent.

DEFENDANTS' appeal from *Gwyn, J.*, at February Term, 1947, of MADISON.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

Calvin R. Edney and John H. McElroy for defendants, appellants.

SEAWELL, J. The defendants, and others not in the appeal, were each separately indicted for the murder of Andrew Hoyle. Since the evidence related to the same transaction the indictments were consolidated and heard together. The two appealing defendants were convicted—Grant Riddle of murder in the second degree, and Emory Riddle of manslaughter.

There are over 40 assignments of error in the voluminous record, and, since a new trial must be granted, we follow the rule to omit discussion of those matters not likely to recur on another hearing.

The occurrence resulting in the death of Hoyle took place near his house in the mountains of Madison County. There was an armed fight

in which Hoyle and a son, on the one part, and numerous persons on the other, including the defendants, took part. As the result of the fight Andrew Hoyle fell fatally wounded, and died shortly thereafter, and numbers of the other group were wounded by a shotgun carried by the younger Hoyle.

The evidence is contradictory as to who was the aggressor and as to which of the opposite group fired the fatal shot. There is evidence, however, tending to show that defendants acted in concert, and it is, therefore, not material which inflicted the lethal wound. There is sufficient evidence, notwithstanding its conflict, to sustain a conviction and the demurrer each defendant made to the evidence was properly overruled.

However, the defendants presented evidence tending to show that they acted in self-defense—each of them—entitling them to a proper instruction to the jury on that phase of the case; and the appellants complain of prejudicial omission in that regard.

The defendants introduced evidence tending to show that the deceased had the reputation of being a man of violent character, and the trial judge permitted the State to introduce rebutting evidence. Before the formal charge to the jury and in the course of the trial, the court made the following observation:

> "Gentlemen of the jury, yesterday the defendants in this case offered evidence tending to show that the deceased man, Andrew Hoyle, was a man of dangerous and violent character. Where defense interposed is that of self-defense such evidence is competent. Evidence of the general reputation of the deceased is not competent or material in the case, but as the Court has stated, where the defendant interposed his self-defense, then it is proper to show that the deceased was a man of dangerous and violent character."

If this may be considered in the light of an instruction to the jury, which because of its allocation in the proceeding we doubt, it appears to be the only correlation attempted between the admitted testimony that deceased was a man of violent character and disposition and the plea of self-defense. The State contends that it satisfies G. S., 1-180, as a sufficient substantive instruction and that if the defendants desired anything further by way of subordinate elaboration they should have asked for it.

We think, however, that while the jury, in its process of thinking, might have made the correct application of the principle underlying the evidence, this did not relieve the court from more directly and clearly instructing them and explaining to them the bearing the reputation of the deceased as a violent man might have on defendants' reasonable apprehension of death or great bodily harm through the attack to which their evidence pointed.

For this inadvertent error in an able charge, there must be a new trial. It is so ordered.

New trial.

DEVIN, J., dissenting: I cannot agree that a new trial should be ordered in this case. The ground upon which it is awarded seems to me to be of insufficient importance to set aside the verdict and judgment reached after full hearing and a lengthy trial. Even if the trial court's reference to this type of character evidence as offered was not as full as it might have been, the court seems to have sufficiently correlated the evidence to the plea of self-defense. The jury heard all the evidence and a full and complete charge from the court as to the law, and I cannot see that by the language quoted the jury was thereby influenced to render an improper verdict. The burden is on the defendant here "not only to show error but also that he was prejudiced thereby to the extent that the verdict of the jury was thereby probably influenced against him." *Rea v. Simonwitz*, 226 N. C., 379, 38 S. E. (2d), 194. The error must be "material and prejudicial amounting to the denial of some substantial right." *Wilson v. Lumber Co.*, 186 N. C., 56, 118 S. E., 797.

I think the verdict of the jury should be upheld and the judgment of the Superior Court affirmed.

BARNHILL, J., concurs in dissent.

DONALD TONEY, BY HIS NEXT FRIEND, NELLIE TONEY, v. JOHNNIE HENDERSON; AND JOHN H. WILSON AND G. T. WOODSIDE, PARTNERS TRADING AS W & W GROCERY COMPANY.

(Filed 26 November, 1947.)

1. Automobiles §§ 15, 18h (3)—Evidence held to show contributory negligence as matter of law on part of boy cyclist injured while making U-turn on highway.

Plaintiff's evidence tended to show the following circumstances: Plaintiff, approximately twelve years old, was riding his bicycle on the left shoulder of the highway some 150 to 300 feet beyond a highway intersection. A car passed traveling in the opposite direction. Plaintiff then made a U-turn and fell between the front and rear wheels of a truck traveling in the same direction as plaintiff had been going. The truck had entered the highway from the intersection and was traveling on its right side with its right wheels on the shoulder. Plaintiff testified he did not see the truck, although his vision was unobstructed except for the car which had passed. *Held:* Plaintiff's evidence discloses contributory negligence barring recovery as a matter of law.

2. Automobiles § 18g (2)—

Evidence that a truck traveling on a highway stopped within six or eight feet from the point of impact negates an inference that it was traveling at excessive speed. Sometimes physical facts speak louder than words.

APPEAL by plaintiff from *Nettles, J.*, at March Term, 1947, of MECKLENBURG.

Civil action to recover for personal injuries sustained by Donald Toney in an accident which occurred on the old Charlotte-Statesville Highway, 31 December, 1945.

The plaintiff was slightly under 12 years of age at the time of the accident. He was riding a new bicycle which his parents had given him for Christmas, on the left shoulder of the highway, proceeding in a northwesterly direction. When he had proceeded a distance of some 150 to 300 feet along this highway from the intersection thereof with the new Charlotte-Statesville Highway, he met an automobile being driven by a Mr. Reid. Mr. Reid testified: "I pulled over in the center of the road to pass him. He was on the shoulder. At the time I did that the truck was behind him on the other side of the road . . . I'd say the truck was 40 or 50 feet behind him . . . When I saw the truck it was over on the right-hand side. It was on part of the shoulder . . . I am sure I passed the boy before I passed the truck . . . I passed the boy on my right side and on his right side. I passed the truck on its left side and on my left side . . . The next thing I saw as I stopped" at the intersection, "was the boy under his left-hand rear wheel of the truck." The truck was loaded with brick and the evidence tends to show it was being driven about 20 miles per hour.

The plaintiff testified: "After he (Mr. Reid) went on past me I stopped, and when he got down there I didn't see nothing on the road so I started to make a U-turn and I don't remember nothing until I was under the wheel of the truck . . . I did not run into the truck . . . I don't hardly remember where I came in contact with the truck, but I stopped and made my turn, the truck I did not see, and the next thing I remember I was under the wheel of the truck. I didn't see the truck at all. I seen it while I was under the wheel . . . The truck was over on the right-hand side of the road . . . on the opposite side that I had been on . . . Part of it was on the shoulder and it was going the same way I had been going; I was going to turn around and go back towards my home . . . The bicycle didn't go under the truck with me . . . I guess I fell off the bicycle. The bicycle was over in the road and I was under the wheel of the truck. I did not see the truck before I fell off."

At the close of plaintiff's evidence, the defendants moved for a judgment as of nonsuit. The motion was granted and judgment entered accordingly. Plaintiff appeals and assigns error.

G. T. Carswell and Robinson & Jones for plaintiff, appellant.
Thaddeus A. Adams for defendant, appellees.

DENNY, J. The evidence adduced in the trial below, when considered in the light most favorable to the plaintiff, fails to show any negligence on the part of the defendants. The plaintiff apparently undertook to make a U-turn immediately after Mr. Reid passed him and in doing so lost his balance, fell off his bicycle and landed in between the left front and rear wheels of defendants' truck. The truck, according to the evidence, was being operated at a moderate rate of speed on its right side of the highway. There was nothing between the plaintiff and the defendants' truck to obstruct his view of the truck after it left the new Charlotte-Statesville Highway and entered the highway on which they were traveling, except Mr. Reid's car as it passed between them. And while the evidence does not disclose any act of negligence on the part of the defendants, even if it did so, the negligence of the plaintiff was sufficient to establish contributory negligence as a matter of law. *Threatt v. Express Agency,* 221 N. C., 211, 19 S. E. (2d), 873; *Van Dyke v. Atlantic Greyhound Corp.,* 218 N. C., 283, 10 S. E. (2d), 727; *Tart v. R. R.,* 202 N. C., 52, 161 S. E., 720.

The plaintiff's failure to see the approaching truck when he looked just before making his U-turn is not chargeable to the defendants. The presence of the truck on the highway at the time and place of the accident and the manner of its operation, negative the plaintiff's allegation of excessive speed. There is no evidence of excessive speed disclosed by the record. Furthermore, the truck was stopped within 6 or 8 feet of the point where its left rear wheel came in contact with the plaintiff's body. Sometimes physical facts speak louder than words. *Powers v. Sternberg,* 213 N. C., 41, 195 S. E., 88.

The plaintiff's injuries were serious and regrettable, but we think his own testimony exonerates the defendants from liability or blame in connection with this unfortunate accident.

The judgment of the court below is

Affirmed.

VIRGINIA ELIZABETH PRESSLAR WINFIELD v. HENRY BOYCE WINFIELD.

(Filed 26 November, 1947.)

1. Divorce § 17—

Where the wife institutes suit for divorce, her remedy to require defendant to provide support for the minor child of the marriage is by motion in the cause, which may be filed either before or after final judgment. G. S., 50-13.

2. Divorce § 12—

Where, upon the wife's motion in the cause to require defendant to provide support for the minor child of the marriage, made after decree of absolute divorce, the husband files affidavit denying paternity, and at his instance the issue is transferred to the civil issue docket, the trial court has the discretionary power to order defendant to provide for support of the child and counsel fees *pendente lite*, and the presumption of legitimacy arising from the birth of the child in wedlock obtains in her favor in passing upon the question. The sufficiency of the affidavit to raise the issue and the correctness of the order transferring the issue to the civil issue docket are not presented by exception.

APPEAL by defendant from *Patton, Special Judge,* at Extra Term, 12 May, 1947, of MECKLENBURG.

Civil action for absolute divorce on ground of two years separation, for custody of six-year-old child of the marriage, and motion after verdict for his support.

The complaint, filed 6 September, 1945, alleges that plaintiff and defendant were married on 16 October, 1932; that one child was born of the marriage, 22 July, 1939, named Henry Boyce Winfield, Jr.; that by mutual consent and agreement, the plaintiff and defendant separated in December, 1942, and have lived continuously in a state of separation since that time; that the plaintiff is entitled to the custody of the child and to an order providing for his support. Wherefore, plaintiff prays for divorce, for custody of the child and for his support.

The defendant filed no answer.

At a Special October Term, commencing on 15 October, 1945, Mecklenburg Superior Court, judgment of absolute divorce was entered on a verdict. In this judgment, no provision was made in respect of the custody of the child or his support.

Thereafter, on 8 April, 1947, plaintiff filed motion in the cause to require the defendant to contribute to the support of Henry Boyce Winfield, Jr., who, on account of a severe burn, had been hospitalized and still needed medical care.

On 5 May, 1947, the defendant, in answer to the motion, filed affidavit denying the paternity of the child and demanded a jury trial on the issue.

The matter was, by order of the Presiding Judge, transferred to the civil issue docket for trial.

At the same time, it was adjudged that the defendant should pay $9.00 a week *pendente lite* for the support of the child and $100 to be applied on counsel fees.

From this order for support and counsel fees *pendente lite,* the defendant appeals, assigning errors.

H. L. Strickland for plaintiff, appellee.
McRae & McRae for defendant, appellant.

STACY, C. J. While the plaintiff objected to the order transferring the issue of paternity to the civil issue docket for trial, no exception was noted to this part of the judgment. Hence, the correctness of the order is without challenge on the instant record. Nor is the sufficiency of the defendant's affidavit to raise the issue presently presented. The only question is the correctness of the order, entered on plaintiff's motion, making partial provision for the child's support and for part payment on counsel fees.

In the case of *Green v. Green,* 210 N. C., 147, 185 S. E., 651, where a minor child sued her putative father for support and maintenance, it was held that neither by statute nor by the common law was the plaintiff entitled to support and counsel fees *pendente lite.* However, that case stands on a different footing from this one. There, an independent action was brought by a minor against her father for support and maintenance. She also asked for counsel fee pending the trial. The action was sustained, but allowance *pendente lite* was denied for want of legislative sanction or authorization.

Here, the mother of the child files a motion in the divorce action for partial support of the child, the only remedy available to her, *In re Blake,* 184 N. C., 278, 114 S. E., 294, and she is met with the defendant's denial of paternity and demand for a jury trial to determine the issue. In these circumstances, the court evidently thought it but meet and proper that the plaintiff should be awarded support and suit money *pendente lite,* if she must needs await the outcome of a jury trial had at the instance of the defendant.

It is provided by G. S., 50-13, that after complaint filed in any divorce action, "both before and after final judgment," it shall be 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, and from time to time to modify or vacate such orders." Under this statute, it would seem that the allowance, here made for support and counsel fees *pendente lite,* was within the sound discretion of the trial judge. *Story v. Story,* 221 N. C., 114, 19 S. E. (2d), 136; *Sanders v. Sanders,* 167

N. C., 317, 83 S. E., 490. It is such an order, respecting the care and maintenance of the minor child, as was deemed proper.

The presumption of legitimacy, which arises from the birth of the child in wedlock, inures to the benefit of the plaintiff on her present motion. Certainly, this presumption, if not conclusive, continues until otherwise determined. Having sought and obtained an order transferring the matter to the civil issue docket for trial before a jury, the defendant, on this record, can hardly complain at being required to assist in the payment of part of the costs.

The order will be allowed to stand.

Affirmed.

STATE v. BILLIE SIMMONS.

(Filed 26 November, 1947.)

Rape § 5—

An instruction which fails to charge that the carnal knowledge of prosecutrix must have been accomplished by force and against her will to constitute the crime of rape must be held for reversible error. G. S., 14-21.

APPEAL by defendant from *Edmundson, Special Judge,* at August Term, 1947, of SAMPSON.

Criminal prosecution upon indictment charging defendant with the crime of rape of a certain named female person.

Verdict: Guilty of rape as charged in the bill of indictment.

Judgment: Death by the administration of lethal gas as provided by law.

Defendant appeals to Supreme Court and assigns error.

Attorney-General McMullan and Assistant Attorneys General Bruton, Rhodes, and Moody for the State.

A. McL. Graham and P. D. Herring for defendant, appellant.

WINBORNE, J. Defendant assigns as error the following portion of the court's charge to the jury: "The court charges you if you find from the evidence in this case and beyond a reasonable doubt that the prisoner had carnal knowledge of the prosecuting witness as that term has been defined by the court to you then you will return a verdict of guilty of rape as charged in the bill of indictment."

The error pointed out is the absence of these essential elements of the crime charged "ravishing . . . by force and against her will." G. S., 14-21.

The State concedes error in the instruction to which the exception is taken.

Hence there must be a

New trial.

STATE v. ANDREW CHESSON AND CHESTER HEDGEBETH.

(Filed 10 December, 1947.)

1. Criminal Law § 81b—

Upon review by *certiorari* of the denial of defendant's motion for a new trial on the ground that he was denied due process of law in the trial resulting in his conviction, it will be presumed that the trial court correctly instructed the jury as to the facts of the case, in the absence of suggestion to the contrary. G. S., 1-180.

2. Criminal Law § 81h—

Where all the evidence is not sent up in response to *certiorari* to review the denial of defendant's motion for a new trial, it will be presumed, in the absence of a showing to the contrary, that a finding by the court hearing the motion was based on the evidence before it, notwithstanding the record evidence fails to contain all the supporting evidence.

3. Criminal Law § 57d—

Upon defendant's motion for a new trial on the ground that he was deprived of his constitutional rights in the trial resulting in his conviction, the burden is upon him to show affirmatively facts inducing the legal conclusion that his constitutional rights in the respects alleged were denied him, the presumption being in favor of the regularity of the trial.

4. Constitutional Law § 34b—

The fact that defendant was arrested 28 December, tried in Recorder's Court 31 December, and in the Superior Court during the term beginning 6 January of the following year, all in the regular course for the disposition of the case in the courts where it was properly cognizable, does not, without more, induce the legal conclusion that defendant was deprived of due process guaranteed by the Constitution of North Carolina.

5. Same—

Expedition in the trial of criminal actions is not to be sought at the expense of rights of the individual guaranteed by the Constitution.

6. Constitutional Law § 34d—

Ignorance of defendant and his unfamiliarity with legal matters are not alone sufficient to render the appointment of counsel for him mandatory in a prosecution for less than a capital offense. Constitution of North Carolina, Art. I, sec. 11.

7. Same—

A defendant has the constitutional right to have counsel and to be represented by counsel, and to have counsel assigned if requested where the circumstances are such as to show apparent necessity of counsel to protect defendant's rights, but in the absence of request the propriety of providing counsel for a person accused of an offense less than a capital felony rests in the sound discretion of the trial judge. G. S., 15-4.

8. Constitutonal Law § 34a—

The guarantee of the Constitution of North Carolina that no person shall be deprived of life, liberty, or property "but by the law of the land" requires that conviction of crime be had only under the general law in the regular course of the administration of justice through courts of competent jurisdiction, and be consonant with fundamental principles of liberty and justice.

9. Same—

The Fifth and Sixth Amendments to the Federal Constitution apply only to trials in Federal Courts; the Fourteenth Amendment against denial of due process is applicable to a State's action, in judicial proceedings as well as through other agencies of the State.

10. Same—

Defendant was convicted of a crime less than a capital felony. Defendant moved for a new trial on the ground that want of counsel, the speed with which the trial was conducted to its conclusion, coupled with defendant's youth and inexperience, amounted to a denial of due process of law. *Held:* Upon the facts found disclosing that defendant made no request for counsel, and that the trial was in the regular course of practice of the courts having jurisdiction, the denial of defendant's motion was without error.

11. Same—

The Fourteenth Amendment to the Federal Constitution does not require a state, contrary to its own practice, to furnish counsel for a defendant.

12. Criminal Law § 81h—

Upon defendant's motion for a new trial on the ground that he was denied due process of law, the allegations in the petition and affidavits are not conclusive, but the findings of the court supported by evidence offered by defendant or the evidence offered by the State *contra*, are conclusive.

APPEAL by defendant Hedgebeth from *Burgwyn, Special Judge,* at July Term, 1947, of WASHINGTON. Affirmed.

The motion of defendant Hedgebeth to set aside the verdict and judgment rendered against him at a previous term of the court, and for a new trial, was heard by Judge Burgwyn at the July Term, 1947, of the Superior Court of Washington County.

Upon the record, the defendant's petition and affidavits, and the oral testimony of Sheriff Reid, the following judgment was entered:

"It appearing to the Court that the defendant was indicted upon a warrant issued by the Recorder's Court of Washington County on December 28, 1946, and that three days later a preliminary hearing was given him before the Recorder of Washington County on said charge at which time he and another were bound over to the Superior Court of Washington County upon a charge of highway robbery, it being alleged

by the State that he, with another, did by force and arms and after placing him in fear for his life, take from the person of Delmer Wilkins a sum of money in the amount of One Hundred Twenty Seven ($127.00) Dollars; it further appearing to the Court that bond in the sum of Five Hundred ($500.00) Dollars was required of the defendant Chester Hedgebeth, which he was unable to give and that in default thereof he was placed in the county jail of Washington County to await trial on said charge; that thereafter and on the 6th day of January, 1947, the regular Superior Court of Washington County was convened and at said term a bill of indictment was returned by the grand jury against the said Chester Hedgebeth and another, charging them and each of them with the crime of highway robbery from the person of Delmer Wilkins; that thereafter and during said term the defendant was called to the bar for trial with his co-defendant; that each of the defendants pleaded not guilty; that inquiry was made of them if they had counsel and upon their answering in the negative the Court proceeded to trial; that after the introduction of testimony by the State the defendant Chester Hedgebeth took the stand voluntarily and gave evidence tending to show that he was not guilty; that thereafter the Judge, Honorable J. Paul Frizzelle, presiding, charged the jury upon the questions of law and facts and that thereafter the jury returned a verdict and for that verdict said the defendant and his co-defendant were guilty; that thereupon the defendant was sentenced by the Judge presiding to a term of years in the State's Prison, to-wit, not less than nine nor more than ten years; that thereafter and on the 9th day of July, 1947, the defendant sued out a writ of *habeas corpus* which was duly signed by Judge Luther Hamilton, one of the Judges of the Superior Court of North Carolina, commanding that the said defendant be produced in open court at the July term of the Superior Court of Washington County, and said writ having been served upon the proper authorities of the State's prison the said defendant was produced in open court of Washington County on July 9, 1947, at which time he was represented by Attorney W. L. Whitley, a member of the Bar of Washington County; that said attorney presented the cause of the defendant to the Court upon delayed motion, which the Court gladly heard; that the trial, conviction and sentence of the said defendant at the January Term, 1947, of said Court be set aside and declared void and that the petitioner Chester Hedgebeth, be granted another trial, or a new trial, and for such other and further relief as to the Court seemed proper, basing his argument upon alleged denial of the defendant's right by the Court, in the expediency of the trial, in the lack of counsel for the defendant and upon the general ignorance of the defendant of his rights. The Court heard the oral testimony, on behalf of the prosecution, of Sheriff Reid, the high sheriff of Washington County.

"The Court finds as a fact that the father and mother of the defendant resided in Currituck County, a distance of some fifty-eight miles or more from the county seat of Washington County, and that the wife of the defendant resided in Washington County and had knowledge of his incarceration and of the nature of the charge preferred against him; that the defendant had sufficient mental capacity to realize the nature of the charge against him and had opportunity, had he been financially able to so do and desired to so do, to procure counsel, and that the Court, at neither the hearing before the Recorder and the trial of the Superior Court, appointed counsel to represent the defendant's interest. The Court also finds the charge preferred against the defendant and upon which he was tried was not and is not a capital offense under the laws of the State of North Carolina. The Court is of the opinion that the due process clause of the Constitution of the United States and of the Constitution of the State of North Carolina have in nowise been violated in the trial of this cause and that the applicant is detained by virtue of a judgment of a Court of competent jurisdiction, and, therefore, the motion of the defendant's counsel and the defendant is denied and it is the judgment of the Court that the defendant be remanded to custody of the Warden of the State's Prison and the writ of *habeas corpus* dismissed."

The writ of *habeas corpus* having been discharged, and defendant's motion denied, the defendant petitioned the Supreme Court of North Carolina for writ of *certiorari,* which was allowed, and in response to the writ the record was presented to this Court for review.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

Wilford L. Whitley, Jr., for Chester Hedgebeth.

DEVIN, J. The defendant Hedgebeth asks us to review the judgment below, assigning as grounds for relief that in the trial in the Superior Court of Washington County his constitutional rights were violated and due process of law denied him, in that he was without counsel, that he was not aware or informed of his rights, and that he was put upon his trial for the alleged commission of a serious felony within too short a time after his arrest. He alleges his innocence of the crime charged against him.

From the findings of fact made by the Judge who heard the defendant's motion below, based upon the averments in his petition and the oral evidence heard, upon which defendant's motion was denied, it sufficiently appears that on 28 December, 1946, defendant Hedgebeth and one Andrew Chesson were arrested charged with assault with deadly weapon and robbery of a sum of money from the person of Delmer Wilkins, and

that on 31 December, 1946, these two defendants were tried in the Recorder's Court of Washington County, and probable cause having been found, were placed under bond for their appearance at the next term of the Superior Court of the county. The required bond of $500 was not given and the defendants remained in jail. The next term of the Superior Court began 6 January, 1947. At this term bill of indictment in due form charging the defendants with the felony of robbery was returned by the grand jury a true bill, and during the term the case was called for trial. Each defendant pleaded not guilty. Inquiry was made of them by the presiding Judge Frizzelle if they had counsel, to which they answered in the negative. No counsel was assigned, nor was the assignment of counsel requested. The trial apparently was conducted in accordance with correct procedure in this jurisdiction and no criticism in that respect is offered. The defendant Hedgebeth voluntarily went on the stand and testified as a witness in his own behalf, his testimony tending to show he was not guilty. In the absence of suggestions to the contrary, under the rule in this State, it will be presumed the trial judge correctly instructed the jury as to the law and facts of the case (G. S., 1-180); *S. v. Hargrove,* 216 N. C., 570, 5 S. E. (2d), 852; *Bell v. Brown,* 227 N. C., 319 (322), 42 S. E. (2d), 92. The jury returned verdict of guilty as to both defendants, and they were sentenced to State's Prison for terms of nine to ten years.

The record further discloses that defendant Hedgebeth was a tenant farmer, resident in Washington County, and 24 years of age; that his schooling did not extend beyond the third grade; and that his father and mother lived in another county some 58 miles from the place of trial. The judge who heard the motion also found that the wife of the defendant resided in Washington County, and that she had knowledge of his incarceration and of the nature of the crime charged. The defendant makes the point that this last mentioned fact does not appear in the written record. However, as the judge heard the oral testimony of the sheriff, which was not sent up, it will be presumed his finding was based on evidence he heard, in the absence of some showing to the contrary. *Banking Co. v. Bank,* 211 N. C., 328, 190 S. E., 472.

The defendant's evidence, and particularly the affidavit of his father, would tend to indicate that the defendant was ignorant and unacquainted with business or legal affairs; that he had not been arrested before and was inexperienced in court procedure; that he was not of average mentality; that his father was not informed of his arrest, and, if he had been so advised in time, would have procured counsel. However, it was found by the judge from the evidence before him, "that the defendant had sufficient mental capacity to realize the nature of the charge against him and had opportunity, had he been financially able to so do, and desired to so do, to procure counsel." The defendant and his counsel were present

at the hearing. The charge in the bill of indictment under which defendant was tried was not a capital felony and the punishment upon conviction would not exceed 10 years in prison.

In the consideration of the defendant's appeal from the judgment denying his motion, it may be observed that no presumption would arise from the mere filing of defendant's motion that the trial was otherwise than in accord with approved practice and procedure in North Carolina courts (*S. v. Harris,* 204 N. C., 422, 168 S. E., 498), and the burden would rest upon the defendant to show affirmatively such facts as would induce the legal conclusion that certain of his constitutional rights in the respects alleged were denied him. It is in this view that the Attorney-General points out that the defendant's petition fails to show affirmatively that he was without funds to employ counsel, or that he requested or desired counsel, or made any effort to secure or communicate with one, or that he attempted to or was denied right to communicate with his father, or that he requested the attendance of any witnesses, or that there were any witnesses whose testimony would have helped him. The petition does not appear to contain any allegation that the trial judge failed to explain the nature of the charge against him, or that the defendant did not understand that the single issue of his guilt or innocence was being submitted to the determination of the jury. Already he had been tried on this charge in the Recorder's Court and knew the charge and the evidence against him. At no time did he ask for delay, nor after conviction did he express a desire for an appeal. He was tried in the county of which he and his wife were residents and where presumably his duties as a citizen were accustomed to be performed. That the evidence offered by the State was competent, and, if accepted by the jury, sufficient to convict, is not denied, though defendant maintained his innocence, nor is it alleged that the trial judge failed to instruct the jury fairly and correctly. The other defendant jointly indicted and tried with the appellant has made no motion for a new trial.

On the other hand, the defendant's position is that the defendant's ignorance, his poverty, his unfamiliarity with court procedure, the speed with which his case was brought to trial while he was held in jail constitute incontestable evidence of his helplessness in the toils of the law, and that his situation was such that the failure of the judge to assign counsel to aid him in his defense, denied to him due process of law and the equal protection of the laws, in violation of rights vouchsafed him by the Constitution of North Carolina and that of the United States.

Referring to the argument advanced by the defendant, based upon the expedition with which his trial was consummated, we are not inclined to hold that the mere fact that he was arrested 28 December, tried in Recorder's Court 31 December, and in the Superior Court during the term beginning 6 January, 1947, indicated such haste as would, without

more, constitute denial of due process. *Avery v. Alabama,* 308 U. S., 443. That was the regular course for the disposition of the case in the courts where it was properly cognizable. The reasons assigned for the decision in *S. v. Farrell,* 223 N. C., 321, 26 S. E. (2d), 322, a capital case, were applicable to the peculiar circumstances of that case and do not apply in all respects here. In that case the defense was insanity, and it was said "if the only issue to be tried was that of guilt or innocence, based on the facts of the alleged offense, ample time was allowed." The administration of justice "without denial or delay" is one of the supreme aims of social organization, but expedition is not to be sought at the expense of rights of the individual guaranteed by the Constitution. *S. v. Ross,* 193 N. C., 25, 136 S. E., 193; *S. v. Whitfield,* 206 N. C., 696, 175 S. E., 93.

The question whether under the laws and approved procedure in this State the ignorance of the defendant and his unfamiliarity with legal matters were alone sufficient to render mandatory the provisions in the Constitution and statutes of North Carolina for the assignment of counsel, and whether failure to do so in a case of robbery constitutes a denial of constitutional rights must be answered in the negative. His trial was before a fair and patient judge and by a jury of the vicinage, and no evidence is offered to rebut the presumption of the regularity of the trial. *S. v. Harris,* 204 N. C., 422, 168 S. E., 498.

The Constitution of North Carolina, Art. I, sec. 11, contains this provision: "In all criminal prosecutions every man has the right to be informed of the accusation against him and to confront the accusers and witnesses with other testimony, and to have counsel for his defense, and not be compelled to give evidence against himself, or to pay costs, jail fees, or necessary witness fees of the defense, unless found guilty." And this constitutional provision is further implemented by statute (G. S., 15-4) in these words: "Every person accused of any crime whatsoever, shall be entitled to counsel in all matters which may be necessary for his defense."

In capital felonies these provisions relative to counsel are regarded as not merely permissive but mandatory. This is indicated by the statute, G. S., 15-5, and by numerous decisions of this Court. *S. v. Collins,* 70 N. C., 242; *S. v. Jacobs,* 107 N. C., 772, 11 S. E., 962; *S. v. Hardy,* 189 N. C., 799, 128 S. E., 152; *S. v. Whitfield,* 206 N. C., 696, 175 S. E., 93; *S. v. Farrell,* 223 N. C., 321, 26 S. E. (2d), 322; *Powell v. Alabama,* 287 U. S., 45. But in cases of misdemeanors and felonies less than capital it has been the uniform practice in this jurisdiction to regard these provisions as guaranteeing the right of persons accused to have counsel for their defense, to be represented by counsel, and the right to have counsel assigned if requested and the circumstances are such, for

financial or other reasons, as to show the apparent necessity of counsel for the protection of the defendant's rights.

But we cannot hold that in all cases, in the absence of any present statute to that effect, the burden is imposed upon the state to provide counsel for defendants. In cases less than capital the propriety of providing counsel for the accused must depend upon the circumstances of the individual case, within the sound discretion of the trial judge. In the language of *Justice Holmes* in *Lockner v. New York,* 198 U. S., 45, "General propositions do not decide concrete cases."

The Constitution of North Carolina further in general and comprehensive terms safeguards the rights of the individual by declaring that no person shall be deprived of his life, liberty or property "but by the law of the land" (Art. I, sec. 17), and the expression "law of the land" has been held equivalent to the due process of law required by the Fourteenth Amendment to the Constitution of the United States. The expression quoted means "the general law, the law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." Conner and Cheshire's Constitution, pg. 56; *Markham v. Carver,* 188 N. C., 615, 125 S. E., 409. It means the regular course of the administration of justice through the courts of competent jurisdiction, after the manner of such courts. *Caldwell v. Wilson,* 121 N. C., 425, 28 S. E., 554. Procedure must be consistent with the fundamental principles of liberty and justice. *Hebert v. Louisiana,* 272 U. S., 312 (316).

Reversal of the judgment below denying the defendant's motion for new trial is urged on the ground that in his prosecution, conviction and sentence in the trial in the Superior Court he was denied the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States and by other constitutional provisions.

While it is well settled that the references in the Fifth Amendment to the Federal Constitution to due process of law, as well as the provisions in the Sixth Amendment declaratory of the right of the accused in a criminal prosecution to have the assistance of counsel, are to be regarded as applicable only to trials in Federal Courts, the provision in the Fourteenth Amendment against denial of due process to a litigant is made directly applicable to State's action in judicial proceedings as well as through other agencies of the State. It was said in *Betts v. Brady,* 316 U. S., 455, "The phrase (due process of law) formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights." The purpose of these provisions as they relate to judicial procedure is to insure fundamental fairness.

It was argued by defendant's counsel that the failure of the trial court to appoint counsel for the defendant's defense and the speed with which

the trial was conducted to its conclusion, coupled with evidence of the youth and inexperience of the defendant, constituted denial of due process of law. Cited in support of this position are the cases of *White v. Ragan,* 324 U. S., 760; *Rice v. Olson,* 324 U. S., 786; *Williams v. Kaiser,* 323 U. S., 471; *Tomkins v. Missouri,* 323 U. S., 485; *De Meerleer v. Michigan,* 91 Law Ed. Adv. Opinions, 471; *Smith v. O'Grady,* 312 U. S., 329. It was insisted that the facts shown in the case at bar are such as to bring it within the principle announced in those and other similar cases. However, it may be noted that in *White v. Ragan, supra,* the Court's opinion was predicated upon allegations by the defendant, uncontradicted, showing bad faith on the part of assigned counsel, sanctioned by the ruling of the judge, and the procurement of testimony known to be false by the prosecuting attorney. And in *Rice v. Olson* the state court held the defendant's plea of guilty, though alleged to have been unfairly entered, constituted an absolute waiver of defendant's rights. In *Williams v. Kaiser* and *Tomkins v. Missouri,* both from the State of Missouri, the statute of that state required the assignment of counsel. In the most recent case on the subject *De Meerleer v. Michigan, supra,* the facts recited by the Court were that the defendant was 17 years of age, was without counsel, and was not advised of his rights, and further that on the same day defendant was arraigned, tried, convicted and sentenced to life imprisonment. In *Smith v. O'Grady* it appeared that remedy in the state court was denied defendant without determining the truthfulness of his allegation that he was without counsel and was "tricked" into pleading guilty.

From an examination of the cited cases and others of like nature recently considered by the Supreme Court of the United States it appears that these decisions were in the last analysis determined on the basis of the facts in each case. Said *Justice Roberts* in *Betts v. Brady, supra,* "Asserted denial (of due process) is to be tested by an appraisal of the totality of facts in a given case." And in the recent case of *Carter v. Illinois,* 91 Law. Ed. Adv. Op., 157, it was said: "But the Due Process Clause has never been perverted so as to force upon the forty-eight States a uniform code of criminal procedure. Except for the limited scope of the federal criminal code, the prosecution of crime is a matter for the individual States. The Constitution commands the States to assure fair judgment. Procedural details for securing fairness it leaves to the States. It is for them, therefore, to choose the methods and practices by which crime is brought to book, so long as they observe those ultimate dignities of man which the United States Constitution assures."

In *Betts v. Brady,* 316 U. S., 455, the Court, after reviewing the statutory and constitutional provisions as to appointment of counsel in criminal cases in the several states, announced this conclusion: "This material demonstrates that, in the great majority of the states, it has been the

considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial. On the contrary, the matter has generally been deemed one of legislative policy. In the light of this evidence we are unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the states, whatever may be their own views, to furnish counsel in every such case. Every court has power, if it deems proper, to appoint counsel where that course seems to be required in the interest of fairness."

The allegations in defendant's petition and affidavits are not to be accepted as presenting a statement of all the facts, or necessarily as one entirely correct, since upon the hearing on defendant's motion other evidence was offered by the State, and upon all the evidence findings of fact were made by the court. These come to us as determinative. It is an established rule in this jurisdiction that findings of fact made by a Superior Court judge as to matters within his jurisdiction and properly cognizable by him, when based on evidence presently presented, must be held conclusive on appeal. *In re Hamilton,* 182 N. C., 44, 108 S. E., 385. His findings import verity. Hence, on the record before us our decision must be based on the facts as found and reported in the judgment below.

After a careful examination of the record in this case and of all the facts which have been made to appear, giving due consideration to the constitutional principles invoked as judicially interpreted by the Supreme Court of the United States, we conclude that none of the fundamental rights essential to a fair trial have been denied the defendant, and that the judgment overruling defendant's motion must be upheld, and the

Judgment affirmed.

STATE v. HARRY FORSHEE, ET AL.

(Filed 10 December, 1947.)

1. Assault §§ 13, 14c—Evidence held to show that defendant aided and abetted in assault after full knowledge of its felonious character.

The evidence tended to show that defendant drove prosecuting witness to a secluded spot and induced the witness to go to the back of the car, where a person concealed in the trunk shot the witness, that the witness got back in the car and requested defendant to drive him to a hospital, whereupon defendant took the ignition keys from the car, went to the back of the car and ordered the witness to follow, and that there the witness was again shot by the person hiding in the trunk. Defendant testified that he acted pursuant to an agreement with the assailant, but that he anticipated only a fist fight between assailant and defendant. *Held:* The court properly denied defendant's motion for a directed verdict of not

guilty upon the charge of assault with a deadly weapon with intent to kill, and correctly refused to submit the question of defendant's guilt of simple assault, since defendant's contention that he anticipated only a fist fight is feckless in view of defendant's actions after the first felonious assault had been made.

2. Criminal Law § 8—

A person who conspires to engage in an unlawful enterprise and is present and aids and abets the perpetrator in the commission of the crime is guilty as a principal.

APPEAL by defendant Forshee from *Bone, J.*, at May Special Criminal Term, 1947, of CUMBERLAND.

Criminal prosecution tried upon indictment charging the defendants with an assault upon one Sgt. James E. Winfield with a deadly weapon with intent to kill, inflicting serious injuries, not resulting in death.

The State's evidence tends to show that the prosecuting witness, Sgt. James E. Winfield, is in the United States Army stationed at Fort Bragg, and lives with his wife and children in Fayetteville, North Carolina. On the afternoon of 6 February, 1947, the witness Winfield came to his home from Fort Bragg about 4:45 p.m. The defendant Harry Forshee was there and invited Winfield to take a trip with him that evening, stating he would be back for him about 7:00 p.m. The witness Winfield said he would go and Forshee left shortly thereafter.

The defendant Forshee returned to the Winfield home about 7:00 o'clock, picked up Winfield and drove to a secluded spot on the old Rosehill road. He requested Winfield to get out of the car and look for a paper which he claimed had been left there for him. Another car was seen approaching and he requested Winfield to get back in the car, stating, "This is not the place." He drove a little further down the road and stopped and said, "This should be the place." He told Winfield to get out and help him look for the paper. He directed Winfield to go behind the car, and as he did so, the trunk of the car quickly opened and someone shot him. The bullet went through his collarbone and lodged in the back of his shoulder. Winfield yelled he was shot, got back in the car and requested Forshee to take him to a hospital. Instead of complying with this request, Forshee took the ignition key out of the car, went to the back of the car and ordered Winfield to come to the rear of the car. When he got out of the car and started toward Forshee, Winfield testified he saw a pistol in Forshee's hand, pointing toward the ground. At that moment another shot was fired at him from the trunk of the car, the bullet grazing his right shoulder. Winfield ran into the woods and finally got a Mr. Bain to take him to Fayetteville. According to the evidence the prosecuting witness was seriously injured. He was admitted to the Fort Bragg hospital on 6 February and was discharged

from the hospital on the following March 7th. The witness Winfield was unable to identify the man who shot him.

At the close of the State's evidence the defendant Murchison moved for judgment as of nonsuit and the motion was allowed.

The defendant Forshee then went on the witness stand and testified in his own behalf. He testified that George Murchison had been going with Winfield's wife for years; that Murchison requested him to make arrangements to take Winfield out in his car to a place where he (Murchison) "could give him a good beating because of something Winfield had said about him." He agreed to do so, and on the evening of 6 February, 1947, he took Murchison concealed in the trunk of his car, when he drove the prosecuting witness to the place where he was assaulted. He denied that he had a gun or that he knew Murchison had one. He testified that he did not think "we were going out there for anything more than a fist fight between two men."

Verdict as to Harry Forshee: Guilty as charged in the bill of indictment.

Judgment: Imprisonment in the State's Prison for a term of not less than six nor more than eight years.

The defendant Forshee appeals, assigning error.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

James R. Nance for defendant, appellant.

DENNY, J. The defendant excepts and assigns as error the refusal of the court below to allow his motion for a directed verdict of not guilty as to the felonious charge, and to the failure of the court to charge the jury that they could return a verdict of simple assault. These exceptions cannot be sustained.

The contention of the appealing defendant that he never anticipated anything more than a fist fight is repugnant to the role he played in this vicious assault on the prosecuting witness. If his contention were true, why did he not take Winfield to a hospital as he was requested to do after Murchison shot him the first time? He certainly knew at that time the nature of the assault Murchison intended to make on Winfield, but he continued to aid and abet him in making a still further assault on him. The defendant and Murchison had not only conspired to engage in an unlaful enterprise, but both were present aiding and abetting each other in the commission of the crime. This made Forshee guilty as a principal. *S. v. Brooks, ante,* 68, 44 S. E. (2d), 482; *S. v. Williams,* 225 N. C., 182, 33 S. E. (2d), 880; *S. v. Smith,* 221 N. C., 400, 20 S. E. (2d), 360; *S. v. Triplett,* 211 N. C., 105, 189 S. E., 123; *S. v. Gosnell,* 208 N. C., 401, 181 S. E., 323; *S. v. Jarrell,* 141 N. C., 722, 53 S. E., 127.

In the case of *S. v. Gosnell, supra,* this Court said: "The principle is . . . well established that without regard to any previous confederation or design, when two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty." And in *S. v. Smith, supra,* it is held: "The general rule is, that if a number of persons combine or conspire to commit a crime, or to engage in an unlawful enterprise, each is responsible for all acts committed by the others in the execution of the common purpose which are a natural or probable consequence of the unlawful combination or undertaking, even though such acts are not intended or contemplated as a part of the original design. *S. v. Williams, supra* (216 N. C., 446, 5 S. E. (2d), 314); *S. v. Lea, supra* (203 N. C., 13, 164 S. E., 737); *S. v. Stewart,* 189 N. C., 340, 127 S. E., 260."

The remaining assignments of error are without merit.

In the trial below we find

No error.

STATE v. JIM M. ENSLEY.

(Filed 10 December, 1947.)

1. Homicide § 18—

A statement is competent as a dying declaration if declarant at the time he makes the statement is in actual danger of impending death and fully apprehends such danger, and death ensues.

2. Same—

Where declarant, mortally wounded, dies about 20 minutes after making a statement revealing his full apprehension of his condition and describing his assailant and denying provocation on his part for the assault, the statement is competent as a dying declaration.

3. Criminal Law § 42c—

Action of the court in limiting cross-examination of witnesses *held* not reversible error on defendant's exceptions.

4. Criminal Law § 81c (2)—

Where the charge construed contextually is without prejudicial error, exceptions thereto will not be sustained.

APPEAL by defendant from *Bone, J.*, at June Criminal Term, 1947, of CUMBERLAND.

Criminal prosecution upon a bill of indictment charging that defendant "feloniously, willfully and of malice aforethought, did kill and murder one Ottis M. Draughan, against the form of the statute, etc."

The Solicitor for the State announced that he was not asking for a verdict greater than murder in the second degree,—and defendant, through his counsel, pleaded "Not Guilty."

Verdict: Guilty of murder in the second degree.

Judgment: Imprisonment in State's Prison for a term of not less than 10 years nor more than 15 years.

Defendant appeals to Supreme Court, and assigns error.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

John H. Cook, R. Glenn Cobb, and James R. Nance for defendant, appellant.

WINBORNE, J. The assignments of error brought up on this appeal, upon careful consideration, fail to show prejudicial error.

1. Exception is taken to the admission of evidence offered as dying declarations of deceased. The wife of deceased visited him at the hospital between 11:30 and 12 o'clock the night he was shot. She testified: "When I saw him . . . he was laying there with his eyes closed and I stood there from three to five minutes and he didn't open his eyes . . . He said, 'Well, Honey, it looks like I am going to leave you . . . Take care of the little one.'

"After he made the statement that I just related to you, I asked him who shot him and he said he didn't know. He described him to me. He said he didn't know his name,—the name of the man who shot him but he said he was a short, stout man with a mustache.

"I asked him why he shot him and he said he didn't know. I said, 'He wouldn't have shot you for nothing. You must have said or done something.' He said 'I swear, Honey, I didn't say a word to him.' "

Defendant excepted to denial of each of his motions to strike the parts embraced in the last two paragraphs.

The witness further testified that she stayed a little while longer and told him good-bye and left and that he died about twenty minutes after she left.

The rule for the admission of dying declarations is well settled. The declarant at the time he makes the statement must be in actual danger of impending death, and in full apprehension of such danger, and death must ensue. *S. v. Bright,* 215 N. C., 537, 2 S. E. (2d), 541, and cases cited. See also *S. v. Stewart,* 210 N. C., 362, 186 S. E., 488.

Tested by this rule, the statement of deceased clearly shows that he was at the time fully apprehensive of the actual danger of death. The evidence shows that he was in such danger, and death ensued.

2. The exceptions taken to ruling of court in sustaining objections to questions asked on cross-examination of witnesses present no cause for reversible error.

3. The several portions of the charge to which exceptions are taken, when considered as component parts of the whole, read contextually, substantially accord with well settled principles of law, and are not of sufficient import to justify a new trial.

In the judgment below we find

No error.

A. C. WARD v. MARSHALL BOWLES AND THE BLUE BIRD TAXICAB COMPANY, INC.

(Filed 10 December, 1947.)

1. Automobiles §§ 16, 18h (2)—

Evidence that when a pedestrian had traversed about half of an intersection in the pedestrian lane on a green light, the light changed, and the pedestrian stopped in the center of the street, and that the driver of a cab, approaching from the pedestrian's right in the left-turn lane, cut to his left and struck the pedestrian when about half of the front of the cab was to the left of the center line of the street, *is held* sufficient to be submitted to the jury on the issue of negligence, since the driver of the cab could have seen the pedestrian in ample time to have avoided a collision had he been keeping a proper lookout, and since the evidence discloses that the driver "cut the corner" in violation of G. S., 20-153 (a), without giving any signal or warning of his approach.

2. Automobiles § 8i—

The fact that a motorist has the green light in traversing an intersection does not relieve him of the duty to exercise proper care for the safety of a pedestrian who has lawfully entered the intersection and is standing in the center of the street.

3. Automobiles § 18h (3)—

A pedestrian who starts across an intersection with the green light and is caught by the changing lights cannot be held guilty of contributory negligence as a matter of law in standing in the center of the street.

4. Master and Servant § 41—

The remedies given an employee under the Workmen's Compensation Act are exclusive as against the employer only, G. S., 97-10, and the Act does not preclude an employee from waiving his claim against his employer and pursuing his remedy against a third-party tort-feasor by common law action for negligence, although his rights against such third party after a claim for compensation is filed, are limited.

WARD *v.* BOWLES.

APPEAL by plaintiff from *Shuford, Special Judge,* October Term, 1947, GUILFORD (High Point Division). Reversed.

Civil action to recover damages for personal injuries resulting from taxicab-pedestrian collision.

The plaintiff was, at the time of the accident complained of, a police officer of the City of High Point. About 11:00 p.m. on 19 September 1943 he started across North Main Street of High Point at the south end of the Main Street bridge. He was going from east to west, within the lane marked for pedestrians, on the green traffic light. When he got about midway the street, the light changed to red, and he stopped at the edge of the center or left-turn vehicular traffic lane.

He saw the corporate defendant's taxicab being operated by defendant Bowles, at the north end of the bridge, approaching in the left-turn lane. He turned to look to the south and as he looked back to the north the defendant's taxi "was right on" him. "The driver of the cab cut short and just about half of the front of the cab was in the northbound fast lane" when it struck plaintiff. The plaintiff suffered certain personal injuries which he says developed and grew worse as time passed.

At the conclusion of the evidence for plaintiff, the court, on motion of defendants, dismissed the action as in case of nonsuit and plaintiff appealed.

Haworth & Mattocks for plaintiff appellant.

Gold, McAnally & Gold for defendant appellees.

BARNHILL, J. On this record plaintiff was lawfully in the intersection, standing in a position where he was clearly visible to the driver of the defendant's taxicab as the latter approached the intersection. The taxi driver, had he been keeping a proper lookout, could have seen him in ample time to avoid a collision. Instead he "cut the corner" in violation of G. S. 20-153 (a) without giving any signal or warning of his approach. The collision resulted. These circumstances, unrebutted as they are on this record, warrant an inference of negligence and are sufficient to require the submission of appropriate issues to the jury.

The defendant Bowles, it is true, was at the time driving on a green light, but that fact did not relieve him of the duty to exercise proper care for the safety of a pedestrian who had lawfully entered and was standing in the intersection when he approached.

The facts are not such as to require or permit the conclusion that plaintiff was guilty of contributory negligence as a matter of law.

There is no evidence that either plaintiff or his employer had given notice of non-acceptance of the Workmen's Compensation Act, G. S. Chap. 97, under the terms of G. S. 97-4. It must be presumed, therefore,

that both the City of High Point and the plaintiff at the time of the accident were bound by the provisions of that Act. G. S. 97-3. The plaintiff, at the time he received his injuries, was engaged in the discharge of his duties as a police officer of said city. He never filed any claim for compensation against the city. These facts, the defendants contend, preclude plaintiff from instituting any action against them and support the judgment of nonsuit entered in the court below. The contention is untenable.

When an employee and his employer have accepted the provisions of the Workmen's Compensation Act, the rights and remedies respecting compensation for personal injuries received while about his master's business, granted the employee by the Act, are exclusive as against the employer only. G. S. 97-10. A third-party tort-feasor is subject to suit even though compensation is paid or liability therefor is acknowledged by the employer. G. S. 97-10. While the rights of the employee, as against a third party after claim for compensation is filed, are limited, G. S. 97-10, there is nothing in the Act which denies him the right to waive his claim against his employer and pursue his remedy against the alleged tort-feasor by common law action for negligence.

The fact that the plaintiff may have been insured against the defendants' negligence, either directly or by virtue of the statute, is of no protection to the defendants from suit for their alleged wrongful act.

The judgment below is

Reversed.

BESSIE TAYLOR, ET AL., v. JOHN B. TAYLOR, ET AL.

(Filed 10 December, 1947.)

1. Wills § 33a—

Unless the intent of the testator to devise an estate of less dignity can be gathered from the instrument construed from its four corners, an unrestricted or indefinite devise of real property is a devise in fee simple, and a subsequent clause expressing a wish, desire or even direction for the disposition of what remains at the death of the devisee, will not be allowed to defeat the devise nor limit it to a life estate. G. S., 31-38.

2. Same—

A devise of real estate to devisees "to do as they like with it," with subsequent provision that after their death whatever property is left should go to testatrix' niece *is held* to vest the fee simple in the beneficiaries first named.

APPEAL by respondents, Geneva Taylor Lewis and husband Mark Lewis, from *Warlick, J.*, at September Civil Term, 1947, of GUILFORD (Greensboro Division).

Special proceeding instituted before the Clerk to sell land to make assets to pay debts and administration costs of the Estate of Anna Taylor.

The interest of the deceased in some of the land described in the petition was derived through the will of her sister, Lillie Taylor Jordan. Construction of this will being necessary to determine the precise interest of Anna Taylor in the land devised to her therein, the cause was transferred to the civil issue docket for such construction and determination.

The pertinent clauses of the will follow:

"2. All my interest in my city property to go to my brothers, Bynum and Talmage Taylor, except my interest in the house on Hendley Street which is to go to my sister, Bessie Taylor, each to do as they like with this property.

"3. My interest in the Home Place to go to Bynum and Talmage Taylor and to my sisters, Annie & Bessie Taylor, to do as they like with it.

"4. All my personal property to my sister, Annie Taylor, for her to keep or dispose of as she sees best.

"5. I wish that after my death and the death of the brothers & sisters, named in this will, whatever property there is left shall go to my niece, Geneva Taylor Lewis and her husband, Mark Lewis."

(It is stipulated that Annie Taylor and Anna Taylor are different spellings of the same name and represent the same person; and, further, that only title to real estate is here involved.)

The trial court held that Lillie Taylor Jordan "devised all her interest in the Home Place in fee to her brothers, Bynum and Talmage Taylor, and to her sisters, Anna and Bessie Taylor; and that the said Geneva Taylor Lewis and her husband, Mark Lewis, take nothing under said will."

From this construction and ruling, the respondents, Geneva Taylor Lewis and her husband, Mark Lewis, appeal, assigning error.

Frazier & Frazier for petitioners, appellees.

J. A. Cannon, Jr., for respondents, appellants.

STACY, C. J. What estate is devised in Item 3 of the Will of Lillie Taylor Jordan? The Superior Court adjudged a fee, and we approve.

It is provided by G. S., 31-38, that when real estate is devised to any person, the same shall be held and construed a devise in fee simple, unless such devise shall, in plain and express language 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. *Elder v. Johnston,* 227 N. C., 592; *Early v. Tayloe,* 219 N. C., 363, 13 S. E. (2d), 609. Consequently, an unrestricted or indefinite devise of real property is regarded

as a devise in fee simple. *Heefner v. Thornton,* 216 N. C., 702, 6 S. E. (2d), 506; *Barco v. Owens,* 212 N. C., 30, 192 S. E., 862. And so, also, is a devise generally to one person with limitation over to another of "whatever is left" at the death of the first taker. *Patrick v. Morehead,* 85 N. C., 62; *Carroll v. Herring,* 180 N. C., 369, 104 S. E., 892. In the case last cited, it is said: "Where real estate is given absolutely to one person, with a gift over to another of such portion as may remain undisposed of by the first taker at his death, the gift over is void, as repugnant to the absolute property first given." Accordant: *Croom v. Cornelius,* 219 N. C., 761, 14 S. E. (2d), 799; *Hambright v. Carroll,* 204 N. C., 496, 168 S. E., 817; *Lineberger v. Phillips,* 198 N. C., 661, 153 S. E., 118; *Roane v. Robinson,* 189 N. C., 628, 127 S. E., 626; *Fellowes v. Durfey,* 163 N. C., 305, 79 S. E., 621; *Holt v. Holt,* 114 N. C., 241, 18 S. E., 967.

Indeed, it is a general rule of testamentary construction that an unrestricted devise of real estate carries the fee, and a subsequent clause in the will expressing a wish, desire or even direction for the disposition of what remains at the death of the devisee, is not allowed to defeat the devise, nor limit it to a life estate. *Barco v. Owens, supra.* It is understood, of course, that this rule, as well as all rules of construction, must yield to the paramount intent of the testator as gathered from the four corners of the will. *Jolley v. Humphries,* 204 N. C., 672, 169 S. E., 417. Such was the reason for taking the case of *Hampton v. West,* 212 N. C., 315, 193 S. E., 290, out of the general rule; and for like reason it is distinguishable from the present case.

The construction of the subject will, in accordance with the general rule, is approved.

Affirmed.

STATE OF NORTH CAROLINA EX REL. UNEMPLOYMENT COMPENSATION COMMISSION OF NORTH CAROLINA v. LOUISE MARTIN, ET AL.

(Filed 10 December, 1947.)

1. Master and Servant § 60—

Employee-claimants who are not directly interested in the labor dispute which brings about the stoppage of work, and who do not participate in, help finance or benefit from the dispute, are nevertheless disqualified from unemployment compensation benefits if they belong to a grade or class of workers employed at the premises immediately before the commencement of the stoppage, some of whom, immediately before the stoppage occurs, participate in, finance or are directly interested in such labor dispute. G. S., 96-14 (d) (2).

2. Master and Servant § 62—

The finding of the Unemployment Compensation Commission that employee-claimants belong to the same grade or class of workers as other

employees, some of whom, immediately before the stoppage occurred, participated in and were directly interested in the labor dispute causing the stoppage, *is held* supported by ample evidence and is therefore conclusive, there being no allegation or evidence of fraud. G. S., 96-15.

APPEAL by employee-claimants from *Olive, Special Judge,* at February Civil Term, 1947, of GUILFORD (High Point Division).

Proceeding under Unemployment Compensation Law to determine validity of claims and disqualifications for unemployment benefits.

The operative facts are these:

1. The Slane Hosiery Mills is engaged in the manufacture of men's seamless hosiery in the City of High Point, and normally employs between 200 and 225 workers in what is known as the "knitting department" and between 100 and 200 workers in what is known as the "finishing department."

2. That the employees in the finishing department, who successively handle the same product in a continuous integrated process, are known as "dyers," "boarders," "pairers," "transfer girls," "rider girls," "folders" and "packers." The Secretary of the Corporation, testifying for the employee-claimants, said: "The manufacture of hose from the time they are put in the dye house until they come out in the cartons and cases to be shipped is a continuous operation and each worker is dependent upon the operation of another worker. It is a chain or integrated operation."

3. That all employee-claimants herein are workers in the finishing department, and are included in the general designation or classification of "finishers." They were unemployed from 3 September, through 6 November, 1946, by reason of a labor dispute existing between the boarders and the management which caused a stoppage of work throughout the finishing department during the existence of the dispute.

4. The employee-claimants, other than the boarders, were not directly interested in the labor dispute which brought about the stoppage of work, nor did they participate in, help finance, or benefit from the dispute.

The Unemployment Compensation Commission found:

1. That all the employee-claimants involved herein were unemployed in consequence of the stoppage of work caused by the controversy between the boarders and the management over wages to be paid the boarders for certain work.

2. That the boarders, who are the only organized group in the mill, participated in and were directly interested in the labor dispute, which disqualifies them for benefits under the statute. G. S., 96-14 (d) (1).

3. That the employee-claimants belong to a grade or class of workers—"finishers"—some of whom (the boarders) participated in and were directly interested in the dispute, which likewise disqualifies them for benefits under the statute. G. S. 96-14 (d) (2).

From the foregoing determinations, the employee-claimants gave notice of appeal to the Superior Court, where the findings and conclusions of the Commission were upheld and affirmed.

From this ruling, the employer, the boarders and the employee-claimants, other than the boarders, noted an appeal, but the boarders and the employer failed to prosecute their respective appeals; and on motion, these have been dismissed. The employee-claimants, other than the boarders, alone have preserved their right of appeal.

W. D. Holoman, R. B. Overton, and R. B. Billings for Unemployment Compensation Commission, appellee.

Haworth & Mattocks for employee-claimants, appellants.

G. S. Steele, Jr., for Colin O'Brien, et al., amici curiae.

STACY, C. J. The question for decision is whether the employee-claimants (other than the boarders) who were not directly interested in the labor dispute which brought about the stoppage of work, and did not participate in or help finance or benefit from the dispute, are disqualified for benefits because they belonged to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurred, some of whom (the boarders) were participating in or financing or directly interested in the dispute. The Superior Court answered in the affirmative, and we approve on authority of what was said in the case of *In re Steelman,* 219 N. C., 306, 13 S. E. (2d), 544.

It is sought to distinguish the present case from the *Steelman Case* on the ground that the appellants here do not belong to the same grade or class of workers as the boarders. This was a question of fact which the Commission has determined against the appellants.

It is provided by G. S., 96-15, that in any judicial proceeding under this section, "the findings of the Commission as to the facts, if there is evidence to support it, and in the absence of fraud, shall be conclusive, and the jurisdiction of said court shall be confined to questions of law."

There is ample evidence to support the findings of the Commission. Hence, in the absence of fraud, and none is alleged here, they are conclusive on appeal to the Superior Court and in this Court.

It results, therefore, that the judgment of the Superior Court must be upheld.

Affirmed.

A. T. MORGAN, ADMR., v. CAROLINA COACH CO., ET AL.

(Filed 10 December, 1947.)

1. Automobiles § 8d—

The stopping of a bus on the right side of the highway on the hard surface to permit a waiting passenger to board the bus is not negligence.

2. Evidence § 20: Trial § 31b: Appeal and Error § 39f—

In a civil action, defendant's evidence of good character relates only to his credibility as a witness, and an instruction that it might also be considered as substantive evidence for defendant must *be held* for prejudicial error when it appears that it may have influenced the verdict of the jury.

3. Automobiles §§ 17, 18h (3): Negligence § 12—

A 13-year-old girl alighted from a school bus on a dirt road some 25 feet to the north of its intersection with a highway. A bus of a common carrier, headed west, was standing, with its motor running, on the hard surface on the north side of the highway. In attempting to cross the highway the girl ran back of the bus, and was struck by a car traveling east. Her vision of the car was obstructed by the bus. *Held:* The 13-year-old child was not guilty of contributory negligence as a matter of law.

APPEAL by plaintiff from *Pittman, J.,* at February Term, 1947, of MOORE.

Civil action to recover damages for death of plaintiff's intestate, alleged to have been caused by the wrongful act, neglect or default of the defendants.

On the afternoon of 1 January, 1945, plaintiff's 13-year-old daughter was a passenger on a school bus traveling in a westerly direction from Carthage on Highway No. 27. When the driver of the bus reached the end of his westerly run, and where the plaintiff's daughter was to alight, he turned to his right and drove his bus off the highway and onto a side road (unpaved), as was his custom in turning around at this point. He stopped at right angles with the Highway leaving a space of from 8 or 9 to 10 feet between the rear of his bus and the edge of the hard surface.

A bus of the Carolina Coach Company was following the school bus and stopped at this point to pick up a passenger who was standing on the eastern edge of this side road. The front of the defendant's bus, passed the rear of the school bus and was near the western edge of the side road when it came to a stop on the hard surface. Here the waiting passenger got on the defendant's west-bound bus.

In the meantime plaintiff's daughter was discharged from the school bus at a point about 25 feet from the hard surface of the highway and was in the act of going behind the bus of the Carolina Coach Company

and running across the hard surface, which was 18 feet wide at that point, when she was struck by a car traveling in an easterly direction and driven by the defendant, G. E. Gibbs. The view of plaintiff's intestate, as well as that of the defendant Gibbs, was, for an interval, obstructed by the presence of the bus of the Carolina Coach Company. Its motor was in the rear and running at the time.

Plaintiff's evidence tends to show that the speed of the Gibbs car was around 50 miles an hour. The defendants say it was not more than 35 or 40 miles an hour. In any event, the Gibbs car was not more than 8 or 10 feet away, so he testifies, when plaintiff's intestate ran from behind the defendant's bus and attempted to cross the southern half of the hard surface. Gibbs swerved his car to the right, but was unable to avoid striking the plaintiff's daughter. Gibbs took her in his car and did all he could for her but she died as a result of the injuries before reaching the hospital.

The jury found, on separate issues, that neither defendant was negligent and that plaintiff's intestate was contributorily negligent.

From judgment on the verdict, the plaintiff appeals, assigning errors.

H. F. Seawell, Jr., and Douglass & McMillan for plaintiff, appellant.

J. Laurence Jones and William D. Sabiston, Jr., for defendant Coach Co., appellee.

M. G. Boyette for defendant Gibbs, appellee.

STACY, C. J. The case was here at the Fall Term, 1945, on demurrer to the complaint. 225 N. C., 668, 36 S. E. (2d), 263. It is here now on plaintiff's appeal from an adverse verdict. It will be noted at once that the case as made by the evidence differs widely from the one alleged in the complaint.

The jury was justified in exculpating the defendant, Carolina Coach Company, from liability under what was said in *Peoples v. Fulk,* 220 N. C., 635, 18 S. E. (2d), 147; *Leary v. Bus Corp.,* 220 N. C., 745, 18 S. E. (2d), 426, and *White v. Chappell,* 219 N. C., 652, 14 S. E. (2d), 843.

The defendant G. E. Gibbs, offered four witnesses who, without objection, testified to his good character in the community where he lives, and in the court's charge, reference was made to this evidence as follows: "Character evidence is substantive evidence; that is, it is basic evidence; not only substantive evidence but it also bears on his credibility as a witness," etc. This, of course, was erroneous as the case is one in tort based on alleged negligence. The issues are civil, rather than criminal, in character, and the evidence was competent only as affecting the defendant's credibility as a witness. *Lumber Co. v. Atkinson,* 162 N. C., 298,

78 S. E., 212. The trial court seems to have overlooked this difference, for the moment. Nevertheless, it had the effect of casting the substantive weight of such evidence into the scales against the plaintiff, and may have been the determinative factor in the case. It was sufficient to affect the atmosphere and tone of the trial, a circumstance which commands the attention of every experienced practitioner.

The defendant, on the other hand, says that in all events, the error should be regarded as harmless since plaintiff's intestate was guilty of contributory negligence as a matter of law. We are unable to agree with this contention in the light of what was said in the recent case of *Sparks v. Willis, ante,* 25, and cases there cited, especially *Smith v. Miller,* 209 N. C., 170, 86 S. E., 1036.

Hence, the result:

No Error as to the defendant, Carolina Coach Co.

New Trial as to the defendant, G. E. Gibbs.

J. F. CAUDLE v. TYRE G. BENBOW.

(Filed 10 December, 1947.)

1. False Imprisonment § 2: Malicious Prosecution § 7—

A complaint alleging the institution of a criminal action prompted by malice and the termination of the action by plaintiff's acquittal, and also that defendant caused plaintiff to be arrested on the warrant issued in the criminal action, is sufficient to state a cause of action for false arrest as well as malicious prosecution.

2. Same: Pleadings § 24a—

Where a complaint alleges a cause of action for malicious prosecution and a cause of action for false imprisonment, and the evidence at the trial shows that the warrant upon which plaintiff was arrested was void, the court, under our liberal practice, may try the action in conformity to the evidence and submit issues relating to false imprisonment.

3. Malicious Prosecution § 2—

An action for malicious prosecution must be predicated upon a valid warrant.

4. False Imprisonment § 1—

Good faith of defendant in procuring the issuance of the warrant does not preclude the recovery of actual or compensatory damages for false imprisonment, proof of express malice not being required, since malice may be inferred from the willful and purposeful doing of an unlawful act injurious to another.

5. Appeal and Error § 39f—

A charge will not be held for error as containing an expression of opinion on the facts involved when, construed contextually, the jury could not have been misled or improperly influenced thereby.

6. False Imprisonment § 2—

An instruction to the effect that actual malice is prerequisite to the award of punitive damages, but that the jury might consider, among other things, lack of probable cause upon the question of actual malice, is without error.

APPEAL by defendant from *Grady, Emergency Judge,* at February Term, 1947, of GUILFORD. No error.

Walser & Wright and D. H. Parsons for defendant, appellant.

No counsel contra.

DEVIN, J. The verdict established that the defendant had wrongfully caused the arrest of the plaintiff under a void warrant, and that the defendant was actuated by malice. Both compensatory and punitive damages were assessed, under separate issues, and from judgment on the verdict defendant appealed. Error is assigned chiefly on the ground that the complaint set out a cause of action for malicious prosecution, and that the court submitted instead issues pertinent to an action for false arrest, and that the case was tried on that theory. Defendant contends his motion for judgment of nonsuit should have been allowed.

True, the complaint alleged the elements of a malicious prosecution, that is, the institution of a criminal action, prompted by malice, and the termination of the action by plaintiff's acquittal. *Carpenter v. Hanes,* 167 N. C., 551, 83 S. E., 577; *Wingate v. Causey,* 196 N. C., 71, 144 S. E., 530; *Mooney v. Mull,* 216 N. C., 410, 5 S. E. (2d), 122. But the plaintiff also alleged "that in obedience to instructions from the defendant and through the Sheriff of Guilford County the aforesaid Justice of the Peace, on or about 24th day of April, 1945, did cause plaintiff to be arrested on said warrant." Thus, the allegations of the complaint, we think, are sufficient to constitute the basis for an action for false arrest as well as malicious prosecution, and that the trial of the action in conformity to the evidence offered as to false arrest would be permissible under our liberal practice. This is the holding in *Rhodes v. Collins,* 198 N. C., 23, 150 S. E., 492. The warrant upon which plaintiff was arrested at the instance of the defendant was admittedly void, hence technically the action for malicious prosecution which presupposes valid process would not lie. *Allen v. Greenlee,* 13 N. C., 370; *Bryan v. Stewart,* 123 N. C., 92, 31 S. E., 286; *Rhodes v. Collins,* 198 N. C., 23, 150 S. E., 492; *Melton v. Rickman,* 225 N. C., 700, 36 S. E. (2d), 276. Upon this being

made to appear, the court, without objection, submitted the issues arising in an action for damages for false arrest. The plaintiff testified he was arrested by an officer upon this warrant and held in custody for an hour until his recognizance could be taken. The defendant testified he had caused the issuance of the warrant upon which plaintiff was arrested but that he did so in good faith. Under these circumstances the defendant's good faith could not protect him from liability for actual or compensatory damages proximately flowing from his wrongful act. *Rhodes v. Collins, supra.* The motion for nonsuit was properly denied.

The defendant excepted to certain portions of the judge's charge to the jury, and assigns error in the instruction given on the second issue as to malice to the effect that the plaintiff, in order to lay the basis for an award of compensatory damages, was not required to prove express malice but that malice might be inferred from the willful and purposeful doing of an unlawful act injurious to another. The exception is without merit. The defendant also pointed out that in the court's charge on this subject, and in the elaboration of the instruction referred to, the court used language in defining the elements of malice, which, it is contended, might have been understood to contain the expression of an opinion on the facts involved, but, taking the charge as a whole and considering it contextually, we do not think the jury was misled or that they were improperly influenced thereby. No prejudicial error has been shown. *Collins v. Lamb,* 215 N. C., 719, 2 S. E. (2d), 863; *S. v. Hunt,* 223 N. C., 173, 25 S. E. (2d), 598.

On the issue as to punitive damages the jury was instructed in effect that before they could award smart money, in their discretion, they must first find by the preponderance of the evidence the presence of actual malice, and that they "had a right to take into consideration the lack of probable cause the man had for issuing the warrant, the degree of malice with which he was actuated in causing the arrest of the plaintiff, all his acts and conduct tending to show, if it does show, a reckless disregard of the plaintiff's rights." Exception was noted only to the instruction that the jury might consider, among other things, lack of probable cause. This exception cannot be sustained. *Kelly v. Traction Co.,* 132 N. C., 368, 43 S. E., 923; *Motsinger v. Sink,* 168 N. C., 548, 84 S. E., 847; *Miller v. Greenwood,* 218 N. C., 146, 10 S. E. (2d), 708.

Upon the whole case, considering the assignments of error brought forward in defendant's appeal as set out in his brief and orally presented in the argument, we think the result below should be upheld.

No error.

CITY OF WILMINGTON, NORTH CAROLINA, NEW HANOVER COUNTY, AND C. R. MORSE, CITY-COUNTY TAX COLLECTOR, *v.* GEORGE SCHUTT AND WIFE, LANEY S. SCHUTT, AND CARL B. SCHUTT AND WIFE, LIDA M. SCHUTT.

(Filed 10 December, 1947.)

1. Justices of the Peace § 3—

Justices of the peace have no equity jurisdiction and therefore no jurisdiction of a cause on contract to recover an amount less than $200 when plaintiff seeks to have the recovery declared a lien on specific realty under the terms of the contract.

2. Contracts § 21—

In an action on contract plaintiff is not required to set out the full contents of the instrument in the complaint or to incorporate same by reference to copy thereof attached as an exhibit.

3. Pleadings § 3a—

The complaint should contain allegations of the ultimate facts constituting the cause of action and not the evidential facts. G. S., 1-122.

4. Courts § 3b—

The Superior Court has exclusive original jurisdiction of a cause on contract to recover an amount less than $200 when plaintiff seeks to have the recovery adjudged a lien on specific property under the terms of the instrument.

APPEAL by plaintiffs from *Morris, J.*, April Term, 1947, NEW HANOVER. Reversed.

Civil action to recover the value of labor and material furnished in making certain alterations and repairs on the property of defendant and to have same declared a lien thereon, heard on motion to dismiss.

The essential allegations in the complaint by which the merit of the motion is to be tested are these:

(1) The plaintiffs and defendants entered into a written contract under seal under the terms of which defendants authorized the plaintiffs to do certain construction, alteration and repair work on their premises, pursuant to an ordinance duly adopted in furtherance of rat eradication and typhus fever control.

(2) The defendants in said contract specifically agreed to reimburse plaintiffs for the actual expenditures made by them in performing the contract on their part and "that said expenditures should be and constitute a lien on said premises until paid."

(3) Plaintiffs, in doing the work contemplated by the contract, made expenditures in the total amount of $182. The defendants, on demand, failed to pay the same.

Plaintiffs instituted this action in the Superior Court to recover said amount of $182 and to have the same declared a lien upon said land and premises until fully paid. There was judgment by default final on the debt and by default and inquiry on plaintiff's claim of a lien. The defendants had the cause set on the motion docket and moved to dismiss for want of jurisdiction of the cause of action alleged in the complaint. The motion was allowed and judgment dismissing the action was duly entered. Plaintiffs excepted and appealed.

J. H. Ferguson for plaintiff appellants.
Stevens & Burgwin for defendant appellees.

BARNHILL, J. A justice of the peace has no equity jurisdiction, and when the remedy sought in a suit on contract is, in whole or in part, equitable in nature the action must be instituted and maintained in the Superior Court, irrespective of the amount in controversy. McIntosh, P. & P., sec. 62, p. 60; *Kiser v. Blanton,* 123 N. C., 400; *Sewing Machine Co. v. Burger,* 181 N. C., 241, 107 S. E., 14; *Grocery Co. v. Banks,* 185 N. C., 149, 116 S. E., 173.

When the amount sought to be recovered in such an action is less than $200, "it is not now required that the debt should be first reduced to judgment, as a creditor may join in one action a proceeding to recover a judgment for the amount of his debt and another to subject property to the payment thereof . . ." *Grocery Co. v. Banks, supra.*

There is no rule which requires a plaintiff to set forth in his complaint the full contents of the contract which is the subject matter of his action or to incorporate the same in the complaint by reference to a copy thereof attached as an exhibit. He must allege in a plain and concise manner the material, ultimate facts which constitute his cause of action. G. S., 1-122; *Patterson v. R. R.,* 214 N. C., 38, 198 S. E., 364; *Wadesboro v. Coxe,* 215 N. C., 708, 2 S. E. (2d), 876; *Barron v. Cain,* 216 N. C., 282, 4 S. E. (2d), 618. The production of evidence to support the allegations thus made may and should await the trial.

The plaintiffs allege that defendants, by contract under seal, agreed that the amount due the plaintiffs should be and constitute a lien upon the lands of defendants described in the complaint. They seek not only to recover judgment on their debt but also to have the same adjudged a lien on specific property. Thus they seek an equitable remedy of which the Superior Court alone has jurisdiction.

It follows that the judgment of the court below must be

Reversed.

W. H. BRYANT v. JETTIE MAE BRYANT.

(Filed 10 December, 1947.)

1. Judgments § 25—

The proper procedure to attack a divorce decree on the ground that plaintiff had not been a resident of the State for six months preceding the institution of the action, G. S., 50-6, is by motion in the cause.

2. Divorce § 3—

Plaintiff must be physically present in this State and have the intention of making his residence here a permanent abiding place in order to be domiciled here within the meaning of the statute making residence in this State for six months a jurisdictional prerequisite to the institution of an action for divorce on the grounds of two years separation.

3. Domicile—

To establish a domicile, there must be a residence, and the intention to make it a home or to live there indefinitely.

4. Divorce § 3: Judgments § 25—

The finding of the court, supported by evidence, that plaintiff was physically present in this State for more than six months prior to instituting action for divorce and that he regarded his residence here as a permanent home, is sufficient to support judgment denying defendant's motion in the cause to set aside the divorce decree on the ground of want of the jurisdictional requirement of domicile.

5. Domicile—

The fact that a person obtains automobile license and ration cards in another state, giving such state as his residence, while competent on the question of domicile, is not conclusive.

6. Appeal and Error § 40d—

Findings of fact by the trial court when supported by evidence, notwithstanding that there may be evidence *contra*, are binding on appeal.

APPEAL by defendant from *Nimocks, J.*, at February Term, 1947, of ROBESON. Affirmed.

This was a motion in the cause by the defendant to set aside judgment in a divorce action on the ground that the plaintiff was not a resident of North Carolina as required by the statute, G. S., 50-6. The motion was not made until after the plaintiff had died, and his personal representatives and heirs were made parties, and answered.

After hearing the evidence offered by the movent and that on behalf of the respondents the court made certain findings of fact and upon them denied defendant's motion. It was not controverted that plaintiff and defendant were married in 1929, and separated permanently in 1932; that 19 October, 1943, plaintiff instituted action for divorce on the

ground of two years separation in the Superior Court of Robeson County alleging residence in this State for more than six months. The defendant was personally served with summons, and filed no answer. At February-March Term, 1944, the case came on regularly for trial before judge and jury, proper issues were submitted and answered in favor of plaintiff, and judgment was rendered accordingly.

It appeared that plaintiff formerly lived near Conway, South Carolina, where he owned a farm of 147 acres, and that in February, 1943, he rented out his farm and came to live with his son in Robeson County, bringing with him his automobile, and his clothes and personal effects. There he remained, working at times with his son on the farm, until the summer of 1944, when he returned to South Carolina to live with his daughter and there died in April, 1946. It also appeared that plaintiff registered his automobile in South Carolina in 1941, and that in October, 1943, he renewed his license in that state, stating his residence as Conway, South Carolina, and that he made application there for gasoline and ration books for 1943-44. The court further found:

"8. In the early spring of 1943, he rented out his farm, stored his furniture and went to live with his son Mack in Robeson County, North Carolina, leaving South Carolina and moving with his son in February, 1943. He took with him his automobile, his truck, suitcase, china, bed clothes, gun and Bible. He had a separate room in his son's home. He did odd jobs about the farm and during tobacco time he worked for wages paid him by W. A. Stone. He bought his own groceries, received his mail there and attended church in the neighborhood regularly and visited among the neighbors and was a resident in North Carolina, more than 55 miles from his former home in South Carolina. At the time he went to live with his son Mack he asked his son's landlord, W. A. Stone, if it was agreeable with him for him to move there and live with his son. He told neighbors in his new home that he had moved to live with his son Mack; that he was better satisfied with him than any of his other children and had moved there with Mack to stay.

"9. In November of 1943, his son Mack took him from Robeson County to Horry County, South Carolina, where he spent a day and a night and while there he sold out his furniture, stored in the old home, and his farming equipment, pursuant to a newspaper advertisement theretofore made by him. In the late fall of 1943, Mack Bryant moved his home to the nearby farm of Dewey Stone, in Robeson County, and plaintiff moved there with him. At the time, Mack Bryant informed his new landlord that his father would work with him during the year 1944. W. H. Bryant continued to live with his son Mack in Robeson County until the early summer or late spring of 1944, and while living there, from time to time, he told neighbors that he intended to remain in Robeson County.

"10. That plaintiff, W. H. Bryant, spent a portion of his time throughout the year 1943 in and around Conway, South Carolina, and in other parts of Horry County, and while there purchased gasoline and other articles from stores near his farm, at times spending nights in the home of neighbors and with some of his own children in said State, and there was a mail box near his farm; that at frequent intervals during 1943 he called on a lady in Homewood, South Carolina, and was frequently seen coming and going in the neighborhood of his old home in South Carolina.

"11. Plaintiff continued to live in the home of his son, Mack Bryant, in Robeson County, until the late spring or early summer of 1944, at which time he returned to Horry County, South Carolina, and went to the home of his daughter, where he remained there and in the hospital until he died in 1946.

"Upon the foregoing findings of fact, it is ordered, adjudged and decreed:

"1. That on October 19, 1943, at the time of the institution of this suit, plaintiff had been a resident of Robeson County, North Carolina, for more than six months next preceding the commencement of this action.

"2. That the motion of the defendant to set aside the judgment is denied."

From judgment denying the motion defendant appealed.

L. J. Britt and McLean & Stacy for plaintiff, appellee.
Johnson & Johnson for defendant, appellant.

DEVIN, J. By motion in the cause the defendant sought to vacate the divorce decree theretofore rendered on the ground that at the time plaintiff instituted his action he was not and had not been for six months a resident of North Carolina as required by G. S., 50-6. Properly the procedure for obtaining relief on the ground alleged was by motion in the cause. *Simmons v. Simmons, ante,* 233.

However, the controverted issue raised by defendant's motion as to the residence of plaintiff at the time of his divorce action seems to have been determined against the defendant by the findings of fact.

In order to constitute residence as a jurisdictional fact to render a divorce decree valid under the laws of this State there must not only be physical presence at some place in the State but also the intention to make such locality a permanent abiding place. There must be both residence and *animus manendi. Reynolds v. Cotton Mills,* 177 N. C., 412, 99 S. E., 240; *Roanoke Rapids v. Patterson,* 184 N. C., 137, 113 S. E., 603; *S. v. Williams,* 224 N. C., 183 (191), 29 S. E. (2d), 744. To establish a domicile there must be residence, and the intention to make it a home or to live there permanently or indefinitely. *S. v. Williams, supra.*

The court found the facts as to plaintiff's actual residence in Robeson County, North Carolina, for more than the statutory period, and further found that at the time he expressed the intention of remaining in Robeson County, saying he had moved there to stay. The fact that plaintiff, for the purpose of obtaining automobile license and ration cards stated his residence as Conway, South Carolina, was some evidence on the question of domicile but not necessarily conclusive. *Welch v. Welch,* 226 N. C., 541, 30 S. E. (2d), 457.

While there was evidence from which a contrary decision might have been rendered, the record also discloses evidence in full support of the findings made by the court. Hence, the conclusion reached below that plaintiff had been a resident of Robeson County for more than six months next preceding the commencement of this action will be upheld. *In re Hamilton,* 182 N. C., 44, 108 S. E., 385; *Stokes v. Cogdell,* 153 N. C., 181, 69 S. E., 65.

Judgment affirmed.

J. J. McKAY v. McNAIR INVESTMENT COMPANY.

(Filed 10 December, 1947.)

Pleadings § 28—

Where defendant admits liability under its own construction of the contract for a part of the amount alleged by plaintiff to be due thereunder, plaintiff is entitled to judgment for such amount without prejudice to the litigation of the balance claimed to be due him, G. S., 1-510, which right may not be defeated by defendant's tender of judgment under G. S., 1-541.

APPEAL by defendant from *Stevens, J.,* at September Term, 1947, of BRUNSWICK.

Civil action to recover on contract.

Plaintiff alleges in his complaint and reply these facts: That on and about 22 December, 1925, defendant entered into a contract with plaintiff for the purchase of several tracts of land in certain townships in Brunswick County by the terms of which it was agreed: That defendant would furnish all moneys, without interest, necessary to purchase said lands and pay all expenses incidental to the survey and examination of titles of said land, and plaintiff would negotiate the purchase of said land and look after and care for same and attempt to make sales thereof; that if and when the lands were sold, plaintiff and defendant would each bear one-half of any loss sustained, and would each share one-half of any profits realized; that in compliance and in accordance with the contract certain lands were purchased with money furnished by defendant, from 22 December, 1925, to 23 September, 1946, and defendant has furnished

money to pay all expenses in connection with said land; that plaintiff has acted as caretaker for said land, all in compliance and accordance with said contract, and has negotiated sale of timber from said land, and helped negotiate the sale of the lands; that from the sale of timber and of the lands defendant has received a net profit of $24,441.34,—to one-half of which, that is, $12,220.67, plaintiff is entitled, and that defendant has failed and refused to pay said sum of $12,220.67, after demand by plaintiff.

Defendant, in its answer, avers: That the contract for the purchase and sale of the several tracts of land was tripartite between it, A. F. Jones, and plaintiff; that it was agreed that when the lands were sold, the proceeds should be applied first to refund to it all moneys advanced in the purchase of the lands and for expenses, with interest at the rate of six per cent per annum, and any balance to be divided into three parts, one part to be retained by it, one paid to A. F. Jones, and one to plaintiff; and that in accordance therewith "the net profits realized for the transaction was $14,730.74," to be divided into three parts of $4,910.25, one part of which to be paid to plaintiff. Defendant thereupon tenders to plaintiff the sum of $4,910.25 in full payment of his share of the net profits realized on the contract, and prays that plaintiff take nothing further by this action.

Plaintiff moved in Term of Superior Court for judgment against defendant for the amount admitted in its pleading to be due plaintiff, and the court entered judgment in favor of plaintiff and against defendant for the sum of $4,910.25 "without prejudice to the rights of the plaintiff to prosecute his claim for the further sum of $7,310.42, as alleged in the complaint filed in this cause, and without prejudice to the defendant's right to defend its rights in this action against the further sum claimed in this action by the plaintiff."

Defendant appeals therefrom to Supreme Court, and assigns error.

Frink & Herring for plaintiff, appellee.
E. J. Prevatte and Jennings G. King for defendant, appellant.

WINBORNE, J. This is the question: Does the statute, G. S., 1-510, authorize the rendition of the judgment from which this appeal is taken? The answer is "Yes." Such answer finds support in decisions of this Court. *Parker v. Bledsoe,* 87 N. C., 221, and *Fertilizer Co. v. Trading Co.,* 203 N. C., 261, 165 S. E., 694.

The statute, G. S., 1-510, provides that "whenever the answer of the defendant expressly, or by not denying, admits a part of the plaintiff's claim to be just, the judge, on motion, may order the defendant to satisfy that part of the claim, and may enforce the order as it enforces a judgment or provisional remedy."

In *Fertilizer Co. v. Trading Co., supra,* this Court said: "In *Parker v. Bledsoe,* 87 N. C., 221, on facts closely akin to those here appearing, an order was entered which directed that the plaintiff recover of the defendants the amount admitted to be due and retained the action for further hearing on the balance of plaintiff's claim. This was the procedure followed in the instant case. The order is authorized by the statute."

And this pertinent treatment of the subject appears in 46 C. J. S., 322, Judgments, Sec. 185, subsection (b), "At common law and in the absence of statute or court rule to the contrary, plaintiff has no right to enter judgment for the part admitted, and then to proceed to trial for the balance of his claim; but by statute in many jurisdictions judgment may be entered before trial, for the part admitted and a trial had for the part disputed. Under this class of statutes two judgments may be rendered in the same case, both for plaintiff, or one for plaintiff and one for defendant, according to the result of the trial of the controverted portion of plaintiff's claim." *Simpson v. C. P. Cox Corp.,* 167 Wash., 34, 8 P. (2d), 424.

Furthermore, the same authority states that, "Where defendant has admitted a part of the claim to be due, and then proceeds under different statutory provision to offer to confess judgment on condition that the judgment be in full of the demands against him, such offer does not affect the right of plaintiff to have judgment entered for the part admitted in accordance with the first mentioned statutory provision." See also *Phenix Furniture Co. v. Daggett,* 145 S. C., 357, 143 S. E., 220, a decision based on statute almost identical to our statute, G. S., 1-510.

As we read the pleadings in the present action, the matters in difference between plaintiff and defendant relate to the terms of the contract in reference to purchase, caring for and sale of the same land. Those differences in the main are: (1) Whether the contract was bipartite, between plaintiff and defendant, or tripartite, between plaintiff, A. F. Jones, and defendant, and (2) whether defendant was to receive interest on moneys advanced. Defendant's answer is on the theory that the contract was tripartite, and that it was to receive interest on the moneys advanced. And on this basis defendant admits that plaintiff is entitled to $4,910.25, the amount for which judgment is rendered. In the face of this admission of the amount justly due plaintiff in accordance with its own version of the contract, defendant may not defeat the purpose of the statute, G. S., 1-510, by undertaking to make a tender under G. S., 1-541.

The judgment below is

Affirmed.

STATE v. CLIFTON H. McMAHAN.

(Filed 10 December, 1947.)

1. Automobiles § 28d—

In a prosecution for manslaughter, the admission of testimony that defendant "was drinking" when taken in charge at the scene of the wreck cannot be held for prejudicial error because of want of evidence that defendant was intoxicated, when there is ample evidence, including the physical facts, of wanton recklessness, the prosecution not being for drunken driving but for culpable negligence in the operation of an automobile.

2. Automobile § 28a—

The court's definition of "involuntary manslaughter" and its distinction between civil and criminal negligence in the operation of an automobile, *held* without error. G. S., 1-180.

3. Criminal Law § 53i—

An instruction, after charging that the jury were to consider defendant's evidence of good character as substantive evidence, that the jury then "ought" to consider it, rather than "were" to consider it, on the question of defendant's credibility as a witness in his own behalf, *is held* without prejudicial error.

APPEAL by defendant from *Rousseau, J.*, at April Special Term, 1947, of GUILFORD (High Point Division).

Criminal prosecution on indictment charging the defendant with the felonious slaying of one Fred Max Farlow.

On Saturday night, 24 November, 1945, between 11:00 and 11:30 p.m., the defendant was driving a 1941 Chevrolet on the Thomasville road in Guilford County. He picked up John Barnes and Max Farlow, hitchhikers, and started with them to High Point. Barnes took a seat in front with the defendant, and Farlow was riding in the back. Barnes says they came into the City on Eighth Street at a speed of 75 or 80 or 85 miles an hour. When they reached Phillips Street at West End in the business section of High Point, the defendant apparently lost control of the car. It skidded off the street, struck a road sign and a telephone pole, clipping them off, and came to rest about 100 feet away when it struck a tree. John Barnes was thrown from the car and Max Farlow, who was on the rear seat, died as a result of injuries sustained.

The policeman who took the defendant in charge at the scene of the accident testified, over objection, that "He was drinking. . . . I smelled some kind of alcohol on him." (Objection; exception.) The defendant was quite abusive to others who undertook to question him about the accident.

The defendant took the stand, and said he was driving between 30 and 35 miles an hour when he reached the business district and that his speed was not over ten miles an hour when he hit the tree. "I was not drinking a drop of any alcoholic beverages of any kind." He attributed the accident to a flat tire.

Verdict: Guilty as charged. The jury recommends mercy of the court.

Judgment: Imprisonment in the State's Prison for not less than two nor more than four years.

Defendant appeals, assigning errors.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

Gold, McAnally & Gold for the defendant.

STACY, C. J. The exception to the testimony of the officer that the defendant "was drinking" when taken in charge at the scene of the wreck, presents no serious difficulty. The defendant is charged with manslaughter, and not with drunken driving as was the case in *S. v. Carroll,* 226 N. C., 237, 37 S. E. (2d), 688, cited and relied upon by the defendant. The court made no reference to this evidence in submitting the case to the jury. Indeed, the force with which the car struck the road sign, the telephone pole and the tree, leaving in its wake manifestations of destruction and injury, is what brought about the defendant's conviction, and rightly so.

The defendant also complains at the court's definition of "involuntary manslaughter," but this was taken almost *verbatim* from *S. v. Stansell,* 203 N. C., 69, 164 S. E., 580, and is unexceptionable. The court recapitulated the evidence, declared and explained the law arising thereon, as he is required to do, G. S., 1-180, and was at pains to point out the difference between civil and criminal negligence in the operation of an automobile. *S. v. Cope,* 204 N. C., 28, 167 S. E., 456.

Finally, the defendant says there was error in the following instruction: "You are to consider this character evidence as substantive evidence for the reason that a man of good character is not as likely to commit crime as one of bad, and then you ought to consider this character testimony, gentlemen, as a circumstance . . . with other evidence . . . as bearing upon the weight and credit that you place upon his (defendant's) testimony." The instruction must be upheld on authority of *S. v. Morse,* 171 N. C., 777, 87 S. E., 946; *S. v. Moore,* 185 N. C., 637, 116 S. E., 161, and *S. v. Whaley,* 191 N. C., 387, 132 S. E., 6. *Cf. Morgan v. Coach Co., ante,* 280. Then, too, there was little in the defend-

ant's testimony to help him in the face of the physical facts adduced on the hearing.

The validity of the trial will be sustained.

No error.

H. C. PENNY, ADMINISTRATOR OF J. T. PENNY, DECEASED, v. H. W. STONE, TRADING AS PETROLEUM TRANSIT COMPANY, AND WILLIAM (BILL) LOCKEY.

(Filed 10 December, 1947.)

1. Pleadings § 31—

All allegations which the pleader is not entitled to support by evidence at the hearing should be stricken upon motion aptly made.

2. Master and Servant § 41—

In an action by the administrator of a deceased employee against the third-party tort-feasor, allegations in defendant's answer of an illegal agreement between the dependents and the employer for the distribution of the fund, are properly stricken on motion, since the administrator is an official of the court under duty to make disbursement of any recovery in conformity with statute, and could not be bound by the terms of the agreement alleged. G. S., 97-10.

3. Same—

In an action by the administrator of an employee against the third-party tort-feasor, evidence concerning amount of compensation paid by the employer or the amount thereof to which dependents are entitled, is prohibited. G. S., 97-10.

4. Same: Attorney and Client § 6: Actions § 3d—Allegations held insufficient to allege contract not to sue.

This action was instituted by the administrator of a deceased employee against the third-party tort-feasor. Compensation had been paid for the employee's death under the Workmen's Compensation Act. Defendant alleged in its answer that in the collision causing the death of plaintiff's intestate, other persons were killed or injured, that the other actions growing out of the collision were compromised, and that in the settlement defendant made a substantial contribution upon the assurance of the attorneys for the employer and insurance carrier that they would recommend that this action not be instituted. *Held:* The allegations failed to show a contract by the employer or the insurance carrier not to sue, or that the attorneys did not make the promised recommendation in good faith; and the allegations were properly stricken upon motion in the administrator's action.

5. Appeal and Error § 29—

An exception not discussed in the brief is deemed abandoned. Rule of Practice in the Supreme Court, No. 28.

PENNY *v.* STONE.

APPEAL by defendant Stone from *Nimocks, J.*, February Term, 1947, ROBESON. Affirmed.

Civil action to recover damages for wrongful death heard on motion to strike allegations in defendant's further answer.

Plaintiff's intestate was employed by the Lumberton Coach Company to operate a passenger bus. On the night of 29 November 1945, the bus operated by him and an oil tanker truck operated by defendant William Lockey, and belonging to defendant Stone, were in collision on N. C. Highway 211. Plaintiff's intestate received injuries which caused his death. Many of the passengers on the bus were also killed or injured. Twenty-eight separate suits for damages were instituted. These actions were closed by compromise settlements, toward which settlements defendant made a substantial contribution.

The dependents of plaintiff's intestate have received an award under the Workmen's Compensation Act, and this cause was instituted pursuant to the provisions of G. S. 97-10 for the joint benefit of plaintiff and the insurance carrier of the Lumberton Coach Company.

The appellant answered, pleading certain affirmative defenses. In his third (unnumbered) further defense he, in eight separate paragraphs, alleges in substance:

1. That an agreement had been entered into between the employer of deceased or its insurance carrier and the father of deceased for a division of the proceeds recovered in this action in a manner contrary to the provisions of G. S. 97-10 and contrary to public policy; that the action is not maintained in good faith but instead is prosecuted under said spurious agreement; and that plaintiff is estopped by law and good morals by "said illegal agreement";

2. The acceptance by the dependents of plaintiff's intestate of the award made by the Industrial Commission and the releases executed in connection therewith constitute a bar to this action;

3. That during the negotiations for the settlement of the twenty-eight damage suits which grew out of the collision, counsel for the insurance carrier of the employer of plaintiff's intestate, in return for a large contribution from defendant toward the settlements, promised to advise their client not to institute this action and assured defendant their client, in their opinion, would follow their advice; and that therefore said insurance carrier and said attorneys are estopped from receiving any part of the recovery herein.

The plaintiff moved to strike all eight paragraphs constituting said further defense. The motion was allowed and defendant excepted and appealed.

James R. Nance and Johnson & Johnson for plaintiff appellee.

Oates, Quillin & MacRae and F. D. Hackett for defendant appellant.

BARNHILL, J. An allegation in a pleading is irrelevant and immaterial whenever it is of such nature that evidence in support thereof would be incompetent at the hearing. Nothing ought to remain in a pleading, over objection, which is incompetent to be shown in evidence. *Pemberton v. Greensboro,* 203 N. C., 514, 166 S. E., 396; *Duke v. Children's Com.,* 214 N. C., 570, 199 S. E., 918. On a motion to strike, the test of relevancy of a pleading is the right of the pleader to present the facts to which the allegation relates in evidence upon the trial. *Trust Co. v. Dunlop,* 214 N. C., 196, 198 S. E., 645.

Tested by this rule, the allegations contained in defendant's third further defense, to which plaintiff objects, are irrelevant. The court below correctly ruled that they should be stricken. Hence defendant's exceptive assignment of error based on said ruling cannot be sustained.

The plaintiff is an officer of the court and he prosecuted this action under express authority conferred by G. S. 97-10. That statute prescribes the manner in which any amount recovered herein is to be disbursed. He is bound by the terms thereof and no agreement made by the father of deceased on the one hand and the employer or its insurance carrier on the other can affect him in the discharge of his duty as administrator.

Furthermore, evidence concerning the amount of compensation paid by the employer or the amount of compensation to which dependents are entitled is expressly prohibited in an action such as this. G. S. 97-10.

No agreement by the insurance carrier of the employer of plaintiff's intestate not to sue is alleged. Defendant merely asserts that counsel for the insurance carrier gave assurance that they would recommend to their client that no suit in the nature of the one here maintained should be instituted and stated to defendant that "we have represented this company for years and we feel sure that they will follow our recommendations." There is no suggestion that counsel did not in good faith carry out their promise. Furthermore, the alleged conversation, in and of itself, discloses that the insurance carrier had not been consulted and had not authorized the statement counsel are alleged to have made. Evidence in respect thereto would be irrelevant and incompetent on the trial of the issues raised by the pleadings herein.

Defendant does not discuss in his brief his exception to the judgment as it relates to the action of the court in refusing to strike paragraph 5 of his third further defense wherein he pleads the acceptance by the dependents of the award made by the Industrial Commission and the releases executed in connection therewith as a bar to this action. Therefore, this

contention is deemed to be abandoned. Rule 28, Rules of Practice in the Supreme Court, 221 N. C., 562, anno. p. 563. In any event it is without merit.

For the reasons stated the judgment below is

Affirmed.

W. E. SISSON AND A. A. PERRYMAN, JR., PARTNERS TRADING AND DOING BUSINESS AS TERMINAL CITY OIL COMPANY, v. S. S. ROYSTER, D. W. ROYSTER, H. R. ROYSTER, S. S. ROYSTER, JR., AND D. W. ROYSTER, JR., PARTNERS TRADING AS ROYSTER TRANSPORT CO.

(Filed 10 December, 1947.)

1. Automobiles § 18h (2)—

Plaintiffs' truck and defendants' truck, traveling in opposite directions, collided on the highway. There was evidence on the part of each party in support of his contention that the truck of the other party was over the center line of the highway when the collision occurred. *Held:* The conflicting evidence presents questions of fact for the jury, and the denial of plaintiffs' motion to nonsuit defendants' counterclaim was proper.

2. Appeal and Error § 39e—

Where defendants' contention that the collision forming the basis of the action was due to the negligence of the driver of plaintiffs' truck is presented to the jury in the pleadings, the testimony of one of defendants and the charge of the court, an exception to the admission in evidence of a letter written by the defendant which stated that the accident was the result of the negligence of plaintiffs' driver cannot be sustained on the ground that it was a self-serving declaration, since, even so, its admission could not have been prejudicial.

3. Appeal and Error § 38—

The burden is on appellant not only to show error but also that it was material and prejudicial.

APPEAL by plaintiffs from *Williams, J.*, at April Term, 1947, of NEW HANOVER. No error.

This was an action to recover damages for injury to plaintiffs' motor truck and trailer growing out of collision on the highway with defendants' truck and trailer. Both vehicles were being used in the transportation of gasoline, plaintiffs' unit being at the time empty and traveling east, and defendants' unit at the time loaded with gasoline and traveling west.

Plaintiffs alleged that the collision and consequent injury to their truck and trailer was caused by the negligence of defendants' driver in

the operation of defendants' truck. The defendants denied negligence on part of their driver, and set up a counterclaim for injury to defendants' truck and cargo, alleging that the collision and resultant injury to defendants' property was caused solely by the negligence of plaintiffs' driver.

Appropriate issues were submitted to the jury who for their verdict found that the plaintiffs' property was not damaged by negligence of the defendants, and on issues addressed to defendants' counterclaim the jury found defendants' property was damaged by the negligence of the plaintiffs and awarded compensation therefor against the plaintiffs.

From judgment on the verdict, plaintiffs appealed.

Stevens & Burgwin and J. Laurence Jones for plaintiffs, appellants.

Carr & Carr and Poisson, Campbell & Marshall for defendants, appellees.

DEVIN, J. A collision of oil trucks on the highway near Maxton, North Carolina, resulted disastrously. Plaintiffs' truck and trailer were badly battered, and defendants' truck and trailer loaded with gasoline were set on fire, the truck destroyed, the contents consumed, and the driver burned to death. This occurred on the night of 19 April, 1946. On 26 April, following, plaintiffs entered suit against defendants for injury to their truck, and the defendants by answer set up their claim for damages against the plaintiffs by way of counterclaim, alleging negligence on the part of plaintiffs' driver. The evidence on the controverted questions of fact as to whose negligence caused the collision was submitted to the jury and decided in favor of the defendants.

The plaintiffs bring up with their appeal from this adverse result several assignments of error. They present the view that there was no competent evidence of negligence on the part of plaintiffs, and that their motion for judgment of nonsuit as to defendants' counterclaim should have been allowed. It appears from the record that plaintiffs interposed motion for nonsuit at the close of defendants' evidence and excepted to its denial, but later offered a witness in rebuttal without thereafter renewing their motion (G. S., 1-183). However, this omission was not harmful, as we have considered the question of the probative value of defendants' evidence and reached the conclusion that there was some evidence to support defendants' allegations of negligence on the part of the plaintiffs. *Coach Co. v. Lee*, 218 N. C., 320, 11 S. E. (2d), 341. True, the plaintiffs' witness Lockey testified the driver of defendants' truck drove his truck over the center line of the highway and into plaintiffs' truck, and there was other evidence offered by plaintiffs tending to corroborate this view, but, on the other hand, the defendants offered the testimony of a

witness who was driving another truck close behind defendants' truck, tending to show that defendants' truck remained on the north side of the center of the highway at all times, and that there was a trail of oil beginning north of the center of the highway and extending across the highway to a point underneath plaintiffs' truck, and evidence was offered as to the position of defendants' truck after the collision, and the location of fragments and marks on the surface of the road. The conflicting versions of what occurred and as to who was at fault in causing the collision presented a question for the jury. As was said in *Lavender v. Kurn,* 327 U. S., 645, "But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

Plaintiffs also assign error in the ruling of the trial court in admitting in evidence, over objection, a letter written by D. W. Royster, one of defendants, to the plaintiffs, dated 25 April, 1946, in which it was stated that after investigating the wreck in which defendants' gasoline transport unit was destroyed and the driver killed, "we are convinced that this accident was due entirely to the negligence of your driver Lockey, and we are requesting that you arrange for immediate payment for all loss incurred in this wreck." There was no request that the scope of this evidence be restricted. It appeared that on the cross-examination of W. E. Sisson, one of the plaintiffs, he had been shown this letter and asked if he had received it, to which he replied that he recalled "receiving a similar letter some two weeks after the end of this suit." It was admitted that the letter was received by plaintiffs 26 April. The plaintiffs contend this letter contained a self-serving declaration and was incompetent. Defendants' reply that it was competent as showing demand on the plaintiffs, and that immediately on its receipt, the same day, the plaintiffs instituted suit against defendants in New Hanover County where plaintiffs reside, and that defendants, residents of Cleveland County, were therefore compelled to set up their cause of action by way of counterclaim. The defendants also call attention to the testimony of defendant Royster, admitted without objection, that he had investigated the wreck immediately after it occurred, and that he had made a written demand on plaintiffs 25 April, forwarded it by registered mail, and produced the return receipt signed by plaintiffs. Defendants contend the letter was competent to explain or contradict the testimony of Mr. Sisson, and also to corroborate Mr. Royster, and that in either view it was competent.

In any event, we are unable to see how the plaintiffs were prejudiced by the admission of this letter. In the pleadings, read in the presence of the jury, was set forth defendants' allegation that the collision was caused

solely by the negligence of plaintiffs' employee, and in the court's charge to the jury in stating the rival claims of the parties as pleaded it was stated that the defendants claimed plaintiffs' driver Lockey was driving in a negligent and careless manner which proximately caused the destruction by fire of defendants' property. Hence, the jury were fully aware that defendants' cross-action was bottomed on the claim that the collision was due entirely to the negligence of plaintiffs' driver, and that defendants were asking compensation for the loss. The letter added nothing to what had already been brought to their attention. If there was error in admitting the letter, which is not conceded, we cannot hold that plaintiffs were prejudiced thereby. Its admission was not of sufficient moment to make it appear that the jury was improperly influenced by it. It is a familiar rule in appellate procedure that the burden is on the appellant not only to show error, but also "that it is material and prejudicial amounting to the denial of some substantial right" (*Wilson v. Lumber Co.*, 186 N. C., 56, 118 S. E., 797; *Collins v. Lamb*, 215 N. C., 719, 2 S. E. (2d), 863), and "that a different result would have likely ensued." *S. v. King*, 225 N. C., 236, 34 S. E. (2d), 3.

We have examined the other assignments of error brought up in plaintiffs' appeal and find them without substantial merit. No prejudicial error sufficient to warrant a new trial has been shown.

No error.

IN RE REVOCATION OF LICENSE TO OPERATE A MOTOR VEHICLE OF WILBUR ANDERSON WRIGHT.

(Filed 10 December, 1947.)

1. Automobiles § 34a—

Upon a receipt of notification from the highway department of another state that a resident of this State had there been convicted of drunken driving, the Department of Motor Vehicles has the right to suspend the driving license of such person. G. S., 20-16 (7); G. S., 20-17 (2); G. S., 20-23.

2. Automobiles § 34b—

Upon the filing of a petition for review by a person whose license to drive an automobile has been suspended or revoked by the Department of Motor Vehicles, the hearing in the Superior Court is *de novo*, and the Superior Court is not bound by the findings of fact or the conclusions of law made by the Department. G. S., 20-25.

3. Same—

Petitioner was arrested in South Carolina charged with operating a motor vehicle while under the influence of intoxicants. He gave bond for appearance, but no warrant was served on him, no trial had, and his bond

forfeited. His license was suspended by the Department of Motor Vehicles upon information of the Highway Department of South Carolina that he had been found guilty of driving while intoxicated. Upon review the Superior Court found, in addition, that the suspension was based upon misinformation and further that petitioner in fact is not guilty. *Held:* The findings support the court's order directing the respondent to cancel the suspension and to restore license to petitioner.

4. Same—

The statute, G. S. 20-16 (b), provides for a hearing by the Department of Motor Vehicles upon application of a licensee whose license has been suspended, and this procedure should be followed and should be made to appear in the petition before review by the Superior Court.

APPEAL by respondent Department of Motor Vehicles from *Burney, J.*, in Chambers at Wilmington, N. C., 30 August 1947, NEW HANOVER. Affirmed.

Petition under G. S. 20-25 for review of an order of the Department of Motor Vehicles revoking petitioner's automobile driver's license.

On 10 April 1947 petitioner, while operating a motor vehicle in the State of South Carolina, was involved in a collision with another vehicle. He was arrested and charged with the offense of operating a motor vehicle on the highways of South Carolina while under the influence of intoxicants. He gave bond for his appearance at a hearing set for the next day. No warrant was served on him. He avers, and the court below found, that he was not advised of the day of the hearing other than as stated on a paper handed him when he gave bond, and which he took to be a receipt for his money. Being injured in the collision, he took a bus and returned to his home at Tabor City. He did not attend the hearing and his bond was forfeited. There was no trial and defendant has never been found guilty of operating a motor vehicle on the public highways of South Carolina while under the influence of intoxicants.

On 17 April 1947 the Director of the Motor Vehicle Division of the State Highway Department of South Carolina advised respondent in part as follows:

"The records of the Department reveal that on April 10, 1947 a resident of your State, whose name and address is shown below, was apprehended on a charge of Driving Intoxicated, Date of hearing April 11, 1947, Disposition Guilty, Judicial Officer Mag. Smart, Conway, S. C." A copy thereof was mailed to petitioner.

Upon receipt of said notice the Department of Motor Vehicles, acting under authority conferred by G. S. 20-23, suspended the driving license of petitioner and on 24 July gave him notice thereof. The petitioner, within 30 days thereafter, filed this petition for review. The respondent filed no answer.

When the petition came on to be heard in the court below, the court found the facts in detail, including many not material on the question here presented for decision. It concluded that although the respondent acted in good faith, its order was based on misinformation; that the license of petitioner was wrongfully revoked; and that he is entitled to retain the same. It therefore entered an order directing the respondent to cancel said suspension and restore said license to petitioner. Respondent excepted and appealed.

Attorney-General McMullan and Assistant Attorneys-General Moody and Tucker for respondent appellant.

Powell & Powell for petitioner appellee.

BARNHILL, J. The statute, G. S. 20-16, vests the Department of Motor Vehicles with discretionary authority "to suspend the license of any operator without preliminary hearing upon a showing by its records or other satisfactory evidence that the licensee: (7) Has committed an offense in another state, which if committed in this state would be grounds for suspension or revocation"; and in this State the revocation of a driver's license is mandatory whenever it is made to appear that the licensee has been found guilty of "Driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug." G. S. 20-17 (2). Hence the department had the right to act upon receipt of the information furnished by the State Highway Department of South Carolina. See, also, G. S. 20-23.

But the petitioner had the right to a review by a Superior Court judge. G. S. 20-25.

The power of the court, here invoked, to review the order of suspension made by respondent is not the limited, inherent power of the judicial branch of the government to review the discretionary acts of an administrative officer. *Pue v. Hood, Com'r.*, 222 N. C., 310, 22 S. E. (2d), 896, and cited cases. The power is conferred by statute. G. S. 20-25. Hence we must look to the Act conferring the jurisdiction to ascertain the nature and extent of the review contemplated by the Legislature.

Upon the filing of a petition for review, it is the duty of the judge, after notice to the department, "to take testimony and examine into the facts of the case, and to determine whether the petitioner is entitled to a license or is subject to suspension, cancellation, or revocation of license under the provisions of this article." G. S. 20-25. This is more than a review as upon a writ of *certiorari*. It is a rehearing *de novo*, and the judge is not bound by the findings of fact or the conclusions of law made by the department. Else why "take testimony," "examine into the facts," and "determine" the question at issue?

Here the court below found that no warrant was issued against the petitioner, no hearing was had, no verdict was pronounced, and the suspension was based upon misinformation. Furthermore, it found that petitioner in fact is not guilty. The facts thus found fully support the judgment entered.

The department filed no answer, and it does not satisfactorily appear on this record whether the petitioner sought and obtained a hearing by the department before filing his petition for a hearing before the judge. Although no question in respect thereto is presented on this record, we deem it advisable to call attention to the fact provision for a hearing by the department, upon application of the aggrieved licensee whose license has been suspended or revoked by the department in the exercise of its discretionary power, is contained in the Act. G. S. 20-16 (b). Orderly procedure demands that the administrative remedies should be exhausted before resort is had to the courts under G. S. 20-25. That this has been done should be made to appear in the petition for a hearing before the judge.

The judgment below is

Affirmed.

STATE v. R. L. WEBB.

(Filed 10 December, 1947.)

1. Criminal Law § 52a—

On motion to nonsuit the evidence must be considered in the light most favorable to the State.

2. Perjury § 7—

In a prosecution for perjury the burden is upon the State to prove beyond a reasonable doubt the falsity of the oath, and this must be established by two witnesses or by one witness together with adminicular circumstances.

3. Same—Evidence that defendant knowingly made false oath in judicial hearing before officer having jurisdiction held sufficient for jury.

In a proceeding instituted by defendant to have his stepmother-in-law committed to a State Hospital for insane, defendant swore to an affidavit before the Clerk of the Superior Court at the hearing that he had carefully observed her and believed her to be a fit subject for admission to the Hospital. The State's evidence tended to show that defendant had theretofore threatened to "get rid of" his stepmother-in-law one way or another, and introduced the testimony of a number of witnesses who had observed his stepmother-in-law that she was sane both before and after the commitment, and the testimony of an expert of the State institution that she showed no signs of abnormal mentality at the Hospital, and that she was released after two days. The State introduced further evidence for the

purpose of showing want of good faith on the part of defendant, that defendant procured the certificate of two doctors that they had examined the subject and were of the opinion that she was a fit subject to be admitted to the Hospital, whereas in truth the physicians had made no recent examination of the subject to defendant's knowledge, and their affidavits were without probative force. *Held:* The evidence is sufficient to be submitted to the jury in a prosecution for perjury.

4. Criminal Law § 81c (3)—

Where it does not appear what the answer of the witness would have been, an exception to the action of the trial court in sustaining the adverse party's objection to the question cannot be sustained, since it cannot be determined from the record that the exclusion of the testimony was prejudicial.

APPEAL by defendant from *Rousseau, J.*, at August Term, 1947, of MOORE.

Criminal prosecution tried upon indictment charging the defendant with perjury.

The defendant instituted a proceeding before the Clerk of the Superior Court of Moore County, on 20 March, 1947, to have Mrs. Molly Wilson, his stepmother-in-law, committed to the State Hospital in Raleigh, North Carolina, for care and treatment as a mentally disordered person. The defendant signed and swore to an affidavit before the Clerk to the effect that he had carefully observed Molly Wilson and believed her to be a mentally disordered person and a fit subject for admission into a hospital for the mentally disordered.

The evidence shows that on the same date, affidavits were procured from two licensed physicians who stated, under oath, that they had examined Mrs. Wilson and as a result of such examination it was their belief that she was suffering from a mental disease and was a fit subject for care and treatment at a hospital for mentally disordered persons.

Based upon these affidavits, the Clerk committed Mrs. Wilson to the State Hospital at Raleigh, North Carolina, for a period of 30 days, as a subject for mental examination and observation.

The State's evidence discloses that Dr. J. Symington, who signed one of the affidavits as to Mrs. Wilson's mental capacity on 20 March, 1947, had not, upon his own admission, seen or examined her for a period of three months prior thereto. The State introduced other evidence which tended to show Dr. Symington had not seen her professionally for more than a year prior to the date he signed this affidavit.

Dr. J. W. Wilcox, the other physician who signed the affidavit as to Mrs. Wilson's insanity on 20 March, 1947, admitted that he had not seen or examined her for several years prior to the date he signed the affidavit. He testified that he signed the affidavit upon the representations of Dr. Symington as to her insanity as "a matter of professional courtesy" between doctors.

Dr. V. E. Lascara, Assistant Superintendent of the State Hospital at Raleigh, who was admitted by the defendant to be a medical expert, testified that about half an hour after Mrs. Wilson was admitted to the hospital on 16 April, 1947, he had an informal interview with her. "I found her fairly cooperative, slightly depressed, and did not find anything abnormal in her behavior at the hospital. She left the hospital on April 18. . . . From the short time I observed her I would not be inclined to make any definite statement as to whether she was sane or insane. In the duration of the time she was there she did not show any abnormal symptoms of mental illness."

A number of neighbors and friends of Mrs. Wilson went upon the witness stand and testified she was sane before and after her commitment.

The State's evidence further tended to show that the defendant is a man of bad character and had made the statement many times that "he was going to get rid of her (Mrs. Wilson) one way or another." He has lived in the same home with Mrs. Wilson for 10 or 12 years. Mrs. Wilson has a dower interest in the property and occupies one room in the home. Her husband has been dead about five years.

The defendant and members of his family offered evidence tending to show that Mrs. Wilson was very nervous, that she had "childish ways," and had threatened to buy poison and kill herself, she refused to eat with them, and had said, "I wish I was dead." The defendant testified she would not see a doctor, but would go "backwards and forwards through the house, grunting and hopping and kept me awake at nights. . . . I didn't know what else to do, but make the affidavits and let her be sent off for treatment and observation at the hospital."

Verdict: Guilty as charged in the bill of indictment.

Judgment: Six months in the common jail of Moore County, to be assigned to work under the supervision and control of the State Highway & Public Works Commission.

The defendant appeals and assigns error.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

S. R. Hoyle and W. Clement Barrett for defendant, appellant.

DENNY, J. The defendant's first assignment of error is to the failure of the court below to sustain his motion for judgment as of nonsuit. The evidence is conflicting but when considered in the light most favorable to the State, as it must be in passing upon such motion, we think it is sufficient to carry the case to the jury. *S. v. Johnson,* 226 N. C., 671, 40 S. E. (2d), 113; *S. v. Murdock,* 225 N. C., 224, 34 S. E. (2d), 69; *S. v. McMahan,* 224 N. C., 476, 31 S. E. (2d), 357; *S. v. Andrews,* 216 N. C., 574, 6 S. E. (2d), 35; *S. v. Adams,* 213 N. C., 243, 195 S. E., 822.

In a prosecution for perjury the burden is upon the State to prove beyond a reasonable doubt the falsity of the oath and this must be established by two witnesses or by one witness and adminicular circumstances sufficient to turn the scales against the defendant's oath. *S. v. Peters,* 107 N. C., 876, 12 S. E., 74; *S. v. Hawkins,* 115 N. C., 712, 20 S. E., 623; *S. v. Rhinehart,* 209 N. C., 150, 183 S. E., 388; *S. v. Hill,* 223 N. C., 711, 28 S. E. (2d), 100.

In connection with the institution of the proceeding to commit Mrs. Molly Wilson to a hospital for the mentally deranged, the defendant took an oath as charged in the bill of indictment to the effect that he had carefully observed Mrs. Wilson and believed her to be a mentally disordered person and a fit subject for admission into a hospital for mentally disordered persons. The oath was taken in a judicial proceeding before an officer competent to administer oaths in a matter within the jurisdiction of such officer. And the affidavit made by the defendant was material to the issue pending before the Clerk of the Superior Court as to the sanity or insanity of Mrs. Wilson.

In addition to making the above affidavit the defendant got Dr. Symington to sign an affidavit in which he swore that he had examined Mrs. Wilson and found her to be a fit subject for admission to a hospital for the mentally disordered. As a matter of fact Dr. Symington had not seen or examined Mrs. Wilson, according to his testimony, for three months prior thereto. Moreover, the examination he had made of her was made at the instance of the defendant and his wife and such examination did not disclose sufficient evidence of mental disorder to warrant a commitment of Mrs. Wilson to a hospital for the mentally disordered; or at least Dr. Symington, according to his testimony, did not base his affidavit on his findings as to her mental condition at the time of such examination. He testified: "The reason that I signed the paper and recommended that she be accepted in the hospital, is there is insanity in the family, and when you find a person in the exceedingly nervous condition that she was, I consider it my duty as a physician to recommend that she be sent to Dix Hill (a hospital for the mentally disordered) for examination by a specialist and kept under observation for some time." However, it is further disclosed by the record that the insanity in the family, to which this witness referred, was in the family of Mrs. Webb, wife of the defendant. Mrs. Wilson married into this family but there is no evidence to the effect that she is related to them by blood. Consequently we think the testimony of Dr. Symington robs his affidavit of any probative value, and, therefore, does not support the contention of the defendant that he acted in the matter in good faith. Furthermore, it is admitted that the affidavit of Dr. Wilcox was made in the presence of the defendant and his wife, at the request of Dr. Symington as a professional

courtesy. Dr. Wilcox testified that Dr. Symington told him he had examined her (Mrs. Wilson) "and told . . . as good a story of senile dementia as I had heard in a long time, and I signed it."

While the defendant was not tried for subornation of perjury, it would seem that the manner in which these affidavits were procured tends to show bad faith on his part. He was present when the affidavits were made and he knew the examinations, referred to therein, had not been made.

The defendant insists, however, that he acted in good faith in having Mrs. Wilson committed to a hospital for mentally disordered persons and that this action is supported by the affidavits of the above licensed physicians, one of whom testified at the trial below that he still believes Mrs. Wilson is mentally disordered. But the State introduced the testimony of five witnesses to the effect that they had known Mrs. Wilson over a long period of years and that she was a sane person. The Assistant Superintendent of the State Hospital testified that during the two days Mrs. Wilson was committed to that institution "she did not show any abnormal symptoms of mental illness." Further, the two licensed physicians upon whose affidavits the defendant relies to support him in his contention as to the mental condition of Mrs. Wilson on 20 March, 1947, by their own testimony in the trial below, we think tend to show bad faith on the part of the defendant rather than to sustain his contention of good faith. The testimony as disclosed on the record is sufficient to sustain the verdict rendered by the jury.

The third assignment of error is based on the ruling of the court in sustaining objection by the State to the following question propounded to the defendant: "Did you make this affidavit willfully, and corruptly?" Conceding the question was a proper one, the record fails to show what the witness would have answered. Therefore, the ruling must be upheld since no error is presented on the record. *S. v. Utley,* 223 N. C., 39, 25 S. E. (2d), 195; *S. v. Thomas,* 220 N. C., 34, 16 S. E. (2d), 399.

We have carefully examined the remaining exceptions and they present no prejudicial error.

In the trial below we find

No error.

WOODROW McKAY; L. M. GRIMES, SR.; JAMES ADDERTON; T. C. HINKLE; J. T. LOWE; W. F. WELBORN; CHAS. E. WILLIAMS, AND J. R. McALPINE, III, TRUSTEES OF THE CAROLINE E. FORD AND MARTHA A. HADEN HOME AND TRUSTEES OF THE CAROLINE E. FORD AND MARTHA A. HADEN ENDOWMENT FUND, v. THE TRUSTEES OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES AND THE PRESBYTERIAN FOUNDATION, INC.

(Filed 10 December, 1947.)

1. Judgments § 30—

In a suit to invoke the equitable jurisdiction of the court to permit trustees to sell part of the realty to preserve the purpose of the charitable trust, decree authorizing sale by the trustees necessarily adjudicates title in the trustees, and is conclusive as a holding *in rem* in a subsequent suit for authority to sell the remaining property, even though the charity which, in the second suit, asserts its right to control and administer the trust funds as trustee to carry out the purpose of the trust, was not a party to the prior suit.

2. Appeal and Error § 40d—

The identity of the trustees entitled to possession and control of trust funds is a question of law to be determined by a proper construction of the will creating the trust, and is not a question of fact as to which the appellate court is bound by the finding of the trial court.

3. Trusts § 6—

Testatrix devised certain realty to the "Presbyterian Church in the United States" for a home for widows of ministers of that denomination, and set up a trust fund to endow the home and appointed as trustees of the endowment fund the trustees of the local church and the minister thereof and another local minister, their "successors to be chosen as occasion may require" by the General Assembly of the denomination. *Held:* The local trustees as designated by testatrix are entitled to the control and management of the trust funds in accordance with intent of testatrix as gathered from the entire instrument.

4. Trusts § 27—

Testatrix set up a trust fund under the control and management of local trustees to maintain a home for widows of ministers of a designated denomination. The trustees of the denomination contended that the funds should be turned over to them for administration on the ground that the funds in themselves were insufficient for the purpose of the charity and that they were administering other funds for the same charitable purpose. *Held:* It not appearing that the local trustees were incapable of effectuating the purpose of the trust within the intent of trustor, the exigencies presently presented are insufficient to justify a court of equity in discharging as trustees those selected by the testatrix for the administration of the fund.

PETITIONERS' appeal from *Hamilton, Special Judge,* at September-October Civil Term, 1947, of DAVIDSON.

Caroline E. Ford, of Davidson County, N. C., died in 1909, leaving a will making certain various bequests and devises of which Item 23 and Item 27 are pertinent to the present controversy:

"ITEM 23. I give and bequeath to R. Baxter McRary for the period of his natural life that of my home place bounded by Hargrave Street on the East, Robert's Heirs' line on the North, a line on the West so drawn as to include my grave, orchard and spring, this line to be parallel with Hargrave Street and on the South by R. Baxter McRary's line. I direct that all the remaining part of my home place be sold publicly or privately, as my executor hereinafter named, may deem best, and the moneys arising from such sale, that is to say, the principal, shall be wisely and safely invested by my executor hereinafter named, and shall constitute a perpetual fund, the interest or income of which shall be paid into the hands of the said R. Baxter McRary for his exclusive use and benefit during the period of his natural life.

"At the death of R. Baxter McRary, I give and devise my said homeplace to the 'Presbyterian Church in the United States' for and as a home for needy widows of Presbyterian Ministers in said Church; and it is my will that the principal referred to above in this Item as arising from the sale of the remainder of my homeplace shall, after the death of R. Baxter McRary, revert to the Trustees hereinafter named as a permanent Endowment fund, in trust for the purposes aforesaid and the proceeds or income from said Endowment fund shall be annually available and used for the maintenance of said home, which shall be known as the 'Caroline E. Ford and Martha A. Haden Home,' and I appoint as trustees for said 'Home' and 'Endowment Fund' the Trustees of the First Presbyterian Church in Lexington, N. C., the Pastor for the time being, together with one other Presbyterian Minister, the first of whom shall be Rev. W. P. McCorkle; their successors to be chosen as occasion may require, by the 'General Assembly' of the Presbyterian Church in the United States."

"ITEM 27. All the rest and residue of my property, both real and personal, not hereinbefore disposed of, I desire sold and the proceeds arising from such sale, together with any money that may be on hand I wish to be added to the perpetual fund arising from sale of remainder of homeplace, and the same to be invested and the income paid to R. Baxter McRary as directed in Item 23, and at his death, the principal arising from all sources in this Item to be placed in the Endowment fund as directed in Item 23."

After the death of the testatrix and during the lifetime of Baxter McRary, the Trustees of the Home and the life tenant joined in a pro-

ceeding in the Superior Court of Davidson County through which the court, in the exercise of its equitable jurisdiction and because of changed conditions, ordered a sale of part of the home place and directed the proceeds paid over to the trustees, the Petitioners, after the death of the life tenant, to be held by them in the same plight as the land was devised and would have been held if same had not been sold. Subsequently this order was approved by this Court in *Ex Parte Wilds,* 182 N. C., 705, 110 S. E., 57, the Respondent herein not having been made a party to the action. This fund, known as the "site fund," amounted to $31,893.67, which was combined by the executor of the will with the "Endowment Fund," then amounting to $21,000, and invested by him as a single fund. On the death of the life tenant in 1946 the successor to Caroline Ford's executor paid over to the trustees, the present Petitioners, the combined fund. The funds suffered some depreciation in the securities comprising them and now amount to about $42,000, of which the assets of the Endowment Fund constitute 39.77 per cent and the assets of the "Site Fund" 60.23 per cent.

The Petitioners brought the present proceeding in Davidson Superior Court, invoking its equitable jurisdiction to sell the rest of the Home Place in order to preserve the trust and effectuate its real purpose; and asked that they be declared the sole owners, as trustees, of the remaining portion of the home place, as well as the "site fund" and the "endowment fund" of which they had been made trustees, and that the funds be paid over to them for further custody and administration.

The Respondents joined in the request that the sale be made but claimed the right to the custody of the funds as holder of the legal title, and administration thereof through its own agency created for execution of similar trusts.

The court entered a judgment ordering a sale of the property as petitioned, but ordered that the proceeds, together with the other funds derived from the will, be turned over to the Respondent for its permanent custody and administration.

From that part of the judgment awarding custody of the trust funds to the Respondent, the Petitioners appealed.

Don A. Walser and Charles W. Mauze for Petitioners, appellants.
Neal Y. Pharr and J. Spencer Bell for Respondent, appellee.

SEAWELL, J. We question whether, within the limitations imposed upon us, we may, in the present case, discharge the trustees appointed in the will and turn the trust fund over to the respondent for administration by its own agency without, in a measure, denying to the testator the *jus disponendi* or defeating the testamentary intention without just reason.

The respondent claims custody of the trust fund as a matter of right, contending that the will directly conveys to it the legal title in trust for the purposes named; and that it may now assert that right against the petitioners, local trustees; and cite cases which recognize the distinction between a trustee to hold the title of the trust *res* and a trustee to manage and control: I Bogart, Trusts and Trustees, Sec. 122; *City of Boston v. Dolan,* 298 Mass., 346, 10 N. E. (2d), 275; *Worcester City Missionary Soc. v. Memorial Church,* 186 Mass., 531, 72 N. E., 72; *Adams v. Plunkett,* 274 Mass., 453, 175 N. E., 60; *Ware v. City of Fitchburg,* 200 Mass., 61, 85 N. E., 951. In reply the appellants call our attention to *Ex Parte Wilds,* 182 N. C., 705, 110 S. E., 57, as expressing a contrary view as to the legal title.

In the *Wilds case,* a part of the lands included in the trust created in Item 23 was sold on petition of the local trustees and the purchaser refused to accept the commissioner's deed on the ground that the latter could not convey a good title because the petitioning trustee had none. The Court thought otherwise. It is said in the opinion that the specific objection made was that title could not vest in the petitioning trustees until the termination of the life estate of McRary. But we cannot assume that the vigilance of the Court would permit it to hold that the title presently vested or would ever vest in the petitioners unless such was the effect of the will; and the construction of the will in this respect was directly involved in the issue of good title.

While the present respondent was not a party to that action and the Court acted without reference to the doctrinal questions now raised, we are inclined to hold that the construction of the will under these circumstances is binding upon us in the present controversy as an expression *in rem* from which we may not consistently depart.

If the respondent could now make good on its theory respecting the title, it would seem to have uncovered a situation of which it might have taken advantage long ago, and we see no exigency which could moot the question now, or disturb a *modus vivendi* admittedly legal, and certainly blueprinted in the will.

The identity of trustees, for this or that purpose, is not a question of fact as to which we are bound by the finding of the trial court, but a question of law involving the proper construction of the will; and the intent of the testatrix to give the custody and administration of the property and funds to the petitioning trustees admits of little doubt.

In considering what might be the dominant purpose of the will it is clear that the testatrix intended to provide a home and care for the widows of Presbyterian Ministers; but the "dominant purpose" cannot always be separated from the complex of which it is a part; and we feel that under the circumstances of this case Mrs. Ford intended that her beneficences might have local supervision by the trustees designated by

her will; that the memorials which they constituted as far as might be possible should also have a site amongst the churches with which she was affiliated and perhaps amongst the people that she knew.

It is contended now that even if the home might be constructed upon the property which is left to them, that the funds set up would be entirely inadequate to maintain it; but it is further suggested that it is planned to have a similar home instituted and maintained in the City of Greensboro, in aid of which the fund donated by the testatrix might be more consistently used.

However this may be, we are of the opinion that the exigencies upon which the equitable intervention of the Court is urged may be exercised are presently not of a nature which would justify the relief demanded or to justify the Court in discharging the petitioners as trustees and of ordering the custody and administration of the fund to the respondent and its agencies as demanded.

That portion of the judgment authorizing and directing the sale of the property described in the petition is affirmed. And that portion ordering the trust funds into the custody and administration of respondent is reversed. The cause is remanded to the Superior Court of Davidson County for judgment in accordance with this opinion.

Modified and affirmed.

STATE v. FRANKLIN YANCEY.

(Filed 10 December, 1947.)

False Pretense § 2: Criminal Law § 52—Evidence held insufficient to show commission of crime charged and nonsuit should have been granted.

Defendant was charged with false pretense in representing that another was lawfully authorized by him to draw drafts on him in payment of tobacco, and that he had made arrangements for payment of such drafts, with intent to defraud. The evidence tended to show that the alleged agent obtained a quantity of tobacco and paid for same with a draft drawn on defendant, which draft was not paid by the drawee bank, but there was no direct evidence that defendant represented to anyone that the alleged agent was authorized by him to draw drafts in payment of tobacco, or unequivocal evidence that defendant was present when the draft was drawn. *Held:* Under the terms of the indictment there must have been a positive misrepresentation by defendant, G. S., 14-100, and there being no evidence of such misrepresentation made by defendant, evidence of circumstances offered by the State for the purpose of corroborating its theory that defendant made such representations is feckless, and defendant's motion to nonsuit should have been allowed.

STATE *v.* YANCEY.

DEFENDANT'S appeal from *Nimocks, J.*, at March Criminal Term, 1947, of CUMBERLAND.

The defendant, Franklin Yancey, and E. G. Peoples, Jr., were together indicted on a charge of false pretense by falsely representing to M. B. Person, T. C. Bynum and J. M. Riddle (trading as Cumberland County Tobacco Warehouse) that the said Franklin Yancey and E. G. Peoples, Jr., together had entered into a contract to purchase leaf tobacco on the floors of various warehouses located in Cumberland County, and that E. G. Peoples, Jr., was lawfully authorized and empowered to draw drafts against the said Franklin Yancey in payment of same; that Franklin Yancey had made arrangements for the payment of such drafts so drawn upon presentation to the payee bank. Whereas, in truth and in fact the said E. G. Peoples, Jr., was not authorized to draw drafts against the said Franklin Yancey and the said Franklin Yancey had made no provision for the payment of said drafts when presented to the drawee bank; that such fact was known at the time to both Franklin Yancey and E. G. Peoples, Jr., "and such false representations were made by both of the said Franklin Yancey and E. G. Peoples, Jr., with the intent and purpose of misrepresenting the true facts with respect to the purchasing of leaf tobacco as aforesaid and with the intent and purpose of cheating and defrauding."

It is charged that by means of the said false pretense Yancey and Peoples obtained from Person, Bynum and Riddle a lot of leaf tobacco of the value $1,010.78, issuing therefor, "a worthless draft, check or order with intent then and there to defraud, against the statute in such case made and provided, and against the peace and dignity of the State."

Peoples was not apprehended and after a preliminary examination Yancey was tried and convicted at aforesaid March Criminal Term of Cumberland Superior Court.

Summarized as much as clarity will permit, the evidence was substantially as follows:

For the State, D. T. Perry testified that he was employed by the Tobacco Board of Trade of Fayetteville as secretary-treasurer and as sales supervisor covering the warehouses in Fayetteville. That he met Franklin Yancey, the defendant, about the 20th of August in Langdon's warehouse the first time in company with E. G. Peoples, Jr. Yancey asked witness if he had a check that Peoples had given him for membership in the Fayetteville Tobacco Board of Trade. The witness answered in the affirmative and Yancey said that he would take it up with a check of his own and wrote and delivered to witness a check for $75, which was dues; and witness turned over to him the check of Peoples. Witness further testified that Yancey told him Peoples was buying tobacco for him and one or the other would be following the sale. In consequence of this payment the witness put the membership in the name of Franklin

Yancey only, and withdrew Peoples' name. Witness stated that he saw the defendant Yancey on the tobacco market the next day and then he was gone; that is the next day after the transaction of the check; that he was gone a few days and returned to the market and told him he had been in the hospital.

J. M. Riddle testified for the State that he was part owner of the Cumberland County Tobacco Warehouse, the co-owners being Person and Bynum. Witness stated that on the 20th day of August the partners were engaged in selling tobacco under the name of Cumberland County Tobacco Warehouse and on that day he saw the defendant Franklin Yancey and E. G. Peoples, Jr., on the warehouse floor during the sale of tobacco. "Mr. Peoples bought some tobacco at my warehouse. Mr. Yancey came in there during the sale and conferred with Mr. Peoples; I don't know what he was talking about; he talked with him while we were selling on the floor. They bought something over a thousand dollars worth and Mr. Peoples was doing the buying, and if I make no mistake it was on the 20th day of August. He bought a thousand, ten dollars and something. I know it was the 21st or the 20th. The amount he bought was $1,010.78, on August 21, 1946. . . . I didn't go into the office until after the sale was over and at that time I saw them in the office at the time this draft was made. At the time I was in the office I don't know whether Mr. Yancey had come out or whether he had just gone in. I went back to the office to get a deposit on the baskets that the tobacco was in. They were taking my baskets and I requested a deposit and they asked me—I don't remember which one,—Mr. Peoples—was it all right to make the check for the baskets with this check and I told him no, to make me a separate check because I had to check the baskets through on the account, and he give me another check for the baskets. That is the draft he gave in payment for the tobacco, I believe it was Mr. Peoples who handed it to me." The witness further stated that he saw Peoples and Yancey there in the warehouse but did not know which one carried the tobacco away. That one or the other backed the truck up and loaded it, both being present, and they carried the tobacco away from the warehouse. On that same day Yancey or Peoples gave witness another draft for a deposit on the baskets. The draft was never paid. This draft was presented in evidence and shows to have been signed "Franklin Yancey by E. G. Peoples, Jr."

On the cross-examination the witness stated that the draft was signed "Franklin Yancey by E. G. Peoples." He further said that he "did not say Yancey was right there at the time Peoples gave the draft into the office; that he was right outside or just walked out of there, one, right there close in the warehouse or office, one. Mr. Peoples got the tobacco and got it up to the door and I told him I would have to have a deposit on the baskets and he asked if it would be all right to make it in one

check and I told him to make it separate" . . . and he drew a check for the baskets and one for the tobacco and gave it to the witness at the outgoing door where he loaded the tobacco on the truck. Witness stated that he had never seen Yancey before.

T. C. Bynum testified for the State that the draft representing payment for the tobacco was given on the 21st day of August and was signed "by Franklin Yancey by E. G. Peoples, Jr.," and that the draft has never been paid. He did not see the sale.

After the draft was returned he had a conversation with Franklin Yancey at his home in Virginia, asking him why the draft came back and Yancey said because he had not given anybody authority to sign his name to a draft; that it was fraud. Asked then why he stopped the draft given by him for the privilege of buying on the market, witness replied that he had been informed that there was no Tobacco Board of Trade in Fayetteville. As for the check for $1,010.78, his reason for declining to pay it was that no one had authority to sign it.

J. M. Riddle, recalled, testified that the check for $1,010.78 was given into the office. Peoples gave him the check and had not then gotten the tobacco off the floor.

At the end of the State's evidence the defendant moved for judgment of nonsuit, which was denied, and defendant excepted.

James W. Blanks testified for the defendant that he attended the trial in the recorder's court and heard the evidence of J. M. Riddle and heard him swear upon that occasion that he did not see Mr. Yancey at any time at his warehouse.

The defendant Franklin Yancey testified in his own behalf; that he lived in Virginia and was 23 years of age; that with his father he operates a tobacco warehouse in Lake City, Florida, and that he knew E. G. Peoples, Jr., having met him when he was at the Military Academy in Virginia; and that he had been employed as a floor sweeper in a warehouse operated by defendant and his father in Florida. That at the opening of the tobacco market in Fayetteville he saw E. G. Peoples but had no transaction with him except the following: He saw Peoples there and Peoples informed him that he had given a check to the Fayetteville Board of Trade and signed it Franklin Yancey by E. G. Peoples. The witness told Peoples that "he should know that the bank in Clarksville wouldn't accept a check signed by him with my name," but that he would lend him $75. In view of that he wrote out a check for $75 and may have given it to Mr. Perry to take up the check that Peoples had signed. He stopped the payment of that check because of information he had gotten that there was no Fayetteville Board of Trade. He did not know that he was liable for the payment of that check at the time and later he had offered to pay it but payment was refused. Witness stated that he had never seen Jim Riddle before the time they were in the recorder's

court; that he heard his testimony there regarding the alleged transaction on the 21st day of August. "Mr. Riddle said in the recorder's court that he had never met me, never seen me until that day in court."

Witness testified that he had never authorized anybody to give any checks on him. "I have never represented to Mr. Riddle or Mr. Bynum or Mr. Person or anybody else that E. G. Peoples had a right to give checks on me. I never received any tobacco that was purchased at the Cumberland County Warehouse and I have never received any that was purchased there. I do not know where E. G. Peoples is now. I last saw him the afternoon of the 20th of August in Lumberton at the Lorraine Hotel." On the morning of the 21st witness was in Lumberton. He went to see a doctor there and left around noon for Clarksville; that he did not stop in Fayetteville except to change buses and did not go to the warehouse district at all. The physician he saw in Lumberton was a Dr. Massey in Dr. McAlister's office; after that he was in bed until the 24th when he went to Watts Hospital in Durham. He was admitted to Watts Hospital on the 23rd of August and paid his bills on the 24th day of August. (Witness exhibited his hospital receipts.) The night of the 21st witness spent in his father's house in Clarksville.

Later witness found that drafts had been given signed by Franklin Yancey by E. G. Peoples. That was on the 25th or 26th of August; having been called by his local bank with regard to the check he declined to authorize the bank to pay it. At that time defendant testified, he had around $8,000 in the bank. He stated that E. G. Peoples had never bought any tobacco for him and that he had never received any tobacco purchased by him, nor had he received any proceeds of any tobacco bought by Peoples; that he had never at any time said anything to Mr. Perry about Peoples buying tobacco.

Again, at the conclusion of all the evidence, the defendant Yancey renewed his demurrer to the evidence and motion for judgment as of nonsuit, which was denied, and the defendant excepted.

There was a verdict of guilty and from the ensuing judgment thereupon, the defendant appealed, assigning errors.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

James R. Nance for defendant, appellant.

SEAWELL, J. A careful examination of the record fails to disclose any evidence that the defendant Yancey made to any of the partners, Person, Bynum or Riddle, the representation which is the gravamen of the indictment: That he had authorized his codefendant Peoples to buy tobacco for him, or for them jointly, and to draw drafts upon Yancey in payment therefor, or sign checks in his name. There is manifest not merely a

substantial variance between the allegation and the proof which, alone, would be fatal, but a failure of proof with respect to commission of the crime itself. *S. v. Ridge,* 125 N. C., 655, 34 S. E., 439.

The *ratio procedendi* of the prosecution suggests a departure from the original objective and an effort to convict the defendants of a conspiracy to defraud, or some unlabeled misconduct in connection with the transactions which seem to center around the activities of Peoples. The trial, therefore, took a wide range, the prosecution resorting freely to circumstantial evidence to prove the essential fact of the misrepresentation,—one which, if it existed at all, must necessarily, under the terms of the indictment, have been made in words,—*suggestio falsi,* rather than *suppressio veri,* if the latter, under any principle, may be applied in a criminal case under G. S., 14-100, without positive conduct of the accused equivalent to a naked lie. *S. v. Matthews,* 121 N. C., 604, 28 S. E., 469.

The nearest approach to proof by this method is in the evidence of J. M. Riddle. After stating that Yancey was present when Peoples signed the check in payment for the tobacco in Yancey's name, the witness qualified that statement by saying that "he had just come in or gone out" (of the office) or at least he was "right there close in the warehouse or office, one," and denied saying he was "right there," meaning the office. This testimony falls short of that necessary to impute to Yancey a knowledge of the act of Peoples, or of conduct on his part indicating its adoption as a fraudulent device. *S. v. Baker,* 199 N. C., 578, 155 S. E., 249.

Expressions like "they"—apparently involving Yancey in the purchase of the tobacco, were modified on cross-examination to mean Peoples or "Yancey or Peoples." There does not appear to have been made to this witness any representation of the kind charged in the indictment, and neither Person or Bynum have testified that any was made to him.

There could be no corroborating circumstances where there is nothing to corroborate.

There are a number of assignments of error with regard to the admission of evidence, some of which we find to be meritorious; but in view of the conclusion reached it is unnecessary to discuss them.

The demurrer to the evidence and motion for judgment of nonsuit should have been allowed, and the judgment to the contrary is

Reversed.

CAROLINA POWER & LIGHT CO. v. WILLIAM MURPHY BOWMAN, ET AL.

(Filed 10 December, 1947.)

1. Registration § 1: Statutes § 12—

The provision of G. S., 40-19, that copy of judgment in eminent domain proceedings be registered in the county where the land lies, and the provision of G. S., 1-228, that judgments in which transfer of title is declared shall be registered under the same rules prescribed for deeds, *held* superseded by the later enactment of Chap. 148, Public Laws of 1917 (G. S., 47-27), exempting decrees of courts of competent jurisdiction in condemnation proceedings from the requirement as to registration.

2. Same—

The proviso of Chap. 148, Public Laws of 1917, exempting decrees of condemnation from the requirement of registration *held* not repealed by the amendments of Chap. 107, Public Laws of 1919, and Chap. 750, Session Laws of 1943, and an easement created by judgment in condemnation proceedings is good as against creditors and purchasers for value from the owner of the servient tenement notwithstanding the absence of registration. G. S., 47-27; G. S., 47-18.

3. Easements § 5—Whether structures erected by defendants constituted interference with plaintiff's easement for transmission line held for jury.

Plaintiff is the owner of an easement, acquired by condemnation, 50 feet wide, for the purpose of erecting and maintaining electric power lines, with right of access for maintenance and inspection. The fee remained in the owner of the servient tenement for all purposes not inconsistent with the easement. Defendants are the purchasers for value of the fee. Plaintiff offered evidence that defendants had erected large permanent structures on the land, the top of one of such structures being within seven or eight feet of plaintiff's heavily charged transmission lines, creating a special hazard. *Held:* Plaintiff's evidence should have been submitted to the jury on the issue of whether the structures constitute an obstruction and interference to the exercise of plaintiff's easement.

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

STACY, C. J., dissenting.

SEAWELL, J., concurs in dissent.

APPEAL by plaintiff from *Bone, J.*, at June Term, 1947, of ROBESON. Reversed.

Plaintiff instituted this action to enjoin defendants from maintaining obstructions in the form of substantial buildings on its right of way which it had acquired and used for the construction and maintenance of its electric power lines.

Plaintiff alleged that in 1912 the Yadkin River Power Co. acquired by judgment in condemnation proceedings under the statutes right of way 50 feet in width over lands of Rebecca Toon and Archie Ward, now

claimed by defendants, for the purpose of erecting and maintaining electric power lines, and that in 1926 by consolidation and merger all the rights and title of the Yadkin River Power Co. passed to the plaintiff. It was further alleged that upon and along this right of way were constructed and maintained by the plaintiff and its predecessor steel towers carrying wires charged with 110,000 volts of electricity by which power was and is transmitted for use over a large portion of the State, and that this use of the right of way has been continuous since 1912. Plaintiff alleged that in 1946 defendants erected on this right of way and underneath plaintiff's power wires in or near the City of Lumberton, a large building 35 x 95 feet and 25 feet high for use as a theater, the top of the building being within 7 or 8 feet of plaintiff's heavily charged transmission wires. It is also alleged that a dwelling house has been erected on plaintiff's right of way. These buildings are alleged to be obstructions and an interference inconsistent with plaintiff's easement, and to constitute a hazard both to those who use the buildings and to plaintiff's wires.

Defendants denied the buildings described interfered with any rights plaintiff may have in the premises or any covered by the judgment in the condemnation proceedings, or that they create any unusual hazard. Defendants further allege that they acquired fee simple title to the *locus* by *mesne* conveyances from Rebecca Toon and Archie Ward, and that the deed to the defendants, who were purchasers for value, was duly registered in 1946, and that the judgment in the condemnation proceedings under which plaintiff claims has never been registered in the office of Register of Deeds of Robeson County. Defendants allege title to the land covered by the building by adverse possession under color, freed from any dominant easement in favor of the plaintiff.

Plaintiff offered in evidence the judgment roll in the condemnation proceeding on file in the clerk's office and the final judgment therein recorded on the judgment docket, together with evidence of the erection, maintenance and continued use of towers and power lines along and upon the right of way so condemned since 1912. Evidence was also offered as to the size, height and use of defendants' buildings referred to, as they affected the inspection, maintenance and repair of plaintiff's lines and the creation of unusual hazards from proximity to the power lines, and as tending to show an interference with the exercise of the rights acquired by the condemnation proceedings.

At the conclusion of plaintiff's evidence, defendants' motion for judgment of nonsuit was allowed, and from judgment dismissing the action, plaintiff appealed.

Varser, McIntyre & Henry and A. Y. Arledge for plaintiff, appellant.
McKinnon & Seawell and McLean & Stacy for defendants, appellees.

DEVIN, J. Two questions are raised by the appeal:

(1) Has the plaintiff an easement in the land now owned by defendants which the law will recognize and protect against invasion by the servient tenant?

(2) If so, does the erection and use of the buildings as described constitute an interference inconsistent with the rights acquired by plaintiff by condemnation?

1. It is not controverted that the condemnation proceedings under which the easement claimed was obtained were in all respects regular, and that whatever rights under that proceeding plaintiff's predecessor acquired have passed to the plaintiff. The question raised relates primarily to the admitted fact that the judgment in the condemnation proceeding, though of record in the clerk's office, was not and has not been registered in the office of the Register of Deeds of the county. It is also not denied that the defendants are purchasers for value, claiming by *mesne* conveyances from the original owners over whose land the right of way for the power lines was condemned, and that the present defendants' deed for the land covered by the obstructions complained of was duly registered in 1946. This requires consideration of the applicable recording statutes.

The North Carolina recording statute, the Connor Act, declares among other things, that no conveyance of land shall be valid to pass any property as against creditors or purchasers for a valuable consideration but from the registration thereof in the county where the land lies, G. S., 47-18.

By Chapter 148, Public Laws 1917, it was provided: "that all persons, firms, or corporations now owning or hereafter acquiring any deed or agreement for rights of way and easements of any character whatsoever shall within ninety days after the ratification of this act record such deeds and agreements in the office of the register of deeds of the county where the land affected is situated. . . . Provided, however, that nothing in this act shall require the registration of the following classes of instruments or conveyances. . . . 3. It shall not apply to decrees of a competent court awarding condemnation or confirming reports of commissioners, when such decrees are on record in such courts." The violation of the act was made a misdemeanor. No deed for any of the land subject to plaintiff's easement was executed by the original servient owners, or registered, prior to the effective date of the Act of 1917.

By Chapter 107, Public Laws 1919, the Act of 1917 was amended by adding further provisions as to registration of "easements granted by said deeds and agreements" to be inserted in lines before and unaffecting the proviso exempting decrees of condemnation. These Acts were codified as sec. 3316 in the Consolidated Statutes of 1919, in which appears the exemption quoted from the Act of 1917.

Chap. 750, Session Laws 1943, amended C. S., 3316, "relating to the registration of deeds and agreements for rights of way and easements," by striking out the provisions making violation a misdemeanor, and inserting in lieu thereof the following: "The failure of electric companies or power companies operating exclusively within this state or electric membership corporations, organized pursuant to Chap. 291, Public Laws of 1935, to record any deeds or agreements for rights of way acquired subsequent to 1935, shall not constitute any violation of any criminal law of the State of North Carolina. No deed, agreement for right of way, or easement of any character shall be valid as against any creditor or purchaser for a valuable consideration but from the registration thereof within the county where the land affected thereby lies." These statutes and amendments are brought forward in the General Statutes of 1943 as section 47-27, under the heading "Deeds of Easements," and in this section is incorporated the exemption from the requirement of registration, as declared in the Act of 1917.

Chapter 291, Public Laws 1935, now codified as G. S., 117-6 to 117-27, contains provisions for the organization of electric membership corporations under the North Carolina Rural Electrification Authority.

Under the statutes relating to eminent domain and the proceedings to acquire rights under the power thereby conferred, there is a provision that copy of the judgment shall be registered in the county where the land lies, G. S., 40-19; and in G. S., 1-228, it is provided that judgments in which the transfer of title is declared shall be registered under same rules prescribed for deeds. However, the subsequent Act of 1917 exempting decrees of courts of competent jurisdiction in condemnation proceedings from the requirement as to registration would seem to supersede these provisions with respect to this particular mode of acquiring title specified in the later acts.

After consideration of the statutes relating to registration as applicable to the facts of this case, we conclude that the amendment contained in the Act of 1943, which now appears as the last clause in G. S., 47-27, does not have the effect of repealing the provisions in the Act of 1917, brought forward in G. S., 47-27, declaring decrees in condemnation proceedings exempt from the requirement as to registration of deeds and agreements for easements and rights of way. The reason for the distinction is clear when it is remembered that proceedings for the condemnation of land are matters of public record in the office of the Clerk of the Superior Court, and that the judgment is there recorded and cross-indexed. See also *Whitehurst v. Abbott,* 225 N. C., 1, 33 S. E. (2d), 129. We think the plaintiff's easement and right of way described in the judgment in the condemnation proceeding for the purposes and to the extent therein set out, and for which the consideration fixed by law has been

paid, has not been lost or defeated by failure to record the judgment in the Register's office.

2. The judgment in the condemnation proceeding decreed to the original petitioner and its successors and assigns an easement and right of way across lands of respondents for the purpose of building and forever maintaining, inspecting and repairing its electric and telephone lines, with right of access for this purpose and to keep the right of way clear of trees and objects which might fall across its lines, but without interfering with defendants' rights except for the aforesaid purposes. This judgment also decreed that the defendants should have full power and right to use the lands over which right of way is condemned for any and all purposes not inconsistent with the easement of petitioner. To this judgment, on transfer to the Superior Court, the judge of that court added that defendants and their heirs and assigns should have right to use a portion of the land condemned for agricultural purposes when not necessary for the use of petitioner. Is there evidence of use by defendants of land subject to plaintiff's right of way inconsistent with plaintiff's easement? From an examination of the record it would seem that the evidence offered, when considered in the light most favorable for the plaintiff, tends to show that the defendants' use of the land in the erection and maintenance of the buildings complained of would constitute an obstruction and an interference with plaintiff's rights inconsistent with the easement acquired, and that the issues of fact raised by the pleadings and evidence should have been submitted to the jury.

The question which defendants sought to raise by their allegation of unencumbered title to the land by adverse possession under color is not presently presented on this record. Nor is it necessary to consider plaintiff's contentions as to *res judicata* and prescription.

W. W. Snow, lessee of the theater building, was at the instance of plaintiff made a party defendant and has answered. His rights as to the building, as well as those of the other parties to this action, must await final determination.

The judgment of nonsuit is set aside and the cause remanded to the Superior Court of Robeson County for trial.

Reversed.

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

STACY, C. J., dissenting: Is the plaintiff's unregistered easement good as against the defendant purchaser for a valuable consideration? The trial court answered in the negative, and I agree with him.

It is provided by G. S., 1-228, that every judgment in which the transfer of title is declared, "shall be regarded as a deed of conveyance."

And in G. S., 40-19, it is further provided that judgments in condemnation proceedings "shall be registered in the county where the land is situated." Of course, the Connor Act, G. S., 47-18, also requires the registration of deeds of conveyance in the county where the land lies.

This was the law in 1912 when plaintiff's predecessor in title acquired the subject easement by judgment of record in the Superior Court of Robeson County.

In 1917, it was provided by Act of Assembly, Chap. 148, Public Laws —amended by Chap. 107, Public Laws 1919—that all persons, firms or corporations "now owning or hereafter acquiring" rights of way and easements of any character shall register the same "in the office of the register of deeds in the county where the land affected is situated"; exempting from its provisions, however, *inter alia,* court decrees in condemnation proceedings, "when such decrees are on record in such courts." Willful violation of this act was made a misdemeanor. These acts were codified and brought forward in the Consolidated Statutes of 1919. C. S., 3316.

Then, in 1943, by Act of Assembly, Chap. 750, the penal provisions of this law were stricken out and the following inserted in lieu thereof:

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

It will be noted that this is the language of the Connor Act.

The defendant, who is a purchaser for a valuable consideration, acquired title to the property by deed dated 17 December, 1945, duly registered 29 January, 1946. This was after the Act of 1943. The judgment of condemnation, under which plaintiff claims, has never been registered in the office of the register of deeds of Robeson County.

If the requirements of registration, which existed when plaintiff's predecessor in title acquired the subject easement in 1912, were superseded by the provisions of the Act of 1917, as declared in the Court's opinion, then by the same token, it would seem that the exemptions in respect of registration set out in the Act of 1917, were superseded or at least modified by the amendment of 1943. Otherwise the paragraph above quoted has no meaning. Which takes precedence, the prior, or the subsequent, Act of Assembly?

Perhaps it is thought the doctrine of supersession has no application to an act which amends a subsisting statute and leaves the exemptions therein still standing. However this may be, the purpose of the 1943 amendment was to preserve the exemptions as between the original parties and to provide that thereafter easements created by court decree or otherwise should be valid as against creditors and purchasers for a

valuable consideration only from the registration thereof. Under this interpretation, which gives effect to each and every part of the statute, "no notice, however full and formal, will take the place of registration." *Turner v. Glenn,* 220 N. C., 620, 18 S. E. (2d), 197, and cases cited.

It is a cardinal principle, in the interpretation of statutes, that the intention of the law-making body is to be gathered from the entire enactment; effect is to be given to each and every clause and provision; and conflicts are to be avoided by reconciliation, if and when this appropriately can be done within the limits of judicial construction. *Board of Agriculture v. Drainage District,* 177 N. C., 222, 98 S. E., 597.

It seems to be intimated, though not quite said, in the majority opinion that the statute applies only to conventional easements. If this be intended, what becomes of the twice-repeated expression "or easement of any character"? And why exempt easements by court decree from the operation of a statute which has no application to such easements? The suggestion answers itself.

Finally, the judgment of the majority deletes the last paragraph of G. S., 47-27, from the statute, or renders it nugatory, and leaves the law in respect of registration of agreements for rights of way and easements of any character precisely as it was before this paragraph was added in 1943.

The fate of this last paragraph recalls *Justice Brown's* quotation in *Kornegay v. Goldsboro,* 180 N. C., 441, 105 S. E., 187, of the epitaph on the tombstone of a little child, which seems equally appropriate here:

"If I am so soon done for,
What was I begun for?"

My vote is to sustain the trial court's interpretation of the statute.

SEAWELL, J., concurs in dissent.

ELIZABETH DRUMWRIGHT v. NORTH CAROLINA THEATRES, INC.

(Filed 10 December, 1947.)

1. Negligence § 4f (2)—

While the proprietor of a moving picture theatre is not an insurer of the safety of patrons, he is under 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 they can be ascertained by reasonable inspection and supervision.

2. Same—

The need for sufficient lights to enable patrons to find or leave their seats during the exhibition of a picture, and the need for sufficient darkness to exhibit the picture without eyestrain on those observing it, are factors to be considered in determining the correlative obligations and rights of the theatre proprietor on the one hand and its patrons on the other.

3. Same—

Plaintiff's evidence tended to show that she was a patron of a moving picture theatre and was directed by an usher to the balcony of the theatre which was in semi-darkness, that she was unfamiliar with that part of the theatre, that there were no floor lights or seat lights burning in the aisle or on the steps as plaintiff was accustomed to see in darkened theatres, that no usher was on duty in the balcony, that the steps in the aisle were alternately long and short, and that plaintiff overstepped one of the short steps and fell to her injury. *Held:* Defendant's motion to nonsuit should have been overruled.

4. Negligence § 11—

Unless obviously dangerous, the conduct of plaintiff which otherwise might be pronounced contributory negligence as a matter of law, would be deprived of its character as such if done at the direction of the defendant or its agent.

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

WINBORNE, J., dissents.

BARNHILL, J., dissenting.

APPEAL by plaintiff from *Harris, J.*, at February Civil Term, 1947, of WAKE.

Civil action to recover damages for personal injuries alleged to have been caused by the wrongful act, neglect or default of the defendant.

On the afternoon of 24 April, 1946, the plaintiff, a student at Meredith College, in company with two fellow students, attended the matinee screen show at the Ambassador Theatre in Raleigh. This theatre is owned and operated by the defendant.

After purchasing their tickets and upon entering the theatre, they were informed by an usher that no seats were available on the first floor and were directed by him to go to the balcony for seats. The plaintiff had never been in this part of the theatre before.

When the plaintiff and her companions reached the landing or platform back of the seats in the balcony, they stood for a moment to accustom their eyes to the darkened condition of the room. The picture was then being shown. There were no floor lights or seat lights in the aisle or on the steps, and no usher was on duty in the balcony. They saw three vacant seats about midway or five or six rows down from where

they were standing, and proceeded in single file along the aisle to take them. The plaintiff was last, her two companions going ahead of her. The steps going down from the platform were uneven in width—the succession being a narrow step then a wider step (which is the landing for that particular row of seats) followed by another narrow step and then a wider step, and so on.

Although the plaintiff was holding to the ends of the seats as she proceeded down the aisle, she slipped or stumbled and fell and was injured. Plaintiff says: "I thought I was on one of the big steps and started to turn and there was another small step and I slipped and fell. . . . There were no lights at all as I saw on the steps, nothing to give you any idea where you were going; no light to show the steps at all. . . . I was looking down where I was going at the time I fell. . . . I had overstepped that small step is what caused me to fall. . . . I knew the darkened condition of the theatre was for the purpose of carrying on the show. But all the movies I have been to had lights on the steps."

Due to the swollen condition of plaintiff's foot, she consulted a physician on the following day, and the X-ray showed a crack or incomplete fracture in the heel bone. The physician said that in his opinion no permanent disability would result from the injury although it might pain her for sometime.

From judgment of nonsuit entered at the close of plaintiff's evidence, she appeals, assigning error.

Thomas W. Ruffin for plaintiff, appellant.

Ehringhaus & Ehringhaus for defendant, appellee.

STACY, C. J. The question for decision is whether the evidence suffices to carry the case to the jury in the face of a demurrer. The trial court answered in the negative. We are inclined to a different view.

The proprietor or operator of a theatre who invites or induces patrons to enter therein is in duty bound 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." *Ross v. Drug Store,* 225 N. C., 226, 34 S. E. (2d), 64; *Watkins v. Taylor Furnishing Co.,* 224 N. C., 674, 31 S. E. (2d), 917; *Benton v. Building Co.,* 223 N. C., 809, 28 S. E. (2d), 491; *Mulford v. Hotel Co.,* 213 N. C., 603, 197 S. E., 169; *Bowden v. Kress,* 198 N. C., 559, 152 S. E., 625; 52 Am. Jur., 295. True, the proprietor or operator is not an insurer of the safety of such patrons, or invitees, while on the premises. *Leavister v. Piano Co.,* 185 N. C., 152, 116 S. E., 405; *Bohannon v. Stores Co.,* 197 N. C., 755, 150 S. E., 356.

In the instant case, however, we are dealing only with alleged tortious conduct and not with suretyship or insurance.

Many fine distinctions are to be found in the cases respecting the relative rights and duties of managers and patrons of motion-picture theatres, but in the end it all comes to a question of due care or commensurate care under the circumstances. The need for sufficient light to enable patrons to find or to leave their seats during the exhibition of a picture, and the need for sufficient darkness to exhibit it without eyestrain to those observing it, are factors to be considered in determining the correlative obligations and rights of the parties. Obviously what would be due care in a lighted room might not be commensurate care in a darkened theatre.

Here, the conjunction of the following facts would seem to call for the intervention of a jury: The plaintiff and her companions were directed by an usher on the first floor to go to the balcony for seats. They were unfamiliar with that part of the theatre. The picture was then being exhibited, and the balcony was in semidarkness. The steps in the aisle leading from the rear platform to the front of the balcony were uneven in width. There were no floor lights or seat lights in the aisle or on the steps. At least none were lighted. Plaintiff was accustomed to seeing such lights in darkened theatres. No usher was on duty in the balcony. Under these circumstances, the plaintiff overstepped one of the small steps in the aisle, stumbled and fell and was injured.

In a case arising out of a closely similar fact situation, the Appellate Division of the Supreme Court of New York reversed a judgment for the defendant and ordered the case submitted to a jury, the court holding that the plaintiff was not contributorily negligent as a matter of law in the light of the usher's direction that she proceed to the balcony for a seat, *Rabinowitz v. Evergreen Amusement Corp.*, 244 N. Y. S., 43. See *Schwartz v. International Vaudeville Co.*, 269 N. Y. S., 642; Note 98 A. L. R., 578; 52 Am. Jur., 300. We are constrained to follow a like course in the case at bar. 52 Am. Jur., 296; Anno. 143 A. L. R., 71.

Unless obviously dangerous, the conduct of a plaintiff which otherwise might be pronounced contributory negligence as a matter of law would be deprived of its character as such, if done at the direction of the defendant or its agent. *Johnson v. R. R.*, 130 N. C., 488, 41 S. E., 794; *Lambeth v. R. R.*, 66 N. C., 494. Here, the plaintiff and her companions were directed by defendant's agent to go to the balcony for seats. In following this direction, plaintiff was injured. The case is one for the jury.

Reversed.

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

WINBORNE, J., dissents.

BARNHILL, J., dissenting: The Court is here writing new law for this jurisdiction. In so doing the conclusion reached is, in my opinion, in direct conflict with former decisions of this Court in which it has been held repeatedly that where a plaintiff voluntarily proceeds under conditions of darkness which make it impossible to see where he is going he must suffer the consequences of his own negligence in so doing. I am, therefore, compelled to set forth to some extent the reasons I cannot concur in the majority opinion.

The facts plaintiff's testimony tends to prove are these: The plaintiff entered the theater of defendant as a paying guest or invitee. The usher in the orchestra told her there were no seats downstairs; to go to the balcony. She and her two companions went to the balcony and while standing on the landing platform selected the seats they wished to occupy five rows down. They then proceeded down the aisle to the seats so selected. The two companions reached their seats in safety and plaintiff reached the fourth tier or row of seats where she stumbled or slipped and fell. What caused her to fall she does not know. Whether she stumbled over something a patron had left in the aisle she cannot say. Evidently, she says, her foot slipped off the edge of the step and that was what caused her fall. The balcony was constructed in the customary manner. The seats were tiered in stairway fashion. The risers between each tier on which the seats were located were of the same height and the seat platforms were of the same width. The picture was being shown at that time, and the theater was in semidarkness as a necessary part of the showing, and there was no illumination from seat or aisle lights. Ample light was furnished between each showing of the picture for departing patrons to leave and incoming patrons to enter and find seats in safety.

When plaintiff reached the balcony she found no usher. She knew the aisle was dark and she could not see the steps, but had to feel her way down to the selected seats. But she was too impatient to await assistance or lights. Instead she proceeded on down the aisle, fully aware of the darkened condition of the theater.

Wherein lies the negligence of the defendant? What wrongful or negligent act did it commit which has any causal connection with plaintiff's injuries? What fact or circumstance tends to exculpate plaintiff in regard to her conduct in proceeding down the aisle, knowing she could not see where she was going or what danger lay ahead?

She, as she is required to do, has picked out those acts of defendant which she contends constitute want of due care. She alleges that defendant was negligent in that it (1) failed to "safely and properly light" the landing platform and "the steps descending to the seating arrangement in the balcony of said Theater at least to the extent that a paid patron and invitee . . . descending steps at the express invitation of the defendant

could at least see and not have to stumble along in the dark," and (2) failed "to provide an usher with a dimmed flashlight to guide the plaintiff and her companions . . . and seat her and her companions safely, all of which is customary with all theater operators having due regard for the safety of their patrons."

There is no allegation of any unusual, defective, or negligent construction of the aisle steps or that the balcony was not constructed in the customary manner. She does not allege that theaters of the type here involved customarily provide lights on the aisle steps during the showing of a picture. The nearest approach to proof thereof is the statement of the plaintiff: "All the movies I have been to had lights on the steps." When, where, or how many theaters she has attended is not disclosed. While she does allege that it is usual and customary to furnish ushers with dimmed flashlights to guide patrons seeking seats in the balcony section of the theater she does not offer any evidence to support the allegation.

While there are allegations of failure to light properly the approaches to the balcony, such allegations are immaterial here for the reason that she reached the balcony in safety. The condition of the light in the approaches through which she had passed in no wise contributed to her injuries. Hence *Mulford v. Hotel Co.,* 213 N. C., 603, and like cases have no application here.

So then she must necessarily rely upon her allegation of insufficient light and failure to furnish an usher as the basis of her contention that defendant breached a duty it owed her as a paying patron of the theater.

What a man of ordinary prudence, in operating a business or trade, would do under given circumstances is ordinarily to be found in the usage or custom of that particular business. Neither court nor jury is permitted to set a standard of prudence from case to case as occasion arises. The standard is set by what men engaged in the same business or trade actually do under similar circumstances. Here there is a total lack of proof that, in operating a theater, seat or aisle lights and ushers are customarily furnished for the guidance of balcony customers.

But to meet this situation the majority suggest that the "direction" to go to the balcony committed defendant to light the way not only to the balcony but also down the steps to her seat. In support of this position, *Johnson v. R. R.,* 130 N. C., 488, and kindred cases are cited. But those cases are not in point here. A passenger buys a ticket to a definite destination. It is the duty of the transportation company to stop at that point so that he may alight in safety. When instead of stopping, the train merely slows down and the agent of the company directs the passenger to alight while the train is in motion, there is a definite and positive breach of duty and lack of due care. Even then when the jump-

ing or alighting is obviously dangerous, the passenger is guilty of contributory negligence. See the Johnson and similar cases. Here the "direction" amounted to nothing more than information. The usher in effect said: "There are presently no available seats downstairs. If you go to the balcony you will find seats there." This was no direction to seek to descend the steps unassisted and find a seat in the dark. It was entirely optional with plaintiff whether she should go to the balcony or wait downstairs. Certainly it was optional with her whether she should await the lights or undertake to find her way down in the dark.

Then finally the majority rely on *Rabinowitz v. Evergreen Amusement Corp.*, 244 N. Y. S., 43, where a judgment of nonsuit was reversed, as presenting "a closely-similar fact situation." With this conclusion I cannot agree. There the step which caused the plaintiff in that case to fall was deeper than the others. The court held that in view of that fact the jury might find the failure to furnish a light to disclose this unusual situation was some evidence of negligence. This is sound, for it is well known that even in open daylight an irregular step of that type is likely to cause a person to lose his balance. But, in my opinion, with all deference to the majority, no such fact situation is disclosed here. See *Schwartz v. International Vaudeville Co.*, 269 N. Y. S., 642, where the *Rabinowitz case* is analyzed and distinguished. See also *Decker v. Brooklyn Strand Theatre Corp.*, 225 N. Y. S., 813, affirmed on appeal, 249 N. Y., 580.

The combination of facts detailed and relied on in the majority opinion is not, in my opinion, sufficient. The direction to go to the balcony was an invitation to use the passageway to the balcony. Had the plaintiff been injured while traversing this passageway and it appeared there was insufficient light therein, the situation would be different. But she reached the balcony in safety. The balcony was in semidarkness—a condition essential to a successful showing of the picture, a fact of which plaintiff was aware. There were no seat or aisle lights, a fact which plaintiff observed—and there is no sufficient evidence that such are customarily used in the balcony during a showing of the picture. *Falk v. Stanley Fabian Corp.*, 178 A., 740; *Rosston v. Sullivan*, 179 N. E., 173; Anno. 143 A. L. R., 68. The difference between the width of the treads or seat platforms and the step-downs is a necessary part of the construction of a balcony and there is no allegation of any defect or irregularity therein. While the plaintiff saw no usher in the balcony, there is no evidence tending to show that it was the duty of defendant to furnish ushers there. *Grand-Morgan Theatre Co. v. Kearney*, 40 F. (2d), 235; *Osborne v. Loew's Houston Co.*, 120 S. W. (2d), 947; Anno. 143 A. L. R., 71. So then, no one of the facts relied on, in and of itself, indicates or warrants an inference of negligence. Can we say that these facts, in

themselves innocent, in combination tend to prove negligence? I cannot so agree. *McKelvy v. Capitol Amusement Co.*, 159 So., 143; *Loew's Nashville & K Corp. v. Durrett*, 79 S. W. (2d), 598.

The plaintiff could see the seats she and her companions wished to occupy. Her companions found their seats in safety. She could have done likewise if she had not for some unknown cause slipped and fallen. She knew that in due time lights would be turned on, and yet, being unwilling to wait, she voluntarily elected to descend steps with which she was not acquainted when she could not see where she was going.

"Assuming that the plaintiff's way down the steps was dark, she was guilty of contributory negligence as a matter of law in proceeding down the steps, if it was so dark that she could not do so with safety." *Schwartz v. International Vaudeville Co., supra; Hudson v. Kansas City Baseball Corp.*, 164 S. W. (2d), 318, 142 A. L. R., 858; *Columbia Amusement Co. v. Rye*, 155 S. W. (2d), 727; Anno. 143 A. L. R., 77.

She walked into a curtain of darkness, knowing that the floor was not level and that she would encounter step-downs she could not see. In so doing she was guilty of contributory negligence as a matter of law. *Dunnevant v. R. R.*, 167 N. C., 232, and cases cited. *Groome v. Statesville*, 207 N. C., 538; *Beaver v. China Grove*, 222 N. C., 234; *Walker v. Wilson*, 222 N. C., 66; *Sibbitt v. Transit Co.*, 220 N. C., 702; *McKinnon v. Motor Lines, ante*, 132; *Hardman v. Stanley Co. of Amer.*, 189 A., 886; Anno. 143 A. L. R., 77; *Johnson v. Mathews-Moran Amusement Co.*, 106 P. (2d), 703.

On this record the plaintiff has, in my opinion, failed to offer evidence sufficient to be submitted to a jury. I can find no cause therein for disturbing the judgment of the court below. I therefore vote to affirm.

STATE OF NORTH CAROLINA, ON RELATIONSHIP OF THE EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, v. NEWS PUBLISHING COMPANY, NEWS PRINTING HOUSE, INC., CHARLOTTE, NORTH CAROLINA.

(Filed 10 December, 1947.)

Master and Servant § 59e—

An employer under the Employment Security Act was engaged in the business of printing and publishing a newspaper and also the business of operating a job printing business as separate businesses with separate books. Thereafter an independent corporation was organized which took over all the assets of the job printing business and retained all the employees of that department. *Held:* The new corporation is not entitled to a

pro rata transfer to it of the reserve fund. G. S., 96-9 (F) (c) (4); G. S., 96-8 (f) (2).

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

BARNHILL, J., dissenting.

APPEAL by plaintiff from *Grady, Emergency Judge,* at September Term, 1947, of WAKE.

This is an action to require the plaintiff to transfer a part of the reserve account from one employer to another where the transferee acquires only a part of the business of the transferring employer.

The facts are not in dispute and may be summarized as follows:

1. From 1903 to 1 September, 1946, the News Publishing Company was a corporation operating two separate and distinct departments: (a) One which printed and published *The Charlotte News,* (b) the other a job printing business.

2. The departments were conducted as separate businesses, each having its own books of accounts, pay roll records, personnel, accounts, billheads, bank checks, letterheads, and telephone listings.

3. None of the employees in either of the departments were interchanged from one department to the other.

4. On 1 September, 1946, a newly formed corporation, the News Printing House, Inc., acquired all the assets of the News Publishing Company theretofore used in its job printing department, and retained all the employees in the department as employees of the new corporation.

5. The News Publishing Company was, on 1 September, 1946, and prior thereto had been, an employer subject to the Unemployment Compensation Act (now Employment Security Law) and had paid all tax contributions due upon the wages of its employees in both the publishing and job printing departments.

6. The assets of the job printing department of the News Publishing Company which were transferred to the News Printing House, Inc., 1 September, 1946, amounted to approximately 20% of the total assets of the News Publishing Company. The total taxable wages paid to employees in the job printing department prior to 1 September, 1946, amounted to approximately 16% of the total wages paid by the News Publishing Company to all its employees.

7. The net reserve fund of the News Publishing Company as of 31 July, 1946, was $40,018.77. The defendants desire to have approximately 16% of this reserve fund, to wit, $6,330.27, transferred to the News Printing House, Inc.

The Employment Security Commission of North Carolina held it was without statutory authority to transfer a part of a reserve fund and entered an order denying the request. Upon appeal to the Superior

Court, the court reversed the ruling of the Commission and remanded the cause, directing the Commission to enter an order and determination in accordance with the judgment entered in the Superior Court.

The plaintiff appeals, assigning error.

W. D. Holoman, Chas. U. Harris, R. B. Overton, and R. B. Billings for plaintiff, appellant.

Wm. G. Lassiter for defendant, appellee.

DENNY, J. The employment experience of the News Publishing Company has been such that the corporation now enjoys a reduced rate of contributions under the provisions of the Employment Security Law. And according to the findings of the Commission, should the judgment of the Superior Court be upheld the News Printing House, Inc., will also be entitled to a similar rate. However, if the statute authorizes the transfer of reserve accounts only in those cases where the entire reserve account is to be transferred, the News Printing House, Inc., will not be entitled to the reduced rate of contributions based on the merit rating of the News Publishing Company. Consequently, the News Printing House, Inc., is interested in securing this reduced rate as well as the transfer of a pro rata part of the reserve fund of the News Publishing Company.

The statute, G. S., 96-9 (F) (c) (4), which provides for the transfer of reserve accounts, reads as follows: "Any individual, group of individuals, or employing unit, who or which acquires the organization, trade, or business of an employer, as provided in section 96-8, subsection (f), paragraph 2, for whom a reserve account has been established and maintained as provided in this chapter, shall immediately notify the commission thereof, and may upon the mutual consent of the parties concerned, and approval of the commission, in conformity with the regulations as prescribed therefor, assume the position of such employer with respect to the resources and liabilities of such employer's reserve account. . . ."

G. S., 96-8 (f) (2), referred to in the above statute, contains the following provisions: " 'Employer' means (2) Any employing unit which acquired the organization, trade, or business or substantially all the assets thereof, of another which at the time of such acquisition was an employer subject to this chapter, or which acquired a part of the organization, trade, or business of another, which at the time of such acquisition was an employer subject to this chapter; provided, such other would have been an employer under paragraph (1) of this subsection, if such part had constituted its entire organization, trade, or business; provided further, that section 96-10, subsection (d), shall not be applicable to an individual or employing unit acquiring such part of the organization, trade, or business."

We think it was the intent of the Legislature in enacting G. S., 96-9 (F) (c) 4, to authorize the transfer of a reserve account only in those cases where an "individual, group of individuals, or employing unit, who or which acquires the organization, trade, or business of an employer . . . for whom a reserve account has been established and maintained." It is true that a reference is made to G. S., 96-8 (f) (2), in the statute authorizing the transfer of a reserve fund, and the defendants insist that by this reference the transfer of reserve accounts is not limited to the class of employing units named in G. S., 96-9 (F) (c) 4, otherwise why refer to G. S., 96-8 (f) (2). This necessitates a consideration of the relation of G. S., 96-8 (f) (2), to other pertinent parts of the Employment Security Law. These statutes have not been construed heretofore by this Court, relative to the transfer of reserve accounts by mutual consent of the parties concerned. See *Unemployment Compensation Comm. v. Nissen,* 227 N. C., 216, 41 S. E. (2d), 734.

An "employing unit" is defined in G. S., 96-8 (e), as "any individual or type of organization, including any partnership, association, trust, estate, joint-stock company, insurance company, or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person which has, on or subsequent to January first, one thousand nine hundred and thirty-six, had in its employ one or more individuals performing services for it within this state." While an "employer" is defined in G. S., 96-8 (f) (1), as "any employing unit which in each of twenty different weeks within either the current or the preceding calendar year (whether or not such weeks are or were consecutive) has, or had in employment, eight or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week) . . ."

G. S., 96-8 (f) (2), is a definitive statute by which it can be determined whether or not an employing unit which is the transferee of all, substantially all, or a part of an organization, trade, or business of another, is subject to the provisions of the Employment Security Law and required to make the contributions as provided therein.

There are two classes of employing units described in G. S., 96-8 (f) (2). The first is any employing unit which acquires the organization, trade, or business or substantially all the assets thereof, of another which at the time of such acquisition was an employer subject to the Employment Security Law. The other class is any employing unit which acquires a part of the organization, trade, or business of another, which at the time of such acquisition was an employer subject to the Employment Security Law; provided, such other would have been an employer under paragraph (1) of G. S., 96-8 (f), if such part had constituted its entire organization, trade, or business. It will also be noted that in this section

of the statute, the employing unit that acquires only a part of the organization, trade, or business of another is expressly exempted from the lien imposed by G. S., 96-10 (d), on the assets transferred although the former owner may not have paid all the contributions due at the time of the transfer.

We think this exemption is significant. If it had been the intent and purpose of the Legislature in enacting G. S., 96-9 (F) (c) 4, to authorize the transfer of such percentage of the reserve account as the transferred assets bear to the entire assets of the transferor, when only a part of the organization, trade, or business is transferred, then there would be no sound reason for exempting such assets from the provisions of G. S., 96-10 (d).

The assets transferred to the first class of employing units described above are not exempt from the provisions contained in G. S., 96-10 (d). Moreover, G. S., 96-9 (F) (c) 4, provides that "any individual or group of individuals, or employing unit who or which acquires the organization, trade, or business of an employer, as provided in section 96-8, subsection (f), paragraph (2), for whom a reserve account has been established and maintained as provided in this chapter," shall notify the Commission and by mutual consent of the parties concerned, and with the approval of the Commission, the transferee may assume the position of the transferor with respect to the resources and liabilities of such transferor's reserve account.

We think G. S., 96-9 (F) (c) 4, by its own limitation, restricts the transfer of reserve accounts to those cases where the account is to be transferred *in toto;* and even then, such reserve account can be transferred only to such employing unit defined in G. S., 96-8 (f) (2), as may acquire the organization, trade, or business of another for whom a reserve account had been theretofore established and maintained.

The job printing department of the News Publishing Company was not an employer as defined in G. S., 96-8 (f) (1), for whom a reserve account had been established and maintained. The News Publishing Company prior to 1 September, 1946, had been the employer within the meaning of the statute and the reserve account had been established and maintained for it. Hence, we do not think that G. S., 96-9 (F) (c) 4, authorizes the transfer of any part of the reserve fund of the News Publishing Company to the News Printing House, Inc.

The judgment of the court below is reversed and this cause is remanded to the end that judgment may be entered in accord with this opinion.

Reversed.

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

BARNHILL, J., dissenting: Here we have a parent corporation conducting two separate and distinct businesses. Another corporation has been formed and it has taken over the assets of the printing business. The Employment Security Commission reserve account has been and still is maintained as a joint account. The parent and subsidiary companies desire now to dissolve this account. The Employment Security Commission held that it was without statutory authority to permit the proposed dissolution of the joint account or the transfer of any part thereof to the subsidiary company. The court below reversed and directed the division or apportionment of the account. Authority for this action, in my opinion, is contained in the first sentence of G. S. 96-9 (F) (c) (4).

The first sentence of that section makes provision for the dissolution of a joint account—the relief defendants seek. The second sentence permits the transfer of a reserve account. These are two different propositions. It seems to me that the majority, in deciding the question presented, gave consideration only to the second sentence of the section and ignored the provisions of the first sentence thereof.

In short, as I view it, the case comes to this: A strict construction of G. S. 96-9 (F) (c) (4), apart from the first sentence thereof, brings the majority conclusion within the strict letter of the law. A liberal construction of the section as a whole, considering the several situations with which it deals, leads to the conclusion that the Commission had statutory authority to permit the dissolution of the joint reserve account —a lack of which authority is the basis of the Commission decision. This construction comes within the spirit, purpose, and intent of the Act.

As I adhere to the latter view, I am of the opinion the court below correctly applied the law to the facts of this case. Hence, I vote to affirm.

W. E. MOTLEY, IN BEHALF OF HIMSELF AND OTHER DULY LICENSED BARBERS IN THE STATE OF NORTH CAROLINA; (AND WILLIE COX AND R. D. ELLINGTON, ADDITIONAL PARTIES PLAINTIFF), v. THE STATE BOARD OF BARBER EXAMINERS, J. M. CHEEK, CHAIRMAN, M. B. BERRY, MEMBER, A. M. McCOY, MEMBER, AND R. P. BRANCH, EXECUTIVE SECRETARY; AND RALPH E. YOUNG.

(Filed 10 December, 1947.)

1. Injunctions § 1—

Licensed barbers in their individual capacity may not challenge the constitutionality of Chap. 941, Session Laws of 1947, by injunction upon the ground that the granting of licenses to returned veterans under the provisions of the statute would tend to lower the standards or destroy the

security of the trade, since there is no allegation of specific injury to personal or property right sufficient to invoke equitable jurisdiction.

2. Injunctions § 2—

Licensed barbers may not attack the constitutionality of Chap. 941, Session Laws of 1947, by injunction on the ground that the granting of licenses to returned veterans under the provisions of the act would result in unlawful competition which would diminish their income from the trade, or even amount to its confiscation, since if the act is unconstitutional there is adequate remedy by prosecution of interlopers.

3. Same—

Suit by an experienced barber who had applied for and was refused license for failure to pass the examination of the Board of Barber Examiners, to enjoin the Board from issuing licenses to returned veterans without an examination under the provisions of Chap. 941, Session Laws of 1947, is determined upon its merits.

4. Barbers § 1: Judgments § 30—

The validity of the statute providing for the licensing of barbers and the control and regulation of the trade having been judicially determined, the validity of the act may not be attacked in a subsequent suit.

5. Constitutional Law § 12—

The restraints and regulations placed upon the practice of a trade or profession in the interests of sanitation, public health and the standards of the trade or profession, are matters of public policy within the control of the Legislature within constitutional limitations.

6. Constitutional Law § 18—

The Constitution of North Carolina does not preclude the Legislature from making classifications and distinctions in the application of laws provided the classifications are reasonable and just and are not arbitrary. Constitution of North Carolina, Art. I, sec. 1; Art. I, sec. 7; Art. I, sec. 17.

7. Constitutional Law § 10b: Statutes § 6—

The Supreme Court may not exercise its power to declare a statute unconstitutional and void unless it is clearly so.

8. Constitutional Law § 18—

The rehabilitation of returning soldiers is a matter of public concern, and statutes giving them exclusive benefits or privileges in furtherance of this public policy will be reconciled with constitutional limitations whenever possible.

9. Constitutional Law § 17—

Service in the armed forces during war is a public service within the meaning of Art. I, sec. 7, of the Constitution of North Carolina, for which exclusive or separate emoluments or privileges may be granted.

10. Same—

The Fourteenth Amendment to the Federal Constitution does not preclude a state from providing preferential treatment in the licensing of

veterans to carry on a particular trade or profession upon the payment of the same fees as prescribed for all others engaged in the trade or profession.

11. Same—

The Legislature may prescribe classifications for the licensing of persons engaged in particular trades or professions provided the classifications are not arbitrary and have reasonable relation to the end sought.

12. Same: Barbers § 1—

The provisions of Chap. 941, Session Laws of 1947, that veterans of World War I or World War II who have practiced barbering for three or more years prior to application, are eligible for license without standing the examination required by the general law, G. S., Chap. 86, prescribes a reasonable classification and is valid.

PLAINTIFF'S appeal from *Grady, Emergency Judge,* at May Term, 1947, of WAKE.

Chapter 86 of the General Statutes, entitled "Barbers," sets up for its administration a State Board of Barber Examiners, 86-6, defines the practice of barbering, 86-2, provides for the issuance of certificates of registration, 86-1, and establishes the conditions under which they shall be issued. 86-3, 86-5, 86-15, and prohibits and denounces the practice of barbering without a certificate and prescribes punishment therefor, 86-1, 86-22, subsections 1 to 11. Under Sec. 86-12 temporary permits by the Board may be given to persons who have practiced barbering in another state or county for two years and who shall demonstrate their fitness to the Board.

The Board is required to give examinations four times a year, including such practical demonstration and oral and written tests as the Board may determine, sec. 86-10.

Sections 86-4 and 86-5 require that the applicant for admission must have worked as a registered apprentice under a registered barber for at least eighteen months before becoming eligible for a certificate as a registered barber. The designation "registered barber" and holder of a barber's "certificate" mean the same.

An amendment to the "Barbers" Act was made in Chapter 941 of the Session Laws of 1947, making veterans of World War I and World War II who have had three years prior experience in barbering eligible to demand certificates and become registered barbers, and practice the trade without the examination and apprenticeship otherwise required for admission by paying the fees prescribed in the Act.

The defendant Young, complying with the amended law, tendered his fees and demanded a certificate. The plaintiff Motley brought this action to enjoin the defendant Board of Barber Examiners from issuing the

certificate, joining Young as party defendant, and obtained a temporary restraining order.

On motion of counsel for plaintiff, Willie Cox and R. D. Ellington were made parties plaintiff.

It appears from the complaints filed separately by the plaintiffs that W. E. Motley is and has long been a registered barber, enjoying the full benefits and protection of the act. He complains that the admission of the defendant Young as a registered barber and into the practice would be an unconstitutional discrimination against him and others licensed in that it would deny him the enjoyment of the fruits of his labor, confer upon the defendant Young a discriminatory privilege denied by the Constitution, deprive him of a property right, and deny him equal protection of the laws, citing the provisions of the State and Federal Constitutions supposed to be involved; and that he and other licensed barbers will suffer irreparable injury, since the effect would be to destroy the security of plaintiffs' trade or profession and will lessen the confidence of the public in the barbering profession as set up under the law. He further pleads that he has a proprietary interest in the Carolina Hotel Barber Shop, which, he contends, gives him an actionable interest in the suit.

The plaintiff Cox adopts the complaint of Motley and adds thereto that he has been practicing as a registered barber under the Act for many years, was compelled to undergo examination to acquire that privilege, and that the admission of Young and other veterans under the provisions of the amended law and without examination would be an unlawful discrimination and deny him the equal protection of the law.

The plaintiff Ellington complains that while he had practiced barbering for many years, he has tried three times to procure a certificate from the Board and each time was unable to pass the examination; and that the admission of Young under the conditions of the amended law would be, against him, an unconstitutional discrimination and a denial of the equal protection of the law.

The defendant Board of Examiners, while they indicate they will obey the law if so required, join with the plaintiffs in resisting the demands made under the Act as contrary to the welfare of the public, lowering the standards of sanitation and health, and contend that the statute is discriminatory and unlawful.

The defendant Young sets forth his compliance with the amended law, and maintains its constitutionality.

The matter came on for a hearing before Judge Henry A. Grady at May Term, 1947, of Wake Superior Court, who, after hearing evidence and argument dissolved the restraining order and dismissed the action. The plaintiffs appealed.

Harris & Poe and Logan D. Howell for plaintiffs, appellants.

J. Frank Huskins and N. F. Ransdell for defendant Ralph E. Young, appellee.

SEAWELL, J. The array of parties plaintiff has given rise to some doubt as to their community of interest in the subject matter of the proceeding; and considered individually their standing in court as qualified suitors for equitable relief has been challenged.

The plaintiffs Motley and Cox are registered barbers of long standing and the complaint that they are discriminated against because they were compelled to stand examination while the defendant Young and others in his class are not so required, without further allegation of injury would seem merely reminiscent. In that respect the gist of Cox's grievance, as alleged, is that the admission of the defendant Young and other veterans to practice barbering without examination "would tend to lower the standards of the barbering trade . . . resulting in irreparable injury to this plaintiff in the practice of his chosen trade." The plaintiff Motley complains that the illegal admission of the defendant Young and other veterans similarly privileged "would destroy the security of plaintiff's trade or profession" as guaranteed by the statute, G. S., Chapter 86; and that he is the owner of the Carolina Hotel Barber Shop in Raleigh and has built up an established business; and that his interest therein gives him an actionable interest in the proceeding. Neither of these plaintiffs alleges a specific injury to a personal or property right such as may be in need of equitable protection; but we may gather from the suggestions made in the argument and the brief that the objection is directed towards an unlawful competition which may affect them by diminishing income from the trade or business, or even amount to its confiscation. Even so, it is difficult to understand how there is an immediate threat to such rights or how the admission of Young to practice in the County of Yancey, where, according to the record there are 18,000 people and only two registered barbers, could affect the number of persons seeking hirsute curtailment in Wake, and reduce their daily take. It is pointed out that if the attempt of the Legislature to open the door to these veterans is null and void, there is adequate protection afforded them already through the prosecution of interlopers. *S. v. Lockey,* 198 N. C., 551, 152 S. E., 693.

However, the status of Ellington, who is experienced at the trade and has tried the Board three times for his certificate and failed, presents a different bid for recognition. While there may remain some doubt as to his relation to the cause of action he seeks to assert, we prefer to consider the matter upon its merits without passing upon that question; and in so doing the constitutional questions posed by his co-plaintiffs and the defendant Board will necessarily have attention.

Counsel for the defendant Young has thrown into the hopper as a serious question how far the Legislature may go in withdrawing from the public the opportunity of employment in what has heretofore been considered an ordinary trade or occupation by erecting it into an autonomous guild, with a Board selected from its members, vested with practical control of admission by the enforcement of conditions and rules so highly restrictive, it is contended, as to promote a monopoly; and points out the power of this board in selecting barbers' colleges, examination of applicants who must demonstrate tonsorial skill, manifest requisite medical knowledge, and must serve at least 18 months in apprenticeship to a registered barber before entering the trade. However, since *S. v. Lockey, supra,* that problem is no longer in the hands of the Court. But it is true that the questions of sanitation, public health and standards of the trade or profession urged upon us in defeat of the statute are matters of public policy within the control of the Legislature and not available to the plaintiffs in support of their present proceeding; and the same authority which conferred upon the Barbers Board the power to determine conditions of admission to the trade, or established them, may repeal them, or alter them, or provide alternative conditions of admission unless plainly forbidden by the Constitution. We are of the opinion that the 1947 amendment admitting qualified veterans to the trade is not necessarily of that character.

The plaintiffs ground their attack on the amending statute upon Article I, Sec. 1, of the North Carolina Constitution, providing "that all men are created equal and are endowed by their Creator with certain inalienable rights, including the enjoyment of the fruits of their own labor"; Article I, Sec. 7, providing "that no man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public service"; Article I, Sec. 17, providing "that no person ought in any manner to be deprived of his life, liberty or property but by the law of the land"; and upon the 14th Amendment to the Constitution of the United States providing "that no state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

These provisions of the Constitution are not so naive as not to contemplate the classifications and distinctions which orderly government is required to make with respect to the subjects of its control. "Discrimination" does not ordinarily connote unfairness nor can it be used as a label to disqualify and condemn a statute as "class legislation." It is only when the classification, or the distinction, is arbitrary and unjustifiable upon any reasonable view that it becomes invidious and offensive to

the Constitution, so that the Court may undertake to exercise the extraordinary power it possesses to declare the statute void. The Unconstitutionality must clearly appear before the Court can so declare it. *Brumley v. Baxter,* 225 N. C., 691, 36 S. E. (2d), 281; *S. v. Brockwell,* 209 N. C., 209, 183 S. E., 378.

From the beginning of civilization and before written constitutions were conceived, nations and governments have recognized an obligation to those who have fought in the Armed Forces in defense of their country and in the preservation of its institutions. It is part of the *mores,* running parallel with the Constitution and demanding reconciliation of its provisions wherever it may be possible. For that reconciliation we must look to the purpose of the statute and its relation not only to the soldier intended to receive its benefits but to the necessities of government itself.

The custom is not based altogether on sentiment or gratitude, or even common justice to the soldier, but it involves other considerations both practical and compelling: The fact that the incidence of war is not wholly borne by those in the military service but falls heavily on the social and economic life of the state or nation, because of their enforced absence and the handicaps under which they labor when they return. It is an inevitable sequence of war that there will be found in the growth of our institutions, as well as in the life of these people, the lean, hard ring of winter. We are, therefore, dealing with a principle of security without which a nation, and particularly a democracy, could scarcely move from peace to war, or again from war to peace, without injustice and disruptions which would mar, if not imperil its social and economic life.

The rehabilitation of the returned soldier is a matter of public concern throughout the nation, and the present relief which the challenged amendment intends for the qualified veteran may be correlated with that necessity.

During the recent World War around 10,000,000 men and boys, largely in the preparatory period of life or its early productive experiences, were inducted into the Army and deprived of all the privileges and opportunities which peacetime occupations could afford and which were freely enjoyed by the noncombatant civilian at home. It is a simple matter of equality and justice to them that these opportunities may in a measure be restored to them, and that the handicaps which have been suffered should be removed, and it is of importance to the continued peace and prosperity of the nation that they should be seasonably returned, in an orderly way, to self-supporting occupations and to the productive enterprises essential to the public welfare and progress. In *Fishgold v. Sullivan Drydock & Repair Corp.,* N. Y., 1946, Supreme Court 1105, 90

L. Ed., discussing the Selective Service Act of 1940, it is said that the purpose of the section considered was designed to protect the veteran by preventing him from being penalized on his return by reason of his absence from his civilian job and *by giving him an advantage which the law withheld from those who stayed behind.*

Article I, Sec. 7, of the Constitution which forbids the granting "of exclusive or separate emoluments or privileges from the community but in consideration of public service" contemplates that the privileges, both "separate" and "exclusive" may be given "in consideration of public service" and the history of its adoption is no doubt impressed with the custom to reward in this way men who have borne arms in the service of the country,—and it is most often cited in that connection. Such services are within the definition of the Constitution, *Brumley v. Baxter, supra; Hinton v. State Treasurer,* 193 N. C., 496, 137 S. E., 699. It is also extended to public non-combatant services, *Bridges v. Charlotte,* 221 N. C., 472, 20 S. E. (2d), 825. Since the privileges so extended are exclusive it follows that others are excluded from their exercise. What *privileges* may the State grant to returned veterans more important than the return to the peaceful occupations of life from which they have been excluded?

Practically all the States in the Union from which men have been drafted for military service have given to returned veterans preferential treatment, in many instances of a more discriminatory character than the privileges conferred by the challenged statute. These have ranged from bonuses, loans, to free education in state-supported schools, both of the veteran and his children; immunity from duties imposed upon others, and a wide variety of privileges not exercised by the general public. It will be helpful in studying and comparing their character and extent to refer to "Veterans Benefits," West Publishing Co. (1946), and "American Law of Veterans," by Kimbrough & Glen, Lawyers Cooperative Publishing Co. (1946), in both of which may be found illustrations and analyses with a list of the states concerned.

The questions with which we are dealing here are very fully and ably discussed in *Valley National Bank of Phoenix v. Glover, et al.,* 159 P. (2d), 292. Almost every phase of the present controversy is considered in that opinion and the argument is convincing. See pp. 298, 299, 300.

In its underlying principle of decision we believe that *Hinton v. State Treasurer,* 193 N. C., 496, 137 S. E., 669, should be controlling of the issues presented on this appeal. In that case an action was brought to restrain the defendants, including the State Treasurer, from carrying out the provisions of Chapter 155 of the Public Laws of 1925, known as the "World War Veteran Loan Act," and the sections of the Constitution supposed to be invaded are those upon which the plaintiffs rely in the instant case. This case is replete with references to pertinent cases from other jurisdictions to which space permits only this reference.

The 14th Amendment to the Federal Constitution has not prevented Congress from insuring bonds of veterans, a practice which, if the position of the plaintiffs is correct, would promote discrimination inside the State; or from expressing the hope that the states in their public employment would recognize the propriety of preferential treatment of veterans accorded by the Selective Service Act, Sec. 308 (c): "If such position was in the employ of any state or political subdivision thereof it is hereby declared to be the sense of the Congress that such person should be restored to such position or to a position of like seniority, status and pay."

We are not dealing here with questions of civil service or license fees as a contribution which must be made to the State with respect to occupation or employment. As to both there is a division of authority as to the effect of veteran preferment. The most outstanding cases cited to us involve arbitrary classification which would exclude from the benefits of the act part of the class which by the recognized service would be entitled to it. *Ex Parte Jones,* 43 S. W., 513; *Lawrence v. Anderson,* 75 S. E., 62; *Adams v. Standard Oil Co.,* 97 Miss., 879, 53 So., 692. These cases are mentioned because they have no doubt given rise to the objection made by the plaintiffs that we are dealing with a "class within a class" since only certain qualified veterans were included in the benefits of the statute.

However, the Legislature may extend the process of classification as far as it deems proper for the purpose of applying the law unless the classification becomes capricious, arbitrary, and without reasonable relation to the end sought. At any rate, the plaintiffs are not in position to raise the objection.

The Constitution does not require a competitive examination to be admitted to the practice of barbering, as in *Barthlemess v. Cukor,* 231 N. Y., 485, 132 N. E., 140, 16 A. L. R., 1404, where civil service was involved. Here examination is the result of the statute; and we are strongly inclined to the view that the provision in the statute for the admission of qualified veterans with three years previous experience in barbering is based upon a sufficient finding of fitness which the Legislature, in its appraisal both of the necessities of the trade and the experience of the veteran, might substitute for the examination required by the Act without serious invasion of the rights of the plaintiffs. A careful consideration leads us to the conclusion that the challenged statute was fully within the legislative discretion and no provision of the Constitutions cited has been violated in its enactment. *Hinton v. State Treasurer, supra; Brumley v. Baxter, supra.*

The judgment below, therefore, is

Affirmed.

MRS. ALVIRADO TAYLOR (WIDOW), LOUISE TAYLOR (DAUGHTER), JOHN L. TAYLOR, DECEASED, v. TOWN OF WAKE FOREST, SELF-INSURER, AND/OR BOARD OF COMMISSIONERS OF WAKE COUNTY, INSURED BY THE TRAVELERS INSURANCE COMPANY.

(Filed 10 December, 1947.)

1. Master and Servant § 40a—

An injury compensable under the Workmen's Compensation Act must be the result of an accident which arises out of and in the course of the employment.

2. Master and Servant § 40c—

The term "arising out of the employment" within the meaning of the Workmen's Compensation Act refers to the origin or cause of the accident, and while it must be interpreted in the light of the facts and circumstances of each case and may not be precisely defined, there must be some causal connection between the injury and the employment.

3. Master and Servant § 40d—

The words "in the course of the employment" within the meaning of the Workmen's Compensation Act refer to time, place and circumstances under which the accident occurs.

4. Master and Servant § 40c—

Evidence tending to show that deceased employee, a township constable, was also employed by a municipality of the township to maintain order in its business district during certain hours of the night, and that prior to the hours of his employment by the town, a policeman of the municipality, who knew he was a constable but did not know of his employment by the town, requested him to go with him on a call outside the limits of the town, and that there he was fatally injured in attempting to make an arrest, *is held* to show that the fatal injury did not arise in the course of his employment by the municipality.

5. Constables § 1—

A constable must be elected in each township of the State, and all constables, before they are qualified, shall take oaths prescribed for public officers as well as an oath of office. G. S., 151-1; G. S., 151-2.

6. Constables § 2—

Constables have the same power and authority as they were invested with prior to our constitutional and statutory provisions, and their powers and duties are co-extensive with the limits of the county in which they are elected.

APPEAL by defendant Town of Wake Forest from *Carr, J.*, at May Civil Term, 1947, of WAKE.

Proceeding under North Carolina Workmen's Compensation Act to determine liability of defendant to claimant.

Before the Hearing Commissioner, Chairman T. A. Wilson, the Town of Wake Forest, self-insurer, and Board of Commissioners of Wake

County, and its insurance carrier, each having denied liability, evidence was offered through witnesses called by claimant, and admissions were made by claimant and by respondents, substantially as follows:

John L. Taylor, claimant's intestate, came to his death instantly on the night of 30 May, 1944, between the hours of seven and eight o'clock, nearer eight than seven, from a gunshot wound administered by a person whom he was trying to arrest, at a point more than one mile from limits of the Town of Wake Forest, but within the limits of Wake Forest Township. At the time of his death, and for several years prior thereto, John L. Taylor was a duly elected constable of Wake Forest Township.

On Easter Monday, 10 April, 1944, the Board of Commissioners of the Town of Wake Forest met in special session to discuss the question of, and to take steps thought necessary to insure better law enforcement in the town. Prior thereto, two men of bad reputation and with bad public records, had been coming down into the business section of the Town of Wake Forest, "about three or four blocks long" and causing a great deal of trouble,—a shot fired at one time, supposedly by one of them, and a fight in which the other took part, at another. All the trouble had taken place at night, "desperado style." To get this situation in hand, and to stop "these fights and this misbehaviour," the Board of Commissioners authorized Mayor Holding to employ a special officer to be present in the business section of the town at night. After the meeting the mayor went to see John L. Taylor. As to this the mayor testified: "I . . . went to see Mr. Taylor, who was already a Township constable, and asked if he would serve in this capacity as a special officer to be in the business section at nights and on week-ends to help keep order." Taylor said he was engaged in the plumbing business and he couldn't accept any police employment that would interfere with his work,—said he often worked until 9 or 10 o'clock at night. However, it was then agreed that after he had finished his business, and had his supper, 8 or 9 o'clock, he would come on duty and stay until 11:30 or 12 o'clock, or as long as there was any disturbance. But if his plumbing business interfered, and he came on duty later, that would be all right with the Town. Taylor said he wasn't demanding any salary for the work. The mayor told him that "we could not expect him to give up his time in helping us without some compensation," and asked if $20.00 per week would be acceptable and "he said, 'Perfectly.'" "His services were limited to the business section." He accepted the appointment upon condition that it not be known,—saying he could be more effective in his work. It was his idea. The mayor had no objection.

Taylor took no oath of office as a special policeman or as a Town officer. "He was already qualified as constable to do the work in the rest of the Township." And he started to work on next day or so, possibly

on the 11th, and, on 30 May, 1944, was "still employed" in the capacity described by the mayor.

The Town had a regular day policeman, Chief George R. Mitchell, who worked until bedtime each night, and a night policeman, W. O. Knuckles, who came on duty at 7 o'clock and worked all night, and they did not know that Taylor was on the Town's pay roll. He wore no uniform. Pay checks for his weekly salary carried stubs on which was written, among other things, "For services as special officer."

On night of 30 May, 1944, the night policeman, W. O. Knuckles, received a message between 7 and 8 o'clock, that an officer was wanted down about a mile from the town limits of Wake Forest, where a Negro man had taken a Negro girl off in the woods and a shot had been heard and it was feared the man had killed her. Chief Mitchell, the day policeman, having gone to supper, Knuckles who knew that Taylor was a constable, inquired as to the whereabouts of Taylor, and found him at work "doing some plumbing" at a cafe on Main Street in the town. Knuckles asked Taylor, using his words, "to come with me," and Taylor said that "as quick as he got up his tools he'd be glad to go with" Knuckles, and he did in "ten minutes." They went down to the scene from whence the report came, and in a short time Taylor was shot, and died there.

Knuckles knew that Taylor had been a constable for three or four years, and during that period of time, and while Knuckles was policeman, it was his usual custom when he had a call and couldn't get any other policeman, he would "go by," or wherever he saw Taylor, and, quoting Knuckles, "I'd ask him to go with me and he always went." And on this night, Knuckles said, "I went down and told him the report I had and he said, 'I'll go as quick as I get my plumbing tools up.' He went back in the place and got them up and put them in his car and locked the door and went in my car."

The charter of the Town of Wake Forest, P. L. L. 1937, Chap. 550, Sec. 8, provides: "That the police officers of the said Town of Wake Forest shall within the corporate limits thereof and also within Wake Forest Township, Barton's Creek Township, and New Light Township, Wake County, have and exercise all the authority, rights, and powers which are now or may hereafter be conferred by law on constables."

Neither of the respondents offered any evidence—except the Board of Commissioners of Wake County, by consent of all parties, offered a certificate of its chairman to the effect that John L. Taylor was not during the year 1944, and at the time of his death on the pay roll of Wake County, or any of its departments, and that he did not draw any compensation or remuneration from Wake County.

The Hearing Commissioner thereafter filed an opinion in which he set forth Findings of Fact, among others: "1. That the claimant's deceased, John L. Taylor, sustained an injury by accident arising out of

and in the course of his employment as special officer for the Town of Wake Forest and as constable of Wake Forest Township between 7:00 and 8:00 o'clock p.m. on the night of May 30, 1944, when he was shot; that the gunshot wound was administered by a person whom Taylor was trying to arrest at the time; and that the gunshot wound was the proximate cause of his immediate death. . . . 4. That at the time of the shooting the deceased, John L. Taylor, was acting in a dual capacity as constable of Wake Forest Township and special officer for the Town of Wake Forest. 5. That as constable searching for and attempting to arrest the law violator, Taylor was not acting in a 'purely administrative' capacity." And thereupon the Hearing Commissioner stated Conclusions of Law, and made an award against all defendants.

Thereupon defendants appeal to Full Commission. And, after hearing, the Full Commission ratified and affirmed the Findings of Fact, Conclusions of Law and award by the Hearing Commissioner. However, Commissioner Kimzey dissented as to award against the County Board. And upon appeal to Superior Court the Judge Presiding, being of opinion that there is sufficient evidence upon the record to support the award against defendant Town of Wake Forest, but that there is not sufficient evidence upon the record to support the award against defendant, Board of Commissioners of Wake County, and its insurance carrier, entered judgment accordingly.

Both plaintiff and Town of Wake Forest gave notice of appeal therefrom to Supreme Court. Town of Wake Forest perfected appeal and filed brief. But plaintiff, having filed no brief on her appeal, the same was dismissed on motion of the Board of Commissioners.

A. Jack Medlin and J. L. Emanuel for plaintiff, appellee.

J. M. Broughton, Lawrence Harris, and C. Woodrow Teague for Town of Wake Forest, appellant.

Bailey, Holding & Langston and Brassfield & Maupin for Board of Commissioners of Wake County, appellee.

WINBORNE, J. The appeal as it comes to us presents this question: Is the evidence shown in the record on this appeal sufficient to support a finding that the death of John L. Taylor resulted from injury by accident arising out of and in the course of his employment by the Town of Wake Forest, within the meaning of the North Carolina Workmen's Compensation Act? The answer is "No."

Under the North Carolina Workmen's Compensation Act, Public Laws 1929, Chapter 120, as amended, now Chapter 97 of the General Statutes, the condition antecedent to compensation is the occurrence of any injury (1) by accident (2) arising out of and (3) in the course of employment.

Conrad v. Foundry Co., 198 N. C., 723, 153 S. E., 266; *Whitley v. Highway Com.*, 201 N. C., 539, 160 S. E., 827; *Beavers v. Power Co.*, 205 N. C., 34, 169 S. E., 825; *Plemmons v. White's Service, Inc.*, 213 N. C., 148, 195 S. E., 370; *Lockey v. Cohen, Goldman & Co.*, 213 N. C., 356, 196 S. E., 312; *Wilson v. Mooresville*, 222 N. C., 283, 22 S. E. (2d), 907.

The words "out of" refer to the origin or cause of the accident, and the words "in the course of" to the time, place and circumstances under which it occurred. *Conrad v. Foundry Co., supra. Harden v. Furniture Co.*, 199 N. C., 733, 155 S. E., 728; *Hunt v. State*, 201 N. C., 707, 161 S. E., 203; *Ridout v. Rose's Stores, Inc.*, 205 N. C., 423, 17 S. E. (2d), 642; *Plemmons v. White's Service, Inc., supra; Lockey v. Cohen, Goldman & Co., supra; Wilson v. Mooresville, supra.*

It has been said that the term "arising out of employment" is broad and comprehensive and perhaps not capable of precise definition. It must be interpreted in the light of the facts and circumstances of each case, and there must be some causal connection between the injury and the employment. *Chambers v. Oil Co.*, 199 N. C., 28, 153 S. E., 594; *Harden v. Furniture Co., supra; Canter v. Board of Education*, 201 N. C., 836, 160 S. E., 924; *Walker v. Wilkins, Inc.*, 212 N. C., 627, 194 S. E., 89; *Plemmons v. White's Service, Inc., supra; Wilson v. Mooresville, supra.*

"Arising out of," as said by *Adams, J.*, in *Hunt v. State, supra*, "means arising out of the work the employee is to do or out of the service he is to perform. The risk must be incidental to the employment." *Harden v. Furniture Co., supra; Chambers v. Oil Co., supra; Beavers v. Power Co., supra; Bain v. Mfg. Co.*, 203 N. C., 466, 166 S. E., 301; *Plemmons v. White's Service, Inc., supra; Wilson v. Mooresville, supra.*

In the light of these principles, what services was John L. Taylor to perform, and what work was he to do under his employment by the Town of Wake Forest? The uncontradicted evidence is: (1) That Taylor "was already a township constable," and the mayor acting under authority from the Board of Commissioners of the Town of Wake Forest, asked him "if he would serve in this capacity as a special officer to be in the business section at nights and on week-ends to help keep order"; (2) that the business section of the town was "about three or four blocks long"; (3) that Taylor was engaged in the plumbing business, and he would not accept any police employment that would interfere with his work; (4) that after he had finished his business, and had his supper, 8 or 9 o'clock, he would come on duty and stay until 11:30 or 12 o'clock; but if his business interfered, and he came on duty later, it would be all right with the Town; (5) that "his services were limited to the business section"; and though he was not demanding any salary for his services, the Town agreed to pay him $20 a week; (6) that he took no oath of office as a

special policeman or as a town officer; "he was already qualified as a constable to do the work in the rest of the township"; he wore no uniform, and his employment by the Town of Wake Forest was kept a secret; (7) that the night policeman Knuckles, who did not know Taylor was in the employ of the Town, but did know that he was a constable, sought Taylor to go with him when the call came between 7 and 8 o'clock on 30 May, 1944, for an officer to come outside of the town limits; this was, and had been for the three or four years Taylor was a constable the usual custom of the policeman when he had a call and could not get another police officer; on this night Taylor was at work "doing some plumbing" at a cafe on the main street in the town; and (8) the place to which the night policeman was called and to which Taylor went with him, was more than a mile outside the town limits.

The evidence clearly shows that the Town of Wake Forest sought the services of Taylor in his capacity as a township constable, and engaged him to do specific work within the limits of a certain territory and during certain hours. The evidence also shows clearly that the mortal injury which Taylor received did not occur in the performance of the specific work he was engaged to do within the limits of the territory to which his employment by the Town of Wake Forest related.

It may be noted that in each township in this State a constable shall be elected by the voters thereof. G. S., 151-1, N. C. Const., Art. 4, Sec. 24; that all constables, before they shall be qualified, shall take oaths prescribed for public officers as well as an oath of office, G. S., 151-2; and that "constables are . . . invested with and may execute the same power and authority as they have been by law heretofore vested with, and have executed." G. S., 151-7. And this Court has held the powers and duties of constables are co-extensive with the limits of the county within which they are elected. See *S. v. Corpening,* 207 N. C., 805, 178 S. E., 564, where the case of *Dade v. Morris,* 7 N. C., 146, decided in 1819, is cited for statement of the law prior to our constitutional and statutory provisions. See also *Wilson v. Mooresville, supra.*

Such being the powers an duties of a constable, to hold that since the Town of Wake Forest makes a special arrangement with a township constable to do a specific job in certain territory within the corporate limits of the Town, it constitutes such constable its employee wherever he may go in the performance of his duty as such in Wake County, in which the Town is located, would present a rather anomalous position.

Hence, for reason stated hereinabove the judgment below is

Reversed.

STATE v. JOHN HENRY BREEZE.

(Filed 10 December, 1947.)

Criminal Law § 80b (4)—

Where defendant fails to serve his case on appeal within the time allowed, no extension of time having been allowed, the motion of the Attorney-General to docket and dismiss will be granted, but where the defendant stands convicted of a capital felony this will be done only after examination of the record proper fails to disclose error.

APPEAL by defendant from *Hamilton, Special Judge,* at March Term, 1947, of ORANGE.

Criminal prosecution tried upon indictment charging the defendant with the murder of one Agnes Wilkerson.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

No counsel for the defendant, appellant.

PER CURIAM. The defendant was convicted of murder in the first degree. Sentence of death by asphyxiation was imposed. Notice of appeal was given but the appeal has not been perfected. The time allowed for serving case on appeal has expired and no extension of the time for serving such case has been granted.

The Attorney-General moves to docket and dismiss the appeal. The motion will be allowed, but, according to the rule of the Court in capital cases, we have examined the record to see if any error appears. No error is disclosed by the record. *S. v. Watson,* 208 N. C., 70, 179 S. E., 455.

Judgment affirmed.

Appeal dismissed.

STATE v. GEORGE WHITAKER, A. M. DEBRUHL, T. G. EMBLER, H. E. SETZER, J. E. ROGERS, FRED BLACK AND R. B. ROBERTSON.

(Filed 19 December, 1947.)

1. Criminal Law § 81b—

The charge of the court will be deemed without error when it is not set out in the record.

2. Monopolies § 5—

The violation of Chap. 328, Session Laws of 1947, declaring the public policy of this State that the right to work shall not be dependent upon membership or non-membership in a labor union, is a criminal offense. G. S., Chap. 75.

3. Constitutional Law § 11—

The police power is reserved to the states under the Tenth Amendment to the Federal Constitution, which power is subject only to the limitations prescribed by the Federal or State Constitutions or those instances where the matter is pre-empted by Federal Law enacted pursuant to constitutionally granted authority.

4. Constitutional Law §§ 11, 20a—

"Due Process of Law" under the Fourteenth Amendment to the Federal Constitution and "Law of the Land" under sec. 17, Art. I, of the State Constitution, in relation to the exercise of the state police power, impose flexible restraints which are satisfied if the act in question is not unreasonable, arbitrary or capricious and the means selected have a real and substantial relation to the objects sought to be attained.

5. Constitutional Law § 11—

In determining whether a statute enacted in the exercise of the State police power is unreasonable, arbitrary or capricious or lacking in real and substantial relationship to the objective sought to be accomplished, it is proper to consider the historical development of the problem and prevailing public opinion in regard to the evils sought to be suppressed.

6. Constitutional Law § 18—

A statute regulating the relationship of employer and employee will not be held unconstitutional as class legislation so long as the act applies alike to all employers and employees coming within its scope.

7. Constitutional Law §§ 12, 18—

Chap. 328, Session Laws of 1947, is applicable to all employers and employees within the State, and therefore the fact that persons or groups coming within its scope must perforce be affected in different degrees because of the difference of their economic, social or political positions, does not render the Act unconstitutional as discriminatory.

8. Constitutional Law § 16½—

Chap. 328, Session Laws of 1947, does not infringe the constitutional rights of free speech or assembly, but to the contrary protects the right of employees to express their individual opinions by refusing to join unions and the right of employers and employees involved in a labor controversy to assemble and publicize their positions.

9. Constitutional Law §§ 8a, 10b—

In determining the constitutionality of an Act passed in the exercise of the police power, the court may determine solely whether the Act violates any constitutional limitation, the question of public policy being solely within the province of the Legislature.

DEFENDANTS' appeal from *Nettles, J.*, at July Term, 1947, of BUNCOMBE.

This is a criminal action in which the defendants were charged with a violation of Sections 2, 3, and 5 of Chapter 328 of the Sessions Laws

of 1947. For convenience of reference the statute is reproduced here in full.

"AN ACT TO PROTECT THE RIGHT TO WORK AND TO DECLARE THE PUBLIC POLICY OF NORTH CAROLINA WITH RESPECT TO MEMBERSHIP OR NON-MEMBERSHIP IN LABOR ORGANIZATIONS AS AFFECTING THE RIGHT TO WORK: TO MAKE UNLAWFUL AND TO PROHIBIT CONTRACTS OR COMBINATIONS WHICH REQUIRE MEMBERSHIP IN LABOR UNIONS, ORGANIZATIONS OR ASSOCIATIONS AS A CONDITION OF EMPLOYMENT: TO PROVIDE THAT MEMBERSHIP IN OR PAYMENT OF MONEY TO ANY LABOR ORGANIZATION OR ASSOCIATION SHALL NOT BE NECESSARY FOR EMPLOYMENT OR FOR CONTINUATION OF EMPLOYMENT AND TO AUTHORIZE SUITS FOR DAMAGES.

"The General Assembly of North Carolina do enact:

"SECTION 1. The right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraints and coercion. It is hereby declared to be the public policy of North Carolina that the right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization or association.

"SEC. 2. Any agreement or combination between any employer and any labor union or labor organization whereby persons not members of such union or organization shall be denied the right to work for said employer or whereby such membership is made a condition of employment or continuation of employment by such employer, or whereby any such union or organization acquires an employment monopoly in any enterprise, is hereby declared to be against the public policy and an illegal combination or conspiracy in restraint of trade or commerce in the State of North Carolina.

"SEC. 3. No person shall be required by any employer to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment by such employer.

"SEC. 4. No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment.

"SEC. 5. No employer shall require any person, as a condition of employment or continuation of employment to pay any dues, fees, or other charges of any kind to any labor union or labor organization.

"SEC. 6. Any person who may be denied employment or be deprived of continuation of his employment in violation of Sections 3, 4 and 5, or of one or more of such Sections, shall be entitled to recover from such employer and from any other person, firm, corporation, or association acting in concert with him by appropriate action in the courts of this State such damages as he may have sustained by reason of such denial or deprivation of employment.

"SEC. 7. The provisions of this Act shall not apply to any lawful contract in force on the effective date hereof but they shall apply in all respects to contracts entered into thereafter and to any renewal or extension of any existing contract.

"SEC. 8. If any clause, sentence, paragraph or part of this Act or the application thereof to any person or circumstance, shall for any reason, be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this Act, and the application thereof to other person or circumstances, but shall be confined to the part thereof directly involved in the controversy in which such judgment shall have been rendered and to the person or circumstance involved.

"SEC. 9. All laws and clauses of laws in conflict with this Act are hereby repealed.

"SEC. 10. This Act shall be in full force and effect from and after its ratification."

Chapter 75 of the General Statutes makes combinations, conspiracies and contracts in restraint of trade illegal and punishable as misdemeanors.

The defendant, George Whitaker, was a building contractor of the City of Asheville. The defendant, A. M. DeBruhl, was an officer and agent of the Asheville Building and Construction Trades Council of that City. The other defendants were officers and agents of local trade unions or organizations affiliated with the American Federation of Labor, as was set out in the warrant. The defendants were convicted in the Police Court of the City of Asheville, in which the case had been duly instituted and tried, and from the judgment and sentence in this case defendants gave notice of appeal to the Superior Court, where the case was tried *de novo*. When the case was called for trial in the Superior Court, the Solicitor announced that he would try the defendants on the original warrant issued in the Police Court.

The warrant charged the defendants, George Whitaker, an employer, and A. M. DeBruhl, an officer and agent of the Asheville Building and Construction Trades Council, T. G. Embler and the other defendants as officers and agents of local trade unions and organizations "did unlawfully and willfully enter into an illegal combination or conspiracy in restraint of the right to work and of trade or commerce in the State of North Carolina and against the public policy of the State of North Carolina, by executing a written agreement or contract by and between said employer and said Labor Unions and Organizations or combinations, whereby persons not members of said unions or organizations are denied the right to work for said employer, or whereby membership is made a condition of employment or continuation of said employment by said employer and whereby said named unions acquired an employment monopoly in any and all enterprises which may be undertaken by said employer are required to become or remain a member of a labor union or labor organization as a condition of employment or continuation of employment by said employer whereby said unions acquire an employment monopoly in any and all enterprises entered into by said employer in violation of House Bill, #229, Session 1947, General Assembly of North Carolina, Chapter 328, 1947 Session Laws of North Carolina, and particularly sections 2, 3 and 5 thereof, and Chapter 75 of the General Statutes of North Carolina.

In the Superior Court the defendants made a motion to quash the warrant on the alleged grounds that the warrant did not charge a criminal offense and that Chapter 328 of the Session Laws of 1947 was enacted in violation of Article I, Section 17, of the Constitution of North Carolina and in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Federal Constitution; and it was further alleged that the Act was in violation of freedom of speech in assembly guaranteed by the First Amendment to the Federal Constitution and protection from State invasion by the Fourteenth Amendment.

The defendants also alleged the Act was in conflict with the Labor Management Act of 1947 and Article VI, Section 2, of the Federal Constitution, but this argument w s not pressed on appeal to this Court.

The motion to quash was overruled, to which the defendants excepted.

All of the defendants were convicted by the jury on the offenses charged in the warrant. The defendants thereupon made a motion for an arrest of judgment, assigning as grounds therefor the same reasons set out in the motion to quash.

This motion was overruled and sentence was imposed by the Court that each of the defendants pay a fine of $50.00 and also pay one-seventh of the costs. From this judgment and sentence the defendants appealed to this Court.

The charge of the Court to the jury was not sent up with the record and it is, therefore, to be taken that the judge fully complied with the statute, G. S., 1-180, and stated in a plain and correct manner the evidence given in the case and declared and explained the law arising thereon.

In the brief of the defendants filed in this case, it is conceded that if the statutes alleged to have been violated are valid, the warrant properly charges the offenses alleged, and that there was adequate evidence of the violation of the statute. The defendants in their brief abandoned their assignments of error Nos. 1, 2 and 3, except as to their contention that a violation of Section 3 of the 1947 Act did not constitute a criminal offense.

From the State's evidence it appeared that the defendant, George Whitaker, was a local building contractor engaged in local construction work and had been such for many years. The defendant, A. M. DeBruhl, was an officer and agent of the Asheville Building and Construction Trades Council. The defendant, T. G. Embler, was an officer and agent of the International Brotherhood of Electric Workers, Local Union No. 238; H. E. Setzer, an officer and agent of the United Brotherhood of Carpenters and Joiners of America, Local Union No. 384; J. E. Rogers, an officer and agent of the Brotherhood of Painters, Paper Hangers, and Decorators of America, Local Union No. 839; Fred Black, an officer and agent of the Bricklayers, Masons and Plasterers International Union of America, Local Union No. 1; and R. B. Robertson, an officer and agent of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Asheville Local Union No. 487.

These labor unions or organizations are all affiliated with the American Federation of Labor, with a total membership of approximately 1,260.

These defendants, by their own admission, had entered into a written contract dated the 25th of May, 1947, which was offered in evidence. This contract provided that the employer agreed to recognize the labor unions of Asheville and vicinity as the spokesmen for the workmen in the industry and the representatives of their respective trades taken collectively. It was agreed that the employer would employ none but the union members, affiliated with the Building and Construction Trades Council composed of the various unions mentioned. The use of members in good standing of the labor unions by the employer was to include skilled, semi-skilled and unskilled labor on all work thereafter to be done, directly or indirectly, by the employer.

In Section 4 of the contract, the employer agreed to abide by all rules and regulations of the respective trades affiliated with the Building and Construction Trades Council, and comply with the rates of wages and

specified hours recognized by the respective trades. Sub-contractors, if employed, would be likewise bound.

The contract in Section 6 recognized the right of the employer to discharge an employee for incompetency, intoxication or other just causes. Provision was made for arbitration in cases of disputes or differences. The agreement was to be in effect from the 25th of May, 1947, until the 25th of May, 1949, and to continue from year to year unless either party expresses a desire for a change ninety days prior to any annual termination date.

Evidence for the State was not contradicted by any of the defendants. Defendants, however, offered as witnesses certain officers of the State Federation of Labor who, without objection on the part of the State, made statements in the form of arguments, presenting their views as to union security agreements upon the economic welfare of employers and employees and the people of the State generally.

The defendant, George Whitaker, testified in the case and gave his reasons for his willingness to enter into the closed shop contract with the labor unions, which is set out in the record. He did not deny that he had entered into the contract.

The jury returned their verdict:

> "That the defendants are guilty of violating the provisions of House Bill #229, 1947 Session of the General Assembly of N. C., Chapter 328, 1947 Session Laws of North Carolina, and Chapter 75 of the General Statutes of North Carolina, as charged in the warrant."

On the coming in of the verdict the defendants moved to set it aside for errors committed on the trial. The motion was overruled and defendants excepted. Judgment was entered on the verdict that defendants pay a fine each of $50.00 and each pay one-seventh of the costs.

The defendants moved for an arrest of judgment for the grounds above alleged, and the motion was overruled. Defendants excepted.

To the judgment rendered defendants objected, and excepted; and appealed, assigning errors.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

George Pennell, Padway, Woll, Thatcher, Kaiser, Glenn & Wilson, By: Herbert S. Thatcher—for defendants, appellants.

SEAWELL, J. The question whether violation of Sections 3, 4 and 5 of the challenged statute constitutes a criminal offense was raised in *S. v. Bishop, post,* 371, and affirmatively answered. To this we refer.

In so far as the same question is raised in this case, it may be, on the same reasoning similarly answered.

We note that appellants' brief abandons assignments of error No. 1 (R. pp. 4 & 30) and No. 2 (R. pp. 14 & 30) relating to the sufficiency of the warrant to state the charge and the sufficiency of the evidence to convict, if the statute is declaratory of a criminal offense, except that they insist on the motion to quash the warrant and arrest the judgment for that cause. We have referred to the contention *supra*. The defense stresses the contention that Chapter 328 is in contravention of both the State and Federal Constitutions, and, therefore, void.

While the basic laws under which the validity of the challenged legislation must be determined are elementary, they are, nevertheless, so fundamental as to bear summarization at this point. The Tenth Amendment to the Constitution of the United States provides, "The powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved for the States respectively or to the people." Within this reservation of powers to the individual states, is what has been judicially termed "the police power."[1] Chapter 328 of the General Session Laws of 1947 was enacted in attempted exercise of that power. The authority of the Legislature to pass this statute, or any other measure it may deem necessary in the public welfare, is unlimited except where prohibited by the Federal or State Constitution or in conflict with Federal law enacted pursuant to constitutionally granted authority. The enactment in question has been challenged as prohibited by the Fourteenth Amendment to the Federal Constitution and Article I, Section 17, of the State Constitution.

Neither the Fourteenth Amendment nor Article I, Section 17, contains any unqualified prohibition. Both operate to prevent the Legislature from depriving anyone of individual or property rights except by due process of law. Due process is, of necessity, an elastic term which through the years has been expanded to cope with the varying problems of our increasingly complex society.

The flexible restraints which the Fourteenth Amendment has placed upon the use of its police power by a state are carefully set forth by *Mr. Justice Roberts* in *Nebbia v. New York*, 291 U. S., 502, at pages 523 and 525:

> "Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of gov-

[1] "What are the police powers of a state? They are nothing more or less than the powers of Government inherent in every sovereignty to the extent of its dominion." *Judge Taney*, License cases, 5 How., 504, 583.

ernmental interference. But neither property rights or contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest.

. . . . . .

"The Fifth Amendment, in the field of Federal activity, and the Fourteenth as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guarantee of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."

The elasticity of these restrictions upon the use of the police power is the life-giving elasticity of the Constitution itself so vital to our economic, social and political growth. Perhaps more than that of any other social force, the progress of labor toward its rightful place in our society would have been retarded if all statutes enacted in the exercise of the police power had been measured on the Procrustean bed of judicial precedent.[2] The dictates of the Fourteenth Amendment, that "the means selected shall have a real and substantial relation to the object sought to be obtained," must be viewed in the light of contemporary conditions under which the Legislature has seen fit to enact the statute in question. However, it is obvious that a clear understanding of those conditions is impossible without some resort to the historical development of the governmentally imposed rules for the struggle between the employer and the employed.[3]

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[2]For instance, the Supreme Court of the United States has sustained as valid exercise of this power, the statutes providing for maximum hours (*Bunting v. Oregon*, 243 U. S., 426), workmen's compensation (*New York Central Railroad Co. v. White*, 243 U. S., 188), prohibiting intimidation of employees (*People v. Washburn*, 285 Mich., 119; appeal denied, 305 U. S., 577) and prohibiting racial discrimination (*Railway Mail Association v. Corsi*, 326 U. S., 88).

[3]"Whether a law enacted in the exercise of the police power is justly subject to the charge of being unreasonable or arbitrary, can ordinarily be determined only by a consideration of the contemporary conditions, social, industrial and political, of the community to be affected thereby. Resort to such facts is necessary, among other things, in order to appreciate the evils sought to be remedied and the possible effects of the remedy proposed. Nearly all legislation involves a weighing of public needs as against private desires; and like-

Until recently, the struggle between management and labor has been demonstrably one-sided with Anglo-American law favoring the side possessing "the heaviest artillery." Since the first attempts within this country to define the legal weapons and areas of combat were based upon English precedent, a brief look in that direction may be helpful.

In England, any combination of laborers to raise wages or shorten hours was a crime until 1824.[4] Until 1871, it was also a crime to threaten a strike or even to persuade an employee to leave his work;[5] in 1875, Parliament enacted legislation providing that workmen would not be subject to indictment for criminal conspiracy in effecting collectively that which was lawful for one workman to do;[6] while the closed shop was recognized as legal in 1898 by the House of Lords, acting as England's highest court,[7] that body was unwilling to declare the boycott a legal weapon of labor although it had previously held it to be a permissible economic weapon when used by a combination of shipping firms;[8] the boycott and peaceful picketing were legalized in 1906 by the Trade Disputes Act;[9] following the general strikes of 1926, Great Britain prohibited local and public authorities to enter closed shop agreements;[10] that restriction was lifted in 1946.[11]

Meanwhile, in this country early labor cases followed the English courts' interpretation of the common law. The *Philadelphia Cord-*

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wise a weighing of relative social values. Since government is not an exact science, prevailing public opinion concerning the evils and the remedy is among the important facts deserving consideration; particularly, when the public conviction is both deep-seated and widespread and has been reached after deliberation. What, at any particular time, is the paramount public need is, necessarily, largely a matter of judgment. Hence, in passing upon the validity of a law challenged as being unreasonable, aid may be derived from the experience of other countries and of the several States of our Union in which the common law and its conceptions of liberty and of property prevail. The history of the rules governing contests between employer and employed in the several English-speaking countries illustrates both the susceptibility of such rules to change and the variety of contemporary opinion as to what rules will best serve the public interest. The divergence of opinion in this difficult field of governmental action should admonish us not to declare a rule arbitrary and unreasonable merely because we are convinced that it is fraught with danger to the public weal, and thus to close the door to experiment within the law." *Justice Brandeis*, dissenting opinion, *Truax v. Corrigan*, 247 U. S., 312, 356.

[4] 5 Geo. 4, C. 95.

[5] Criminal Law Amendment Act (1871), 34 and 35 Vic. C. 32.

[6] The Conspiracy and Protection of Property Act (1875) 38 and 39 Vic. C. 86 Section 3.

[7] *Allen v. Flood*, A. C. 1, 1898.

[8] Compare *Mogul Steamship Co. v. McGregor* (1892) A. C. 25 and *Quinn v. Leathem* (1901) A. C. 495.

[9] 6 Edw. 7, C. 47 Section 2.

[10] Trade Disputes Act of 1927, ...

[11] Trade Disputes & Trade Unions Act, 1946, 9 & 10, Geo. 6, C. 52.

wainers case is generally regarded as the first labor case in America; in 1806 a combination of journeymen shoemakers to effect a higher pay schedule was held illegal under the common law doctrine of criminal conspiracy.[12] This typified the early treatment of such matters. The courts made the initial inroads in the common law rules governing the employer-employee relationship, but the multiplicity of forums made for a variety of laws among the several states. The right of workingmen to form unions and strike for legitimate ends was recognized in 1842,[13] but the judicial views on what constituted legitimate ends differed greatly.[14] Many states held the closed shop illegal even in the absence of prohibitive statutes; while many others regarded it as justifiable and legal.[15] It is not here necessary to multiply illustrations or attempt to catalogue judicial pronouncements on labor matters. It is, however, significant to note that *Justice Brandeis* in discussing this heterogeneous growth of labor relations law in his dissenting opinion in *Truax v. Corrigan,*[16] first spoke of ". . . the absence of legislation, to determine what the public welfare demanded . . ." and then stated "Judges, being thus called upon to exercise a *quasi*-legislative function and weigh relative social values, naturally differed in their conclusions on such questions."

Ultimately, state legislatures did attempt "to determine what the public welfare demanded" by enacting laws defining the area of permissible conflict open to industrial combatants. Their general authority to do so has been firmly established.[17] In the realm of labor contracts,

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[12]*Commonwealth v. Pullis* (1806) Documentary history of American Industrial Society, Vol. 3, p. 59.

[13]*Commonwealth v. Hunt*, 45 Mass., 111. Cited in *S. v. Van Pelt*, 136 N. C., 633.

[14]For instance, in some jurisdictions the strike was held an illegal means of procuring a unionized shop: (*Plant v. Woods*, 176 Mass., 492) while in others it was held legal (*S. v. Van Pelt, supra*).

[15]Teller, Labor Disputes & Collective Bargaining, Vol. 2, sec. 424 *et seq.*

[16]*Supra*, note 3.

[17]"The right of the state to determine whether the common interest is best served by imposing some restrictions upon the use of weapons for inflicting economic injury in the struggle of conflicting industrial forces has not previously been doubted." *Carpenters' Union v. Ritter's Cafe*, 315 U. S., 722, @ 725.

"That the State has power to regulate labor unions with a view to protecting the public interest is, as the Texas court said, hardly to be doubted." *Thomas v. Collins*, 323 U. S., 516, @ 532.

"It is true that the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of society in which they exist. This is but an instance of the power of the State to set the limits of permissible contests open to industrial combatants." *Thornhill v. Alabama*, 310 U. S., 88, pp. 103 & 104.

the Supreme Court of the United States has sustained, as valid exercise of state police power, legislation providing for maximum hours,[18] workmen's compensation,[19] forbidding payment of seamen's wages in advance,[20] prohibiting intimidation of employees,[21] and prohibiting racial discrimination.[22] In commenting on the latter decision, Professor E. Merrick Dodd stated, "Whatever might have been thought to be the law in the days when liberty of contract was treated by the Supreme Court as an almost absolute constitutional privilege, the decision in the *Corsi case* was to be expected. It is a natural consequence both of the increase in the economic power of unions and of the Supreme Court's increasing recognition, in recent years, that to refuse to treat the economic power of particular private groups as a constitutional justification for their regulation is in effect to substitute private government for government of, by and for the people. Now that employers have lost what were formerly regarded as their constitutional rights of discriminating against union members and of paying less than legislatively-determined minimum wages, now that statutory bargaining rights granted to unions have been found to create implied duties not to discriminate against racial or religious groups, a union's claim that anti-discrimination laws infringe its constitutional liberties is a palpable anachronism. Moreover, what is true of labor unions, economic institutions which even when they have no closed shop agreements, tend to obtain a large measure of job control, is presumably true *a fortiori* of employers, who are the creators of jobs."[23]

The most comprehensive gains made by labor have unquestionably been made in the field of Federal legislation. It is neither possible nor necessary for us to do more than highlight those gains in this opinion. *The Clayton Act* in 1914 restricted the use of the injunction in labor disputes in an effort to correct an almost universally recognized abuse of that judicial process.[24] This marked the first major step taken by Congress in enacting rules beneficial to labor in its conflict with management. However, it fell far short of its purpose and the Norris-LaGuardia Act in 1932 further and more specifically restricted the use of the injunction in addition to prohibiting "yellow dog contracts" and limiting the liability of union officials.[25] In 1935 Congress enacted the National

[18] *Bunting v. Oregon, supra.*
[19] *New York Central Railroad Co. v. White, supra.*
[20] *Patterson v. The Bark Eudora*, 190 U. S., 169.
[21] *People v. Washburn, supra.*
[22] *Railway Mail Association v. Corsi, supra.*
[23] 58 HLR 1018 @ 1061.
[24] The Clayton Act, Oct. 15, 1941, C. 323, Sec. 20, 38 Stat. 730, 738.
[25] Act of March 23, 1932, C. 90, 47 Stat. 70 and 73.
[26] The National Labor Relations Act, Act of July 5, 1935, C. 3725, 149 Stat. 499.

Labor Relations Act[26] declaring the public policy of the United States to be the encouragement of collective bargaining and the protection of "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." To safeguard those rights the Act prohibited five specified types of unfair employer practices. It further provided for the settlement of questions as to who are to represent employees, and it specifically preserved the right to strike. Among other provisions of the Act was the authorization of closed shop agreements with the specific limitation that nothing contained in the Act would permit such agreements in states under whose laws they were illegal.

Perhaps it might be said with the passage of The National Labor Relations Act, "the labor movement has come full circle."[27] Perhaps that statute only marked a temporary high point in the progress of labor which will some day be surpassed. We cannot know now, and our feelings in the matter have no bearings upon the case at hand. What is more important to a consideration of this case is that Congress contemporaneously with the adoption of Chapter 328, by the North Carolina General Assembly, determined that it had gone too far in licensing weapons which labor might use in obtaining its ends and that further restrictions thereon were necessary in the public interest. The Taft-Hartley Act[28] was primarily adopted for that purpose. The purpose and provisions of that statute, therefore, become highly important to a consideration of the contemporary conditions out of which Chapter 328 also emerged.

Section 1 of the National Labor Relations Act has found, as a basis for that statute, that the national welfare had been adversely affected by several stated malpractices of management in its dealings with labor. Section 1, of the Taft-Hartley Act restated those findings on the basis of evidence considered by Congress, finding that both labor and management were guilty of acts in their relationship to each other which necessitated mutual regulation in the public interest.[29] The industrial strife and disruption of the national economy which led to this finding of dual responsibility and blame are briefly summarized in the reports which

[27] *Justice Jackson*, dissenting opinion, *Hunt v. Crumbach* (1945), 325 U. S., 821.

[28] The Labor Management Relations Act, Chapter 120, Public Law, 101.

[29] "During the last few years the effects of industrial strife have at times brought our country to the brink of a general economic paralysis. Employees have suffered; employers have suffered: and above all the public has suffered. The enactment of comprehensive legislation to define clearly the legitimate rights of employers and employees in their industrial relations in keeping with the protection of the paramount public interest is imperative." House of

accompanied the Senate and House Bills and the conference committee's report at the adoption of the Taft-Hartley Act of 1947.

Section 7 of the Taft-Hartley Act prohibits the narrowly defined closed shop, and Section 8 (3) permits a union shop subject to certain conditions. Section 14 (b) supplements these sections by providing:

> "'(b) Nothing in that Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial Law.'"[30]

Representatives, 80th Congress, First Session, Report No. 245 (Accompanying HR 3020).

"We have felt that on the record before us the abuses of the system have become too serious and numerous to justify permitting present law to remain unchanged. . . . Numerous examples were presented to the Committee of the way union leaders have used closed shop devices as a method of depriving employees of their jobs and in some cases a means of securing a livelihood in their trade or calling for purely capricious reasons." Senate, 80th Congress, First Session (Report No. 105).

[30]The possible need for supplemental state legislation, based on the actual administration of the Taft-Hartley Act, was revealed by the chief administrative officer of the National Labor Relations Board, General Counsel Robert N. Denham, in a speech to the St. Louis Bar Association on November 3, 1947. In discussing the growth of bootleg contracts for union or closed shops made in defiance of the Taft-Hartley Act, Mr. Denham stated: "At this point, it also might be well to invite your attention to a situation which has arisen on many occasions since August 22. That is, there have been occasions when employers have enjoyed satisfactory relations with the union in their plant. The contract has expired since August 22, and the union and the employer are attempting to negotiate a new contract. There is no question of recognition involved, because the employer is quite willing to recognize the union and realizes that it does, in fact, represent a majority of his employees. But the union insists that the new contract contain a union shop provision. Let us assume that the union is one which has not complied with the requirements filing certain data with the Secretary of Labor and certain affidavits of its officers with the National Labor Relations Board. In short, the union is not in a position where it can request the Board to conduct the usual union shop election. Nevertheless, the employer in seeking to maintain his relations with the union, accedes to the union's demands and executes a contract with the union shop provision in it without the required election among the employees. The National Labor Relations Board cannot prevent such a contract and there is nothing inherently illegal in it, but it does not afford either the union or the employer any protection, because, if the employer should discharge an employee at the insistence of the union for having lost his good standing with the union, even if it should be for nonpayment of dues, such a discharge would constitute an unfair labor practice and the employer could expect that if charges were filed, he would be ordered to reinstate the employee; he might be ordered to make the employee whole for back pay loss, or the union, in such circumstances, might be required to make the employee whole out of its funds."

The committee on Education and Labor explained this provision to the House as follows: ". . . by section 13 the United States expressly declares the subject of compulsory unionism one that the States may regulate concurrently with the United States, notwithstanding that the agreements affect commerce, and notwithstanding that the State laws limit compulsory unionism more drastically than does Federal law."[31]

The report of the Senate Committee on Labor and Public Welfare[32] discusses the Committee's findings and the evidence adduced by it which led to the enactment of the provisions referred to above. Those findings are so pertinent to the reasonableness and relevancy of the North Carolina "Right to Work Statute" that it behooves us to quote at length from the report.

> "A controversial issue to which the committee has devoted the most mature deliberation has been the problem posed by compulsory union membership. It should be noted that when the railway workers were given the protection of the Railway Labor Act, Congress thought that the provisions which prevented discrimination against union membership and provided for the certification of bargaining representatives obviated the justification for closed-shop or union shop arrangements. That statute specifically forbids any kind of compulsory unionism.
>
> "The argument has often been advanced that Congress is inconsistent in not applying this same principle to the National Labor Relations Act. Under that statute a proviso to section 8 (3) permits voluntary agreements for compulsory union membership provided they are made with an unassisted labor organization representing a majority of the employees at the time the contract is made. When the committees of the Congress in 1935 reported the bill which became the present National Labor Relations Act, they made clear that the proviso in section 8 (3) was not intended to override State laws regulating the closed shop. The Senate committee stated that 'the bill does nothing to facilitate closed-shop agreements or to make them legal in any State where they may be illegal' (S. Repr. No. 573, 74th Cong., 1st sess., p. 11; see also H. Rept. No. 1147, 74th Cong., 1st sess., pp. 19-20). Until the beginning of the war only a relatively small minority of employees (less than 20 per cent) were affected by contracts containing any compulsory features. According to the Secretary of Labor, however, within the last 5 years over 75 per cent now contain some form of compulsion. But with this trend, abuses of compulsory membership have become so numerous there has been great public feeling against such arrangements.

[31]House Report, 245, 80th Cong., 1st. sess., p. 34.
[32]Senate Report, 105, 80th Cong., 1st. sess., pp. 5, 6 & 7.

This has been reflected by the fact that in 12 States such agreements have been made illegal either by legislative act or constitutional amendment, and in 14 other States proposals for abolishing such contracts are now pending. Although these regulatory measures have not received authoritative interpretation by the Supreme Court (see *A. F. of L. v. Watson,* 327 U. S., 582), it is obvious that they pose important questions of accommodating Federal and State legislation touching labor relations in industries affecting commerce (*Hill v. Florida,* 325 U. S., 538; see also, *Bethlehem Steel Co. v. N. Y. Labor Board,* decided by the Supreme Court April 7, 1947). In testifying before this committee, however, leaders of organized labor have stressed the fact that in the absence of such provisions many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost.

"The committee has taken into consideration these arguments in reaching what it considers a solution of the problem which does justice to both points of view. We have felt that on the record before us the abuses of the system have become too serious and numerous to justify permitting present law to remain unchanged. It is clear that the closed shop which requires pre-existing union membership as a condition of obtaining employment creates too great a barrier to free employment to be longer tolerated."

At this writing 15 states have been called to our attention in which laws have been adopted prohibiting closed shops, either by constitutional amendment or by legislative act.[33] The provisions of this legislation are comparable or substantially similar to Chapter 328.[34] Great weight must be attached to the fact that so many separate jurisdictions have, within a short space of time, seen fit to exercise their police power in the same manner and for the same purposes. The composite will of such a broad cross section of our country cannot be lightly discarded as unreasonable, arbitrary or capricious or lacking in substantial relationship to its objective. "Since government is not an exact science, prevailing public opinion concerning the evils and the remedy is among the important facts deserving consideration; particularly, when the public conviction is both deep-seated and widespread and has been reached after deliberation."[35]

[33]In Arizona, Arkansas, Florida and Nebraska constitutional amendments of that character have been recently adopted.

[34]Such statutes have been enacted in Delaware, Georgia, Louisiana, Tennessee, Texas, Virginia, and Iowa.

[35]*Justice Brandeis,* dissenting opinion, *Truax v. Corrigan, supra,* note 3. See also *Muller v. Oregon,* 208 U. S., 412.

The appellants contend that Chapter 328, together with Chapter 75 of the General Statutes, constitutes class legislation and is discriminating so as to deny them equal protection as guaranteed by the Fourteenth Amendment of the Federal Constitution and Article I, Sec. 17, of the State Constitution. The nature of the employer-employee relationship has itself long been recognized as constitutional justification for legislation applicable only to persons in that relative status.[36] The only question raised by the plea of discrimination is whether the statute applies alike to all employers and to all employees within its scope who may be found situated in like circumstances and conditions.[37]

Any legislation in exercise of the police power must perforce affect in different degrees persons or groups within its orbit who occupy different economic, social or political positions with reference to the ends sought by the legislation. Thus Chapter 328 may enable a non-union workman to obtain a "free ride" by receiving benefits attained through the expense and efforts of union workmen, but neither this nor other illustrations which might be given of the variable incidences of the statute upon persons differently circumstanced can render the Act discriminatory. Chapter 328 is geographically coextensive with the State of North Carolina and its provisions are applicable with the same force to all employers within those boundaries just as they are applicable to all employees therein. It is difficult to see how, within the scope of its authority, the statute could be more uniform in its application.

We can see no merit in the appellants' proposition that Chapter 328 violates the Fourteenth Amendment by abridging the rights of free speech and assembly guaranteed by the First Amendment. That argument has been used successfully against a certain type of legislation restricting union activity. The Supreme Court of the United States in *Thornhill v. Alabama, supra,* held that a state statute prohibiting peaceful picketing was void as infringing upon the natural rights secured by the First Amendment. A like result was reached in *Thomas v. Collins,* 323 U. S., 516, with respect to a state statute requiring procurement of an organization card as a prerequisite to the solicitation of workmen to join a union. However, Chapter 328 bears no resemblance to that type of statute. On the contrary, it seems to us that Chapter 328 may serve to secure the rights of free speech and assembly to all persons concerned. The statute protects the rights of workmen to organize; it further protects rights of workmen to express their individual opinions by refusing to join unions. The right of either side, or any faction of any side, to a

[36] *New York Central Railroad Co. v. White,* 243 U. S., 188. *Arizona Employers Liability case,* 250 U. S., 400. *Second Employers Liability Case,* 223 U. S., 1. *Mullen v. Oregon, supra.*

[37] *Barbier v. Connolly,* 113 U. S., 27. *Hayes v. Missouri,* 120 U. S., 68.

labor controversy to assemble and publicize its own ideas remains inviolate.

The essence of the courts' decision in *Thornhill v. Alabama,* is contained in the following statements of *Mr. Justice Murphy* at pages 102 and 103 of the opinion: "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. . . . Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern society." *Mr. Justice Rutledge,* speaking for the Court in *Thomas v. Collins,* stated at page 532, "The right to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as a part of free speech, but as a part of free assembly." Regardless of how salutary the net result of a closed shop agreement may be, it seems patent to us that the freedom of discussion and dissemination of ideas by all concerned in labor disputes are more restricted by such agreements than by a statute which stresses individual initiative and liberties by prohibiting the use of union membership or the absence thereof as a condition of employment.

The General Assembly of North Carolina has attempted to draw upon the residual powers of the State in an effort to remedy a situation of economic instability which has alarmed thinking people throughout the country. Those efforts have culminated in a prohibition upon the use of union membership or the absence of union membership as a condition of employment or continued employment. Substantially the same result has been reached in many other state forums which have considered the problem and also to a limited degree by the Congress of the United States.[38] In one of those States, Florida, the people adopted a Constitutional Amendment having the same purpose and effect as Chapter 328. A three judge Federal District Court held the amendment valid exercise of State police power.[39]

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[38] See: The Labor Management Relations Act, discussed *supra.*

The Railway Labor Act, Act of May 20, 1926 C. 347, 44 Stat. 577; as amended by Act of June 21, 1934, C. 691, 48 Stat. 1185; Act of April 10, 1936, C. 166, 49 Stat. 1189, among other things, prohibits closed shop or "yellow dog" contracts in the labor relations of railroads and airlines and their employees. The constitutionality of the statute has been broadly sustained. *Shields v. Utah Idaho Cent. R. Co.,* 305 U. C., 177; *Virginia Ry. Co. v. System Federation No. 40,* 300 U. S., 515.

[39] *American Federation of Labor v. Watson,* 6 F. Supp., 1010, reversed in 327 U. S., 582, on the grounds that the Florida Amendment has not been interpreted by the highest court of Florida.

State laws similar to Section 4 which outlaw "yellow dog contracts" were first ruled unconstitutional[40] but are now regarded as valid.[41] The appellants have not questioned the constitutionality of Section 4. They contend, on the contrary, that such a provision outlawing contracts requiring abstinence from union membership should be held constitutional and that a contrary result should be reached respecting the corollary provisions of Sections 2, 3 and 5 prohibiting union membership from being made a requisite of employment. We cannot accept this view. In either instance, the state is merely delineating the area within which two factions with largely conflicting aims may wage their disputes without transgressing the public welfare. If the State may say to the employer, "you cannot deny work to anyone because of his membership in a union," we think it follows, *a fortiori*, that the state may say to the parties, "you cannot deny work to anyone because he is not a member of a union."[42]

We are not called upon here to determine the wisdom of the Legislature's action in adopting Chapter 328. Our sole concern must be whether the Legislature has acted within the limitations imposed upon it by the Fourteenth Amendment to the Federal Constitution and Article I, Section 17, of the State Constitution.[43] In determining that question we believe that Article I, Section 17, should be viewed in the same light *Justice Holmes* regarded the Fourteenth Amendment: "There is nothing I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me and those whose judgment I respect."

[40] *Coppage v. Kansas*, 236 U. S., 1.

[41] C: *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S., 1; *Phelps Dodge Corp. v. NLRB*, 313 U. S., 177.

[42] "Accordingly, decision here has recognized that employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty. . . . The Constitution protects no less the employees' converse right. Of course espousal of the cause of labor is entitled to no higher constitutional protection than the espousal of any other lawful cause. It is entitled to the same protection." *Thomas v. Collins, supra.*

[43] "The wisdom or lack of wisdom of a state statute or of a provision in a state constitution is not a matter for the courts. The people, through their representatives in the Legislature and through their vote for an amendment to their constitution, have the right to commit folly if they please, provided it is not prohibited by the Federal Constitution or antagonistic to Federal statutes authoritatively enacted concerning the matter involved. 'The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands.'" *American Federation of Labor v. Watson, supra.*

While, perhaps, we do not share the resentment expressed by the great Jurist, we may point out that the Congress seems to have made clear its intention to recognize as valid the particular experiment inaugurated by Chapter 328.

In summary, the case, stripped to decisional factors, falls into simple lines. The power of the State by general legislative act, in the exercise of its police power, to condemn private contracts found to be injurious to the public welfare, to declare them contrary to public policy and prevent their consummation cannot be denied. Exercised within constitutional limitations, it is both a necessary and a salutary function of government, the exercise of which is not infrequently an exigent duty. Within those limitations the occasion justifying the exercise of the power is within the legislative discretion, provided only that its action is not arbitrary or capricious and has a reasonable relation to the end sought to be accomplished.

The rights of property guaranteed by our Constitution are necessarily relative to those held by others under the same Constitutional sanctions. The right of contract, whether considered as natural or merely civil, is a property right; certainly of no greater dignity than the right to work, ordinarily regarded as inalienable; and it cannot be unrestrictedly used to the injury of another. Under such circumstances the exercise of the State's police power in its regulation is not a violation of Due Process required by the Fourteenth Amendment. We cannot find that the Legislature exceeded its powers. The General Assembly felt that it could no longer avoid the issue of the closed shop; and probably felt that so far as it concerned the principle which it felt should be preserved there is no substantial difference between the "closed shop" and the so-called "all union shop." We cannot say that the matter was not a proper subject of governmental regulation or that government has become so ensnarled in its own charter as to be forced to admit its impotency.

Being of that opinion we further conclude that the record does not disclose error which would justify us in disturbing the result of the trial. We find

No error.

STATE v. THOMAS PINKNEY BISHOP.

(Filed 19 December, 1947.)

1. Criminal Law § 3: Common Law—

The Common Law Rule obtains in this State that where a statute enacted in the public interest commands an act to be done or proscribes the commission of an act, and no penalty is expressly provided for its breach, its violation may be punished as for a misdemeanor. G. S., 4-1.

2. Same: Monopolies § 5—

Chap. 328, Session Laws of 1947, providing that the right to work shall not be denied on account of membership or non-membership in any labor organization is declaratory of public policy and was enacted in the interest of the public welfare, and therefore the violation of its provisions is a criminal offense punishable as for a misdemeanor, notwithstanding the failure of the statute to prescribe a penalty for its breach. G. S., Chap. 75. The fact that the act incidentally provides for the redress of private injuries does not alter this result.

DEFENDANT'S appeal from *Nettles, J.*, at July Term, 1947, of BUNCOMBE.

The defendant was charged in the warrant with violation of Chapter 328, Session Laws of 1947, by requiring one Fred Smith to become or remain a member of a labor union, to wit: The Brotherhood of Painters, Decorators and Paper Hangers of America, Local Union #839, as a condition of employment or continuation of employment by said Bishop; and in a similar count particularly referring to sections 3 and 5 of that chapter and Chapter 75 of the General Statutes. Chapter 328 is set out in full in the companion case, *S. v. Whitaker, et al., ante,* 352, and reference is made to that case for the text. Chapter 75 of the General Statutes makes combinations, conspiracies and contracts in restraint of trade illegal and punishable as misdemeanors.

When the case came on for hearing the defendant moved to quash the warrant because it did not charge a criminal offense, in that the statute upon which it was based did not make it a criminal offense to do the acts alleged. The motion was overruled and defendant pleaded not guilty.

H. C. Caldwell, for the State, testified that the defendant told him he had never employed any person unless he was in good standing in the Brotherhood of Painters, Decorators and Paper Hangers, and in Buncombe County the local union of this organization No. 839. He had an employee named Fred Smith, a painter, and on 26 May, 1947, Smith came to him (the defendant) and told him he had dropped out of the union and was not going to become a member again by payment of dues and reinstatement. Bishop said, "You are fired right now—get your tools and get off the job—for I ain't going to work anybody who is not a union man in good standing." Smith replied, "You can't do that to me. The law says you can't require me to become or remain a member of a labor union or labor organization as a condition of employment or continuation of employment." Bishop then told him, "You can't work for me until you renew your union card, for I am requiring you as a condition of employment or continuation of employment to pay all union fees, dues and charges to Local No. 839 of the Brotherhood of Painters, Decorators and Paper Hangers."

The evidence discloses that Smith left the job, and returned about four or five days later asking, "Will you give me my job back if I pay up all dues, fees and other charges?" and was told that he would be given the job back on that condition but not otherwise. Smith then paid to the union all his dues and reinstatement fee, exhibited his receipts to Bishop and was put back to work, because he was a union man again, but would not have been re-employed if he had not done so, and would have to remain so to hold his job.

At the conclusion of the evidence the defendant demurred and moved to nonsuit. The motion was overruled and defendant excepted. There was a verdict of guilty. The defendant moved to set aside the verdict for error committed on the trial. The motion was overruled and defendant excepted.

The defendant moved in arrest of judgment for that the law on which the warrant was based did not create or declare any criminal offense; and because the law was unconstitutional, in violation of the Fourteenth Amendment of the United States Constitution, Article VI, Section 2, of the United States Constitution, and Article I, Sec. 17, of the Constitution of North Carolina; and that it was in conflict with the Labor Management Act of 1947.

The motion in arrest of judgment was overruled and defendant excepted. Judgment was pronounced that defendant pay a fine of $50.00, to which defendant objected, excepted and appealed.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

George Pennell and Padway, Woll, Thatcher, Kaiser, Glenn & Wilson By: Herbert S. Thatcher—for defendant, appellant.

SEAWELL, J. The constitutional questions found in the record are not brought forward in the appellant's brief or argued orally. The same questions were raised in the companion case, *S. v. Whitaker, et al., ante,* 352, and are there discussed.

The defendant relies upon the theory that the statute under which he is indicted does not make the acts which it forbids or commands violations of the criminal law, since it does not declare them so or provide a punishment. It is suggested that the most it does is to provide, in Sec. 6, that a person deprived of employment in violation of Secs. 3, 4, and 5, or either of them, may recover such damages as he may have sustained.

At the Common Law, which, by virtue of the statute G. S., 4-1, is in force in this State, and, with respect to the point presented remains unchanged, when a statute, in the interest of the public, commands an act to be done or forbids an act, and no penalty is expressly provided for

its nonobservance or breach, the offending person may be punished as for a misdemeanor. This rule, as it obtains in this jurisdiction, is correctly stated in 22 C. J. S., p. 77, S. 25.

> "However, on the other hand, it is held that where a statute prohibits any matter of public grievance or commands a matter of public convenience, although no penalty is prescribed for disobeying its prohibitions and commands, an indictment will be sustained and the offense punished by a fine; and if the Legislature denounces an act as a misdemeanor, but fixed no punishment, the Court may fix the punishment within the limits of punishment for misdemeanors."

S. v. Addington, 121 N. C., 538, 27 S. E., 938; *S. v. Bloodworth,* 94 N. C., 918; *S. v. Brown,* 221 N. C., 301, 20 S. E. (2d), 286.

S. v. Addington, supra, is explanatory and declaratory of the statutory construction obtaining here:

> "Section 8 provides that 'Any violation of this Act, *either by seller or purchaser, shall be fined* not less than $20 nor more than $40 for each offense, at the discretion of the court.' This section, the only one providing any penalty, being limited to the 'seller or purchaser,' can apply only to section 1. Therefore, section 6 is left without any penalty, so far as this act is concerned, but, being a matter of public grievance expressly forbidden by statute, it becomes a misdemeanor, as at common law punishable by indictment. Archbold Crim. Law, 2 Hawk., ch. 25, sec. 4; *S. v. Parker,* 91 N. C., 650; *S. v. Bloodworth,* 94 N. C., 918. As its punishment is, therefore, not limited to a fine of $50 or imprisonment for thirty days, it is not within the jurisdiction of a justice of the peace. Const. of N. C., Art. IV, sec. 27; Code, sec. 892."

And in *S. v. Bloodworth, supra,* where a similar contention was made by the appellant, it is said:

> "It was contended, that inasmuch as the Legislature had not declared a violation of Sec. 2799 to be an indictable offense, it is not a criminal offense to violate its provisions. But this is a mistake. In *S. v. Parker,* 91 N. C., 650, the Court held, 'if a statute prohibited a matter of public grievance, or commanded a matter of public convenience, all acts or omissions contrary to the prohibition or command of the statute, being misdemeanors at common law, are punishable by indictment, if the statute specifies no other mode of proceeding,' citing for the doctrine Arch. Cr. Law, 2; 2 Hawk., Ch. 25, Sec. 4. But when the Statute mentions a particular mode of proceeding, as when it imposes a penalty for its violation, and

says nothing more, that proceeding excludes that by indictment. *S. v. Snuggs,* 85 N. C., 541."

There can be no question that the statute under review has for its main purpose the promotion of the public interest, deals with public policy, and is intended to promote the welfare of the whole public rather than sow the seeds of private litigation. The fact that it incidentally provides for the redress of private injuries does not deprive it of that character.

> "Section 1. The right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraints and coercion. It is hereby declared to be the public policy of North Carolina that the right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization or association."

It is not a mere fulmination. It is aimed at a practice which, to the legislative mind, was detrimental to the public welfare, and intends that nobody within its jurisdiction shall be compelled to pay unwilling tribute to any organization or union whatsoever before being permitted to work for a living in the most ordinary occupation in life. In this character it must stand or fall; and it is well within the rule of the cited cases.

Defendant's exceptions, as above set out, do not disclose merit, and his several motions were properly overruled.

The constitutional questions presented in the record were argued in *S. v. Whitaker, et al., ante,* 352, and will be found there discussed.

We find

No error.

SAFIE MANUFACTURING COMPANY v. BRUCE ARNOLD, ET AL.

(Filed 19 December, 1947.)

1. Contempt of Court § 2b—

A court has inherent power, necessary to the maintenance of judicial authority, to punish as for contempt the willful violation of its orders, including temporary restraining orders. G. S., 5-1.

2. Contempt of Court § 4—

Proceedings as for contempt should always be based upon affidavits.

3. Same—

A petition in proceedings for contempt which is verified in accordance with the form prescribed by statute, G. S., 1-145, is sufficient to give the court jurisdiction of the persons named when the facts set forth in the

petition constituting a sufficient basis for judgment of contempt are stated to be within the knowledge of affiant and not upon information and belief.

4. Same—

A respondent in contempt, by being sworn at his or her request, and answering the charge of contempt, waives any defects in the verification of the facts constituting the basis of the proceeding.

5. Appeal and Error § 6c (3)—

Where there is no exception to the findings of fact by the court, exceptions to the admission of evidence on which the findings are based are ineffectual.

6. Contempt of Court § 5—

Civil action was instituted alleging that defendants had conspired to prevent persons from entering plaintiff's plant on lawful business by unlawful picketing. Temporary restraining orders were issued in the cause. Later petition was filed alleging violation of the restraining orders. *Held:* Upon the hearing to show cause why named defendants should not be adjudged in contempt, the acts and declarations of each conspirator, done or uttered in furtherance of the common design, are admissible in evidence against all.

7. Same—

In contempt proceedings for violating temporary orders against unlawful picketing, the acts and declarations of each respondent are competent for the purpose of showing *animus* of those in the crowd of which respondents were a part.

8. Same—

In contempt proceedings against a number of defendants for violating temporary orders against unlawful picketing, the sufficiency of the evidence as to each respondent is not to be determined on the basis of his individual acts and declarations as shown by the evidence, isolated from and disconnected from the evidence as to the acts and declarations of the others, which the evidence discloses was concerted action which violated the orders of the court.

9. Appeal and Error § 14—

An appeal from an interlocutory order stays all further proceedings in the lower court in regard to matters relating to the specific order appealed from, but the action remains in the lower court and it may proceed upon any other matter included in the action upon which action was reserved or which was not affected by the judgment appealed from. G. S., 1-294.

10. Contempt of Court § 2b: Appeal and Error § 14—

In a civil action to restrain unlawful picketing, the court entered a temporary order restraining defendants from interfering with ingress and egress to plaintiff's plant and specifically reserved the right to later limit the number of pickets. Defendants appealed. Thereafter the court entered subsequent orders limiting the number of pickets and making the limitations imposed in the original order and the limitation as to the

number of pickets apply alike to the original defendants and to persons made additional parties defendant. *Held:* The appeal did not deprive the court of jurisdiction to adjudge defendants in contempt for willful violation of the injunctive provisions of the interlocutory orders.

11. Contempt of Court § 5—

Judgment in contempt proceedings must be supported by findings of fact, especially findings concerning the purpose and object of the contemnor.

12. Same—

Where the petition specifically alleges the provisions of injunctive orders with which respondents are charged with violating, findings of the court, supported by evidence, that each respondent had willfully violated the injunctive orders of the court in particulars specified separately as to each defendant, is sufficient to support separate judgment as to each defendant.

13. Same—

Contempt proceedings may be resorted to in civil or criminal actions, and though contempt is criminal in its nature, respondents therein are not entitled to trial by jury.

APPEAL by Bessie Eubanks, Lessie Hinson, Agnes Odom, Isabelle Webster, Nettie Russell, Elsie Stubbs, Helen Cash, Evelyn Russell Patrick, Ed James, Jr., Jim Bullard and Sidney Driggers, from *Rousseau, J.*, at July Term, 1947, of RICHMOND.

Civil action commenced 22 April, 1947, to restrain and enjoin the then defendants from unlawful interference with employees and others entering plaintiff's textile manufacturing plant on the outskirts of the city of Rockingham, Richmond County, North Carolina, to work therein, and to do business with plaintiff, heard upon petition to adjudge certain persons, appellants hereinabove named, in contempt for deliberate and willful violation of orders of court.

The underlying factual situation, as shown by the record, follows:

I

Plaintiff instituted this action on 22 April, 1947, against ninety-seven individual defendants, including Helen M. Cash and Lessie Hinson, who are now appellants, and filed complaint. In the complaint so filed plaintiff alleges, briefly stated, that it owns, and prior to 16 April, 1947, operated a textile manufacturing plant on the outskirts of the city of Rockingham, Richmond County, North Carolina; that the defendants have conspired together and are conspiring together to prevent by unlawful means, as therein set forth, plaintiff from operating its said plant; that employees of plaintiff desire to enter the plant and work therein, and other persons desire to enter the plant and do business with plaintiff, as theretofore; that since 16 April, 1947, as such employees and such persons seek to enter the plant for such purposes, defendants gather in

front of the gates, which constitute the only entrances to the plant, and "there massing themselves solidly in the gates, they forcibly and continuously prevent any person from entering"; that "repeatedly on such occasions since April 16, 1947, . . . employees of the plaintiff have sought to make their way through defendants thus gathered and massed at the aforesaid gates and have been violently pushed back and sometimes thrown to the ground by the defendants,—the defendants meantime shouting and declaring that they will by whatever force necessary, prevent any person whomsoever from working in the plaintiff's plant, until they, the defendants, see fit to permit otherwise"—all as is set forth in the affidavits attached to and made a part of the complaint; that likewise persons desiring to transact business with plaintiff, have been denied entrance to the plant by defendants,—"defendants at such times threatening such persons with violent injury if they persisted in their efforts to enter"; and that by reason of such unlawful acts of defendants, no person has been able, since 16 April, 1947, to enter plaintiff's plant to work therein or to do business with plaintiff to its and their damage for which it and they have no adequate remedy at law. Thereupon "plaintiff prays the court to restrain and enjoin defendants, and each of them, from continuing to commit any of the unlawful acts hereinabove described, and that notice to show cause issue."

The defendants filed answer denying in general the allegations of the complaint, and averred matters in further defense.

After hearing on notice to show cause was issued to defendants, the court being of opinion that a temporary injunction and restraining order should forthwith issue, entered an order under date of 2 May, 1947, in which it is "ordered, adjudged and decreed that the defendants, and each of them, until the merits of this cause are determined and until this court orders otherwise, are hereby enjoined and restrained:

"From interfering in any manner with free ingress and egress to and from the plaintiff's premises.

"From assaulting, threatening, abusing or in any manner intimidating persons who work or seek to work in the plaintiff's plant.

"The things which the defendants are above enjoined and restrained from doing, they, and each of them, are likewise enjoined and restrained from aiding or procuring or causing to be done.

"The court does not at this time limit the number of persons who may act as pickets but reserves the right to do so if, in its opinion, such action becomes appropriate."

Each of defendants named in the order excepted thereto and, in open court, gave notice of appeal to the Supreme Court. The appeal, however, was not perfected.

II

Thereafter, on 16 May, 1947, plaintiff entered a motion in the cause in Superior Court for an order to amend the order of 2 May, 1947, limiting the number of pickets at or near the entrance to plaintiff's plant, and for an order making one hundred and thirteen other persons, including respondents Agnes Odom, Evelyn Patrick, Estelle (Bessie) Eubanks, Bettie (Nettie) Russell and Annie I. (Isabel) Webster, additional parties defendant in this action, and subject to the court's order of 2 May, 1947, with the amendment so prayed. The motion set forth that the temporary injunction and restraining order issued by the court on 2 May, 1947, as aforesaid, is not being respected and obeyed, but has been and is being willfully disobeyed and violated by eighty of defendants named, —in that when employees desiring and seeking to enter the gates and work in plaintiff's plant, they, with one hundred and thirteen other persons above referred to, gather in large groups and crowds and, arranging themselves into close formation and continuously march to and fro in front of said gates in such manner that two lines of them, moving in opposite directions, sometimes double file, thereby blocking all entrance to the plant from any angle or approach, and that though some of the employees have jumped, pushed and squeezed through these close marching picket lines and gained entrance, they have come in rough physical contact with the pickets, and some of them, as they thus seek to get through the picket lines, have been tripped, shoved and kicked. Supporting affidavits, one signed by 369 employees of plaintiff and another signed by 71 employees of plaintiff, were filed. Also there were filed an affidavit of a common carrier of freight, by motor vehicle, that two of his trucks loaded with manufactured cloth and operated by his driver, had been for two days blocked by pickets massed at the gates, and not allowed to leave the premises, and a letter from representative of another common carrier, by rail, sworn to as an affidavit, to the effect that a locomotive engine with two loaded cars were prevented by pickets on two occasions from entering plaintiff's premises to deliver the freight,— describing in detail the incidents; that the pickets were belligerent and threatened violence to the train crew; and that on 9 May, 1947, superintendents of the Railroad Company, pursuant to pre-arranged engagement met with representatives of the Textile Workers Union of America, CIO, Mr. C. R. Thomas, who had stated that he was in charge of the pickets, Mr. L. L. Shepherd and a Union committee consisting of five or six additional persons, in an effort to persuade the Union representatives to permit the Seaboard train to enter the premises as a common carrier under legal duty to deliver goods and property consigned to it for transportation. Their efforts were unavailing.

The court, acting upon the verified motions with affidavits attached thereto and further affidavits filed by plaintiff and defendants, and after having heard full argument of counsel for plaintiff, and of counsel for defendants, and reciting that the court in its order of 2 May, 1947, had reserved the right to limit the number of persons who might act as pickets at or near the plaintiff's premises, being of opinion and finding as a fact that such limitation should now be made, ordered, adjudged and decreed, under date of 17 May, 1947:

"That the temporary injunction and restraining order issued by this court on May 2, 1947 be, and it hereby is, altered and amended so that its restraining and enjoining provisions shall read" in part pertinent to this appeal:

"That the defendants and each of them, until the merits of this cause are determined and until the court orders otherwise, are hereby enjoined and restrained as follows: (Provisions limiting area in which peaceful picketing may be carried on and the number of pickets permitted are set forth, and then these):

"None of the defendants shall interfere in any manner with the free ingress and egress of any person to and from the plaintiff's premises.

"None of the defendants shall anywhere assault, threaten, abuse or in any manner intimidate any person who works or seeks work in the plaintiff's plant, or who does or seeks to do business with the plaintiff.

"The things which the defendants are thus enjoined and restrained from doing they, and each of them, are likewise enjoined and restrained from aiding or procuring or causing to be done."

And the court also ordered (1) that others, sought to be made parties defendant in this action, who have not been served with process herein and for whom appearance has not been made, be and they are joined as additional parties to this action, and that they be served forthwith "with summons, copies of plaintiff's complaint, copies of the court's order of May 2, 1947, copies of the plaintiff's motion herein referred to, and copies of the present order"; and (2) that "said additional parties defendant, and each of them, are hereby enjoined and restrained identically as set forth above in this order; and (3) that as to such additional parties defendant, this order is made returnable at the May 26, 1947 Term of Richmond County Superior Court, to the end that they, if they so desire, may be heard as to whether this order shall also as to them be continued until final determination of the merits in this cause."

(Note: Counsel for plaintiff and counsel for defendants in the contempt proceeding in this cause agree "that the foregoing summons for relief dated May 16, 1947, and motion of plaintiff heard May 17, 1947, were not served on the following defendants prior to or on May 17, 1947, and that no appearance was made by or for any defendant not served in

the hearing had upon the plaintiff's motion of May 17, 1947; Bessie Eubanks, Agnes Odom, Isabelle Webster, Nettie Russell, Elsie Stubbs, Evelyn Russell Patrick, Ed James, Jr., Jim Bullard, Sidney Driggers; and that none of the following defendants were named in the aforesaid summons, motion nor in the foregoing order signed on May 17, 1947: Elsie Stubbs, Ed James, Jr., Jim Bullard, Sidney Driggers.")

III

Thereafter it being made to appear to the court, by motion of plaintiff, verified 27 May, 1947, and by affidavit of representatives of the Seaboard Air Line Railroad (1) that not only are many of defendants herein violating the court's orders as set out in the previous motion filed by plaintiff, but more recently large numbers of other persons were appearing at and near the gates of plaintiff's plant, and have been and are engaged in the same acts which the court has prohibited the defendants from engaging, and have been and are continually interfering with the free ingress and egress to and from the plaintiff's premises of persons who seek to work in the plaintiff's plant and persons who seek to transact lawful business with the plaintiff, and have been and are continually threatening, abusing and intimidating persons who seek to work in plaintiff's plant, and persons who seek to transact lawful business with plaintiff; (2) that such other persons and the defendants are members of, or affiliated in common with, an unincorporated association or organization known as the Textile Workers Union of America, CIO, and their engaging in the same and similar acts above is caused and brought about by their joint association or membership in the said organization, which acts are "co-ordinated, planned and directed by the said labor organization, its officers, agents, representatives, members and associates," naming some of them, the court, Edmundson, S. J., under dated of 27 May, 1947, ordered: (a) That the Textile Workers Union of America, CIO, and certain named persons individually and in their capacities as representatives of said organization "be and they are hereby" joined as additional parties defendant to this action and shall be forthwith served with a summons, copies of plaintiff's complaint, copies of the plaintiff's motion, and copies of the court's order; (b) that defendants and the additional parties defendant above named and all officers, agents, representatives, members and associates of the Textile Workers Union of America, CIO, and all other persons whomsoever are, until the merits of this cause are determined and until the court orders otherwise, hereby enjoined and restrained as follows, to the same extent as defendants were enjoined and restrained in the said order of 17 May, 1947. And the court further ordered that as to such new parties defendant the order be returnable before the court on 16 June, 1947, to the end that they, if

they so desire, may be heard as to whether the order as to them shall be continued until final determination of the merits in this cause.

And the court further ordered that the sheriff of Richmond County post copies of this order in conspicuous places at and in the vicinity of plaintiff's plant. (There is evidence that approximately a dozen copies were posted within two days after the order was issued—on the gates, on the front of the store, on a tree in front of the store, and a tree and a post near the railroad gate—all around—where they could be seen very well.)

Counsel for plaintiff, and counsel for defendants, appellants, stipulate that the hearing before Edmundson, S. J., on 27 May, 1947, was in open court at regular May 26, 1947, Term of Superior Court of Richmond County; that the cause came on for hearing at said time by reason of the fact that the order of 17 May, 1947, as to the additional parties defendant named therein was made returnable to said term of court, and also by reason of the fact that all defendants who had theretofore been served with process, or for whom appearance had theretofore been made, were moving the court to dismiss the aforesaid order of 17 May, 1947; and that counsel appearing for said defendants at said hearing on 27 May, 1947, was duly served in open court with a copy of plaintiff's motion of 27 May, 1947, and said counsel argued said motion on behalf of all defendants who had theretofore been served and who had theretofore made appearances, as hereinabove pointed out, and counsel likewise argued said motion with respect of all the provisions requested by plaintiff, including the provisions which would affect persons who had not been served with process in the cause, that is "all officers, agents, representatives, members and associates of the Textile Workers Union of America, CIO, and all other persons whomsoever."

On 16 June, 1947, the Judge Presiding at June Term, 1947, of Richmond County Superior Court continued the preliminary order, and the hearing on preliminary order of Edmundson, S. J., to and to be heard at July Term of said court.

IV

Thereafter plaintiff represented to the court, by petition verified 13 July, 1947, by Alex S. Moore, an officer of plaintiff, its assistant secretary:

"1. That the orders issued by this Court in this cause have been and are being deliberately and willfully violated;

"2. That the individuals hereinafter named are known to the plaintiff to have violated the same orders in that they have deliberately and willfully interfered with the free ingress and egress of persons to and from the plaintiff's premises and have deliberately and willfully threatened, intimidated, and assaulted persons who work or seek to work in the

plaintiff's plant; that more particularly, in the course of such interference, threats, intimidations, and assaults:

"a. Bessie Eubanks on July 8, 1947, assaulted Agnes Grant.

"b. Lessie Hinson on July 8, 1947, assaulted Agnes Grant; and on July 10, 1947, threatened and intimidated Myrtie Flowers Martin.

"c. Agnes Odom on July 8, 1947, assaulted Agnes Grant; and on July 10, 1947, threatened and intimidated Myrtie Flowers Martin; and on July 11, 1947, threatened and intimidated Helen Thorpe.

"d. Isabelle Webster on July 8, 1947, assaulted Agnes Grant; and on July 10, 1947, threatened and intimidated Viola Forbis Carpenter.

"e. Nettie Russell on July 8, 1947, threatened and intimidated Agnes Grant; and on July 11, 1947, assaulted Helen Thorpe.

"f. Elsie Stubbs on July 8, 1947, assaulted Mr. and Mrs. Dan Campbell; and on July 10, 1947, assaulted Myrtie Flowers Martin; and on July 10, 1947, threatened and intimidated Opal Therrell.

"g. Helen Cash on July 10, 1947, threatened and intimidated Myrtie Flowers Martin; and on 10 July 1947, threatened and intimidated Eula Willard.

"h. Evelyn Russell Patrick on July 11, 1947, assaulted Helen Thorpe.

"i. Ed James, Jr., on July 8, 1947, threatened and intimidated Agnes Grant and Ed Grant; and on July 8, 1947, assaulted Agnes Grant.

"j. Jim Bullard on July 8, 1947, threatened and intimidated Agnes Grant; and on July 12, 1947, assaulted George Long.

"k. Sidney Driggers on July 12, 1947, assaulted George Long."

And thereupon plaintiff prayed that the persons named be adjudged in contempt of court and punished as the court in its discretion may see fit, and that forthwith an order be issued directing the said persons to appear before the court to show cause, if any they have, as to why they should not be so adjudged and punished.

The court, Rousseau, J., Presiding, under date 14 July, 1947, issued an order to the persons named in the petition next above set forth, to appear before the court at the County Courthouse in Rockingham, N. C., on 16 July, 1947, at 9:30 o'clock a.m., or as soon thereafter as they may be heard, and show cause, if any they have, as to why they and each of them should not be adjudged in contempt of court and punished therefor; and further ordered that the order be served in manner specified.

The persons named in said order entered a special appearance on 16 July, 1947, for the purpose of making motion to dismiss the petition to adjudge in contempt for that the court has not in this action properly acquired jurisdiction over their persons nor over matters attempted to be presented thereby; for that the "petition to adjudge in contempt is based upon or purports to be based upon affidavit of Alex S. Moore, which affidavit is upon information and belief, and which is wholly insufficient

upon which to base proceeding for contempt as herein attempted." The motion was denied, and each respondent excepts. Exception 1.

Thereupon, hearing on plaintiff's petition was had on July 16 and 17, 1947. Evidence was offered by plaintiff, and by respondents. Each of the respondents, except Sidney Driggers, testified. The evidence offered by plaintiff tends to show that the acts of assault and intimidation of persons named, as charged against respondents, were because such persons were working in plaintiff's plant, and with a view to preventing them from so working. Respondents took numerous exceptions in the course of the hearing, including exceptions to denial of their respective motions for judgment as of nonsuit.

The court, having heard and considered the evidence as appears of record, and found as a fact as to each defendant that he, or she as the case may be, has willfully violated the injunctive orders of this court in this cause under the circumstances and conditions shown by the evidence respectively, as follows:

1. Helen Cash—by intimidating Myrtie Flowers Martin and Eula Willard.

2. Jim Bullard—by assaulting George Long and intimidating Ed Grant and Agnes Grant.

3. Evelyn Russell Patrick—by assaulting Helen Thorpe.

4. Elsie Stubbs—by assaulting Myrtie Flowers Martin and Mrs. Dan Campbell and by intimidating Opal Therrell.

5. Agnes Odom—by assaulting Agnes Grant and intimidating Myrtie Flowers Martin and Helen Thorpe.

6. Isabelle Webster—by assaulting Agnes Grant and by intimidating Viola Forbis Carpenter.

7. Nettie Russell—by intimidating Agnes Grant and by assaulting Helen Thorpe.

8. Lessie Hinson—by assaulting Agnes Grant and by intimidating Myrtie Flowers Martin.

9. Bessie Eubanks—by assaulting Agnes Grant.

10. Sidney Driggers—by assaulting George Long.

11. Ed James—by assaulting Agnes Grant and intimidating Ed Grant and Agnes Grant.

Thereupon, the court, in a separate judgment as to each defendant, adjudged (1) that he, or she as the case may be, is in contempt of court; and (2) that as to defendants Helen Cash, Evelyn Russell Patrick, Elsie Stubbs, Agnes Odom, Isabelle Webster, Nettie Russell and Bessie Eubanks, each be punished for her said contempt by being imprisoned in the common jail of Richmond County for a period of twenty (20) days and that she pay a fine of One hundred ($100) Dollars; and (3) that as to defendants Jim Bullard, Sidney Driggers and Ed James, each be pun-

ished for his said contempt by being imprisoned in the common jail of Richmond County for a period of thirty (30) days and that he pay a fine of One Hundred and Fifty ($150) Dollars; and (4) that as to defendant Lessie Hinson, she be punished for her said contempt by being imprisoned in the common jail of Richmond County for a period of thirty (30) days,—this prison sentence is suspended upon her paying a fine of One Hundred ($100) Dollars plus the costs of the entire proceedings wherein Bessie Eubanks, and other defendants above named, have been adjudged in contempt of the court.

"To the judgments rendered, each and every of the eleven defendants except and appeal to the Supreme Court of North Carolina."

Guthrie, Pierce & Blakeney for plaintiff, appellee.

Robert S. Cahoon for defendants, appellants.

WINBORNE, J. It is appropriate to note, in summary, that the contempt proceeding against respondents, appellants in this Court, arises out of a principal action in which Superior Court judges, presiding over Superior Courts of Richmond County, courts of competent jurisdiction, successively issued three injunctive orders for the purpose of protecting persons who desired to work, and who had a right to work, if they so desired, in plaintiff's plant. And while the orders are by their terms temporary and effective only until final trial of the cause, they are lawful orders of a court of competent jurisdiction. Any person guilty of willful disobedience of such order may be punished for contempt of court. G. S., 5-1. *Nobles v. Roberson,* 212 N. C., 334, 193 S. E., 420; *Elder v. Barnes,* 219 N. C., 411, 14 S. E. (2d), 249.

The power of courts to compel obedience to their orders lawfully issued is essential to their jurisdiction and the maintenance of judicial authority. *Cromartie v. Comrs.,* 85 N. C., 211; *Elder v. Barnes, supra.*

It is apparent from the record on this appeal that the courts proceeded with patience and moderation, and that the contempt proceeding was resorted to only after moderate means had failed,—in that the lawful orders of the court were being willfully disobeyed.

On this appeal appellants, as challenge to the judgments holding them in contempt for willful violation of the injunctive orders of the court, present six questions, neither of which is tenable. We treat them here *seriatim,* as follows:

The first point presented brings into question the denial of respondent's motion, made on special appearance for the purpose, to dismiss the said petition to adjudge in contempt for that the court has not thereby acquired jurisdiction of the persons of the respondents or of the subject matter attempted to be presented thereby in that it is verified upon

information and belief. In this connection while "proceedings" as for contempt should always be based upon affidavit, *In re Deaton,* 105 N. C., 59, 11 S. E., 244, the record in the case in hand discloses that the petition is verified in accordance with the form prescribed by statute, G. S., 1-145, for the verification of pleading in a court of record, that is, "that the same is true to the knowledge of the person making it, except as to those matters stated on information and belief, and as to those matters he believes it to be true." And the facts set forth in the petition, as shown in the record, do not appear to be "matters stated on information and belief," but are stated to be within the knowledge of the person making it.

Hence we hold that the verification is sufficient to meet the requirement of legal procedure in contempt proceedings. However, if such were not the case, each of the respondents, except Driggers, waived any rights he or she may have had, if any, in this respect, by being sworn, at his or her own request, and making answer in that form to the charge of contempt of court so preferred against him or her. *In re Odum,* 133 N. C., 250, 45 S. E., 569.

The second question presented by respondents, the appellants, challenges the competency of certain testimony of witnesses, admitted over their objection, during the hearing on notice to respondents to show cause why they should not be adjudged in contempt of court in the respects set out in the petition initiating the contempt proceedings.

In this connection, the record on this appeal shows that during the course of the said hearing before the judge below, on said notice to show cause, respondents, appellants, entered numerous exceptions, thirty-six or more, to the admission of evidence, all of which are grouped in the assignments of error and debated in their brief filed in this Court. However, the record also shows that there is no exception to any finding of fact made by the court, as set out in the several judgments entered in Superior Court. An exception to each of the judgments so rendered does appear. In the light of this situation of record, the exceptions to the evidence offered are ineffectual. See *Smith v. Davis, ante,* 172, and cases there cited.

Nevertheless, it is appropriate to say that on examination the exceptions to the admission of testimony, to which they relate, are found to be without merit. See *S. v. Smith,* 221 N. C., 400, 20 S. E. (2d), 360, and cases cited. There this Court, speaking to the subject of a conspiracy to accomplish some unlawful purpose, repeated a well settled principle of law, that "the acts and declarations of each conspirator, done or uttered in furtherance of the common illegal design, are admissible in evidence against all. *S. v. Ritter,* 197 N. C., 113, 147 S. E., 733. 'Every one who enters into a common purpose or design is equally deemed

in law a party to every act which had before been done by the others, and a party to every act which may afterwards be done by any of the others, in furtherance of such common design.' *S. v. Jackson,* 82 N. C., 565; *S. v. Anderson,* 208 N. C., 771, 182 S. E., 643."

Moreover, the evidence so admitted tends to show, in the main, the state of mind and *animus* of those in the crowds of which respondents were a part, as bearing upon the question as to whether the acts, with which respondents are charged, were done with knowledge of, and in willful violation of the order of injunction against interference with those who wished to enter the plant of plaintiff for work.

The third and fourth points raised by respondents, appellants, are that the court erred in overruling their separate motions for judgment as of nonsuit. In this connection respondents, appellants, consider the evidence as it relates to each of them as incidents isolated from and disconnected with the matters to which the court orders of injunction pertain,—contending that at most each might be guilty of some criminal offense. The scope of the evidence as shown in the record is not so limited. The facts found by the judge are supported by the evidence as so shown, and are sufficient to constitute contempt of court, and to sustain each of the several judgments against the individual respondents.

The fifth and sixth questions relate to, and challenge the legality of the several judgments rendered against respondents individually and separately upon numerous grounds. We have carefully considered each, and find only these to merit treatment:

It is contended that the orders, upon the contempt proceedings is based, are void and of no effect in that the order of 17 May and the order of 27 May are amendments to the original order of 2 May, and were entered after an appeal from the order of 2 May had been taken to, and was pending in the Supreme Court. In this connection, there is in this State a statute, G. S., 1-294, formerly Code 558, Revisal 602, C. S. 655, which provides that "when an appeal is perfected as provided by this article (civil procedure on appeals) it stays all further proceedings in the court below upon the judgment appealed from or upon the matters embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from . . ."

In construing this statute, this Court, in the case of *Herring v. Pugh,* 126 N. C., 852, 36 S. E., 287, a proceeding in contempt, after referring to the general rule that the effect of an appeal from a final judgment is to remove the cause into another jurisdiction, that of the appellate court, had this to say: "But there are powers of the court in which the judgment was originally rendered in the nature of auxiliary agencies that can be exercised in furtherance of the object of the suit." And, continu-

ing, the Court said: "And besides Section 558 of the Code is itself in language too plain to admit of doubt that the court in which the judgment was rendered still retains jurisdiction to hear motions and grant orders, except such as concern the subject matter of the suit." Compare *Combes v. Adams,* 150 N. C., 64, 63 S. E., 186, where *Hoke, J.,* writing for the Court, states the principle conversely: "While the Court has held that an appeal from an interlocutory order leaves the action for all other purposes in the court below, the decision is also to the effect that the disposition of the interlocutory order and all questions incident to and necessarily involved in the ruling thereon are carried by the appeal to the appellate court."

Moreover, this Court held in the case of *Green v. Griffin,* 95 N. C., 50, in an opinion by *Smith, C. J.,* that appeals from interlocutory or subsidiary orders, judgments and decrees made in a cause, carry up for review only the ruling of the court upon that specific point, and that the order or judgment appealed from is not vacated.

In the light of the statute and of these decisions of this Court in respect thereto, it is noted (1) that in the order of 2 May, 1947, the court expressly reserved the right to limit the number of persons who might act as pickets, if, in its opinion, such action should become appropriate; (2) that in the order of 17 May the court acted in accordance with such reservation, and made the limitations imposed apply alike to original defendants and to persons made additional defendants at that time; (3) that the orders of 17 May and 27 May did not change in substance the injunctive provisions of the order of 2 May, but only enlarged the number of persons to whom those provisions should apply; and (4) that all three orders are interlocutory, pending final hearing. Manifestly, the action of the court in making these orders is in full accord and in keeping with the provisions of the statute and decisions of this Court.

Furthermore, the appeal taken to the order of 2 May was not perfected, and on motion duly made, in this Court, has since been dismissed.

It is next contended that the court below failed to make sufficient findings of fact against each respondent to support a judgment of contempt. As to this, it is a well settled principle of procedure that in contempt proceedings the facts upon which the contempt is based must be found by the court, especially the facts concerning the purpose and object of the contemnor, and the judgment must be founded on these findings. *In re Odum, supra; In re Hege,* 205 N. C., 625, 172 S. E., 345.

Applying this principle to each of the judgments involved on this appeal it appears that the findings of fact are sufficient, and the judgment is founded on such findings. It appears in each judgment that the cause was heard upon plaintiff's petition, and the petition specifies the provisions of the injunctive orders with the violation of which respond-

ents are charged. Evidence, as appears of record, was heard and considered. And the court finds as a fact that each respondent has willfully violated the injunctive orders of the court in this cause by assaulting or intimidating, or both, particular person, or persons, under the circum stances and conditions shown by the evidence. And the evidence to support the finding is ample.

It is further contended in effect that this contempt proceeding is of criminal nature, and is governed by the rules of procedure and the law applicable to criminal prosecutions, and hence the judgments rendered under the circumstances of this proceeding exceed the jurisdiction of the court. As to this contention, in this State a contempt proceeding is authorized by statute, G. S., 5-1. This Court has described it as *sui generis,* criminal in its nature, which may be resorted to in civil or criminal actions. *In re Hege, supra.* And it is held that persons charged are not entitled to a jury trial in such proceeding. *In re Gorham,* 129 N. C., 481, 49 S. E., 311.

Finally, careful consideration of all assignments of error, and of the argument advanced by respondents fails to show error in the judgments from which appeals are taken.

Affirmed.

CHARLES T. SINCLAIR, SR., AND CHARLES T. SINCLAIR, JR., CO-PARTNERS, TRADING AND DOING BUSINESS UNDER THE FIRM NAME OF CARTHAGE FURNITURE COMPANY; M. M. WAY; MACKS' 5-10-25c STORES, INC., LEROY LEES' STORES, INC., FOR THEMSELVES AND ALL SUCH OTHER CREDITORS OF MOORE CENTRAL RAILROAD COMPANY, AND PERSONS INTERESTED IN THE CONTINUED OPERATION OF THE BUSINESS OF SAID COMPANY AS SHIPPERS OR OTHERWISE AS MAY MAKE THEMSELVES PARTIES TO THIS ACTION, v. MOORE CENTRAL RAILROAD COMPANY AND VAN B. SHARP AND LOUISE R. SHARP.

(Filed 19 December, 1947.)

1. Appeal and Error § 14—

Judgment was entered denying the appointment of a receiver upon the filing of the bond as provided by G. S., 1-503. Plaintiffs appealed. *Held:* Pending the appeal the lower court was *functus officio,* and an order entered pending the appeal appointing a permanent receiver upon application of parties who were permitted to come in and make themselves parties plaintiff, is void and of no effect.

2. Receivers § 3—

Plaintiffs who are parties at the time the court accepts bond filed pursuant to G. S., 1-503, and denies application for appointment of a receiver, are thereby estopped from further prosecuting their application for a

receiver, and the court is without authority to revoke such order at a subsequent term over objection of defendants.

3. Appeal and Error § 40d—

In proceedings in equity for the appointment of a receiver the findings of fact by the lower court are not binding on appeal.

4. Appeal and Error § 14—

The Superior Court, upon supporting findings of fact, has the power to adjudge that an appeal has been abandoned, and having so adjudged, has jurisdiction to proceed as though no appeal had been taken.

5. Same: Receivers § 2—Where court adjudges that appeal had been abandoned, it may ratify prior orders entered while appeal was pending.

Judgment was entered denying the appointment of a receiver upon the filing of bond as provided by G. S., 1-503. Plaintiffs appealed. Thereafter, on the application of other parties who were permitted to come in and make themselves parties plaintiff, order to show cause was issued and a permanent receiver appointed. Upon hearing on the receiver's report, the court authorized the receiver to issue certificates and to continue the operation of the business, and adjudge that the appeal had been abandoned. *Held:* It will be assumed that the orders were entered in proper sequence, and upon adjudication that the appeal had been abandoned, the court had jurisdiction to proceed in the action and the latter decree will operate as a ratification of the order permitting the joinder of the additional parties plaintiff and of the ineffectual order appointing the receiver.

6. Receivers §§ 1, 7—

The inherent power of a court of equity to appoint a receiver is not limited by the prevailing statutory provisions. G. S., 1-502; G. S., 55-147.

7. Same—

Ordinarily the appointment of a receiver is ancillary to some other equitable relief prayed in order to preserve and insure the proper disposition of the subject of litigation.

8. Same—

Some of the most common, but not exclusive, instances in which a receiver may be appointed are (1) to preserve, *pendente lite*, specific property which is the subject of litigation; (2) to tide an individual or corporation over a temporary financial embarrassment; (3) to prevent preferences and to insure the equitable distribution of the assets of an insolvent.

9. Receivers § 7—

Ordinarily the appointment of an operating receiver is limited to those instances where a temporary stay of creditor pressure is necessary to the preservation of the business, and a permanent operating receiver for financial embarrassment or impending insolvency will be appointed most commonly, if not exclusively, for railroads or other public utilities.

10. Carriers § 1½—

While a public utility such as a railroad retains its franchise, it owes to the State and to the public the duty of continuous operation.

11. Carriers § 1½: Receivers § 7—

Unless obligated to do so by its charter, a railroad should not be forced to continue operations in the public interests by the appointment of an operating receiver when such operation must be at continuing loss or the chance of profitable operation is nothing more than a gamble, and therefore the court before appointing an operating receiver should determine whether such operation will pay expenses and will tend to conserve rather than dissipate its assets. In the instant case the circumstances are not such as to justify the appointment of a permanent operating receiver.

12. Receivers § 8—

As a general rule a receiver for a corporation will not be appointed at the instance of a simple contract creditor without a lien unless he has some peculiar equity or beneficial interest in the property of the corporation, except perhaps to prevent preferences and to assure equitable distribution of the assets of an insolvent.

13. Receivers § 7: Carriers § 1½: Utilities Commission § 1—

Persons asserting unliquidated damages past and prospective resulting to them as consignees and consignors from the abandonment of the operation of a railroad may not in their individual capacities maintain an action to force continuing operation of the railroad by the appointment of a permanent operating receiver, since such damages, though possibly different in degree, are not different in kind than those sustained by the public generally, and since the power to require continuous operation in the public interest of the State is vested exclusively by statute in the Utilities Commission. G. S., 62-30, *et seq.*

14. Receivers § 7—

Under G. S., 62-89, it would seem that the Legislature has withdrawn from the courts the right to authorize the issuance of receiver's certificates maturing more than two years after date of issue.

APPEAL by defendants from *Pittman, J.,* May Term, 1947, MOORE. Error.

Civil action in the nature of a creditor's bill for the appointment of an operating receiver for defendant railroad company.

The corporate defendant is a North Carolina corporation, chartered to operate as a common carrier of freight and express. It has been in existence under various names since 1899. It was originally chartered to operate a railroad from Cameron on the Seaboard Air Line Railway to Carthage to Halliston on the Norfolk Southern Railroad, approximately 20 miles. The line from Carthage to Halliston, about 10 miles, was abandoned in 1930. Operation thereof for years has been more or less unprofitable and it has found its way into the hands of receivers a number of times.

It was in receivership in February 1945 at which time all of its assets, franchise, etc., were sold under order of court and purchased by defendants Sharp for the sum of $4,250. It was thereafter operated in a more

or less haphazard manner—its one engine from time to time being derailed for as much as 30 days—until 31 January 1947. On 1 February 1947, due to the dilapidated condition of the property, operation thereof was abandoned. Its one engine had been condemned by the Interstate Commerce Commission. It has no other rolling stock. Its substructure is in a condition of bad repair, at times being under water. Its small size 40 pound rail "has become bent and warped and unfit for proper use, causing (during its operation) frequent derailment of cars." The crossties "are greatly deteriorated and damaged." The supporting timbers of the trestles are in such condition that a person walking on the trestle will cause them and the rail situate thereon "to wobble and shake." Some of the rail joints are not bolted and "in numerous instances the rail had not been spiked to the crossties; never more than two bolts were used when four are required." At several places all the crossties have completely deteriorated and in several places along said railroad, at distances of eight or ten feet, there was only one crosstie supporting the rail. The Seaboard Air Line, the connecting line which has furnished the necessary rolling stock for the operation of the road, has placed an embargo on said road and will not permit any of its cars or engines to be used thereon, and it has declined to lease to defendant suitable rail for trackage. Defendant company is indebted to the Seaboard in a large amount for per diem use of cars; to defendant Sharp in the sum of approximately $28,000; and to various other creditors and claimants in smaller sums, so that it is now admittedly insolvent as a going concern.

The original plaintiffs herein named in the caption instituted this action, each alleging a debt in a small amount. The sole specific prayer for relief is for the appointment of an operating receiver with authority to issue and sell receiver's certificates, to restore the road for operation, and to operate the same. A temporary receiver was appointed and notice to show cause why said receiver should not be made permanent was served on defendants. On 30 December 1946, when the cause came on for hearing on the notice to show cause, the defendants tendered a good and sufficient bond to indemnify the plaintiffs and to pay such amounts as the plaintiffs may recover on their claims as set out in the complaint, as provided by G. S., 1-503. The court thereupon found that said bond complied "in all respects with the requirements of undertaking as set out in G. S. 1-503," and entered its order denying the application for a permanent receiver and dismissing the temporary receiver theretofore appointed. The plaintiffs excepted and appealed and thereafter served their case on appeal to this Court.

On 28 February 1947, M. M. Way, C. W. Short, and R. L. Comer filed a motion for an order making them parties plaintiff and requiring the defendants to appear and show cause why a permanent operating re-

ceiver should not be appointed. They aver in the motion that the defendant "has suspended its business, and unlawfully ceased operations and closed its offices and is no longer rendering or capable of rendering the services for which its charter and franchise was issued." They filed in connection therewith affidavit in which they assert claims for damages for failure to transport merchandise. Pittman, J., issued notice as prayed, returnable 6 March 1947. When the matter came on to be heard on the latter notice the court entered an order making Carl W. Short, R. L. Comer, H. M. Parker, and J. L. Currie Lumber Co. parties plaintiff and allowing them to file complaint, then tendered. They allege in their complaint the insolvency of the defendant and further in part as follows:

"That the line of railroad of defendant, Moore Central Railroad Company, extending from the Town of Carthage to the Town of Cameron is the only railroad operated from any point to said Town of Carthage, that the plaintiffs and other persons and corporations in the Town of Carthage and vicinity are wholly dependent upon this railroad line for outgoing and incoming freight in very large amounts during each year, and unless said line of railroad is adequately and successfully operated, the plaintiffs and a large number of business men in Carthage and its vicinity will be irreparably damaged." They pray that the court appoint a permanent operating receiver and authorize him to sell receiver's certificates for the purpose of obtaining funds with which to restore the defendant's railroad trackage and to operate the business thereof.

In its decree then entered the court appointed a permanent receiver with authority to operate said railroad in discharge of its public duty and further ordered "that the indemnifying bond filed by the defendants herein, indemnifying and guaranteeing payment of the claims of the first and original parties plaintiff to this action, be and the same is hereby withdrawn and cancelled and the defendants and their surety hereby discharged from any liability by reason of the execution thereon . . ." The defendants excepted to the order entered.

The record discloses a demurrer and motion to dismiss filed by defendants which was overruled. The date of the filing and the date of the order overruling the same is not disclosed. The record also discloses that just prior to the May Term, 1947, the defendants filed affidavit and motion, so termed, in which they object to the orders and decrees entered herein since appeal by the plaintiffs from the order entered 30 December 1946 and further object to a hearing upon the motion of the receiver for allowance to issue receiver's certificates. At the May Term, 1947, Pittman, J., overruled the motion and objection and proceeded to hear the matter on the report of the receiver. Defendants excepted.

On 10 May, 1947, the receiver filed his report in which he set forth fully the dilapidated condition of the defendant's physical property and the patent insolvency of the defendant and recommended that the court authorize the issuance of receiver's certificates in the sum of $40,000 and to use the proceeds derived from the sales thereof in reconstructing said railroad for operation. Affidavits were filed in support thereof and affidavits in rebuttal were offered by defendants.

Upon consideration of the evidence offered, Pittman, J., entered an order at the May Term, 1947, in which, after finding certain facts, he (1) authorized the receiver to issue $40,000 of receiver's certificates payable in fifteen years, bearing interest at the rate of 3% per annum; (2) authorized the receiver to continue the operation of said road; (3) required all creditors to present their claims in this cause; and (4) adjudged that the appeal entered by the plaintiffs 30 December 1946 has been abandoned. Defendants excepted and appealed.

W. D. Sabiston, Jr., and M. G. Boyette for plaintiff appellees.

H. P. Seawell, Jr., and Jones & Jones for defendant appellants.

BARNHILL, J. At the time Pittman, J., issued notice to the defendants to appear and show cause why a permanent operating receiver should not be appointed for the corporate defendant and on 6 March 1947, the return date of said notice, when an order appointing such receiver was entered, this cause was pending in this Court on the appeal of plaintiffs from the decree of 30 December 1946. The judge was at that time, in respect to this action, *functus officio,* and said order is void and of no effect. *Hoke v. Greyhound Corp.,* 227 N. C., 374, and cited cases.

For a further reason said order, in so far as it undertakes to strike the bond filed by defendants and release the surety thereon, is invalid. G. S. 1-503 was enacted for the benefit and protection of a defendant against whom an application for a receiver is prosecuted. It authorizes the judge in his discretion, upon the filing of the undertaking therein stipulated, "to refuse the appointment of a receiver." The undertaking was tendered, accepted, and approved by the court at the 30 December hearing and it, in its discretion, denied the application for a receiver. This, as to the original plaintiffs, was a substitute for the appointment of a receiver. Thereafter they were estopped by the order from further prosecution of their application for a receiver, and the court, of course, was without authority to revoke said order at a subsequent term, over the objection of defendants.

This brings us to the order entered at the May Term, 1947, exception to which raises the primary question sought to be presented on this appeal, to wit: Was it error for the court below to appoint a permanent

operating receiver for the railroad with authority to sell receiver's certificates payable fifteen years after date; to use the proceeds thereof to reconstruct the physical property of the corporate defendant and put it in condition for operation; and thereafter to operate the same as a going concern?

On this question the findings of fact made by the court below are not binding on us. *Coates v. Wilkes*, 92 N. C., 376; *Pearce v. Elwell*, 116 N. C., 595; *Bank v. Royster*, 194 N. C., 799, 139 S. E., 774. We must instead consider the record as a whole. On the facts therein appearing we are compelled to answer in the affirmative.

Barring the fact this action was pending in this Court at the time, the additional parties had the right to come in and make themselves parties plaintiff herein. The May Term order may be treated as a ratification thereof. Likewise it may be deemed that said order sufficiently ratifies the ineffective appointment of C. W. Short as receiver.

That the orders (1) making new parties and permitting them to plead, (2) ratifying the appointment of a receiver, and (3) adjudging that the former appeal had been abandoned and reinstating the cause on the civil issue docket were all incorporated in one decree presents no particular difficulty, for we may presume that such orders were in fact entered in proper sequence.

The judge, upon the facts found and the admissions made by the original plaintiffs, had the right to adjudge that the appeal herein had been abandoned. Having so adjudged, by and with the consent of the appellants, he had the right to proceed as if no appeal had been taken. *Hoke v. Greyhound Corp., supra*, and cases cited.

The power of the court to appoint a receiver in proper cases and upon a proper showing is not limited by prevailing statutory provisions. G. S. 1-502, G. S. 55-147. It is one of the inherent powers of a court of equity. *Jones v. Jones*, 187 N. C., 589, 122 S. E., 370; *Hurwitz v. Sand Co.*, 189 N. C., 1, 126 S. E., 171; McIntosh, N. C. P. & P., 999 *et seq.* Ordinarily it is not an end in itself but is only a means to reach some ultimate legitimate end sought in a court of equity and is ancillary to some other main equitable relief prayed. In brief, the purpose of a receivership is the preservation and proper disposition of the subject of litigation. 45 A. J., 16.

Some of the most common, but not exclusive, instances where the power is exercised are (1) to preserve, *pendente lite*, specific property which is the subject of litigation; (2) to tide an individual or corporation over a temporary period of financial embarrassment; and (3) as a State substitute for Federal bankruptcy, to prevent preferences and to assure the equitable distribution of the assets of an insolvent.

While the court has the power to, and sometimes does, appoint receivers with authority to continue the operation of a business, this power

should be exercised with great caution, and courts generally are averse to exercising it. *Booth v. Clark,* 58 U. S., 322, 15 L. Ed., 164. Except in cases where a person or corporation is temporarily financially embarrassed and the temporary stay of creditor pressure is essential to the preservation of the business, the power to appoint operating receivers is most commonly, if not exclusively, exercised in cases of financial embarrassment or impending insolvency of railroads and other public utilities. 45 A. J., 179.

While a public utility such as a railroad retains its franchise, it owes to the State and the public the duty of continuous operation. *Commonwealth v. L. & N. R. Co.,* 85 S. W., 712 (Ky.). This duty to State and public is a prime consideration in determining whether the continuing operation under receivership shall be ordered; that is, considerations of public interest are controlling. Even then a railroad in the hands of a receiver should not be compelled to operate at a continuing loss because of lack of traffic or the dilapidated condition of its rolling stock and roadbed unless cessation of its operation is contrary to its charter. Nor should such operation be authorized when the chance of success is nothing more than a gamble. Hence, before decreeing the operation by receiver the court should ascertain whether such operation will pay expenses and will be in the interest of conservation rather than conducive to dissipation of the property. 44 A. J., 432; 45 A. J., 182; Anno. 12 A. L. R., 292; Anno. 50 A. L. R., 159; *R. R. Com. of Texas v. R. R. Co.,* 258 U. S., 79, 68 L. Ed., 569.

The railroad here involved is for all practical purposes nonexistent as a going concern. It owns its right of way and franchise but to be operated it must be substantially rebuilt from the ground up. Plaintiffs seek, in fact, to resurrect and then to operate. Whether the revenues which may then be derived from its operation will be sufficient to pay operating expenses depends upon its ability to obtain for transportation substantially all the freight and express in and out of Carthage and the adjacent territory. In view of the modern-day truck transportation competition this is, to say the least, nothing more than a gamble.

But on this record this is not the most serious defect in the proceeding.

As a general rule a receiver for a corporation will not be appointed at the instance of a simple contract creditor without a lien unless he has some peculiar equity or beneficial interest in the property of the corporation. 45 A. J., 21; 53 C. J., 27; 2 Clark on Receivers, 855. The reason is this: The action on the debt is an action at law, involving no equity, whereas receivership proceedings are equitable in nature and receivers are appointed by the court in the exercise of its equity jurisdiction in furtherance of some equitable relief to which the applicant establishes a *prima facie* right.

This rule, perhaps, has no application to a bill in equity maintained by unsecured contract creditors as a substitute for bankruptcy to prevent preferences and assure, through court action, the liquidation and equitable distribution of the assets of an insolvent.

But the intervening plaintiffs do not occupy a position even as favorable as that of contract creditors. They assert unliquidated claims for damages and penalties arising out of the failure of the defendant to accept and transport merchandise, which refusal, on this record, necessarily occurred after the actual abandonment of operations. They allege also future irreparable damage which will accrue to them by the loss of transportation facilities and resultant depreciation of their property and the property of other citizens of the community.

It is a universally recognized rule that no private individual may complain because of consequential damages from the refusal to perform public or *quasi*-public duties, unless the damages which he sustains are peculiar and differ from those of other members of the public. *Beatty v. L. & N. R. R.*, 195 S. W., 487 (Ky.).

The losses sustained by intervening plaintiffs, large consignors and consignees of merchandise, by reason of the abandonment of the operations by the defendant, may exceed those sustained by their neighbors and may be more easily identified. Nonetheless, they arise out of the failure of the defendant to perform its *quasi*-public duty. The losses they sustain constitute a difference in degree but not in kind. *Bryan v. L. & N. R. Co.*, 238 S. W., 484, 23 A. L. R., 537; Anno. 23 A. L. R., 556; *Day v. Tacoma Ry. & Power Co.*, 141 P., 347; L. R. A. 1915 B, 547; *H. & L. Smelting & R. Co. v. Northern P. R. Co.*, 204 P., 370, 23 A. L. R., 546. Even if recoverable at law, they cannot be made the basis of an application for the appointment of a receiver.

Speaking to the subject in *Saylor v. Penn. Canal Co.*, 38 A., 598 (where a privately operated canal used as a public highway had been abandoned), the Court said:

"The business in which the plaintiff was engaged (the operation of a boat for the transportation of merchandise) was open to all persons using or desiring to use the canal for the purpose for which it was constructed. The privilege he exercised and enjoyed was not special or peculiar, nor was the injury he alleges he sustained by the neglect or failure of the company to repair or reconstruct the highway it was required, as a purchaser, to maintain. The privilege was such as any person who chose to exercise it was entitled to, and the injury done by the abandonment of the highway was not to the plaintiff alone, but to him in common with the public. The difference, if any, was only in degree, and this will not sustain his suit." *H. & L. Smelting & R. Co. v. Northern P. R. Co., supra;* Anno. 23 A. L. R., 555.

With us the Utilities Commission has been vested with power to compel the operation of passenger and freight trains, G. S. 62-46, to inspect and require repair, G. S. 62-48, to compel efficient service, G. S. 62-74, to require improvements and extensions of services, G. S. 62-37, to compel maintenance of facilities, G. S. 62-39, to supervise the services given, G. S. 62-30, and to authorize abandonment, G. S. 62-96. The Commission, "whenever in its judgment any public utility has violated any law," shall notify the Attorney-General and furnish him with the facts in respect to such violation. Thereupon he must "take such proceedings thereon as he may deem expedient." G. S. 62-63; *Colorado v. United States,* 271 U. S., 153, 70 L. Ed., 878.

Whether the last cited section, G. S. 62-63, requires the action to be maintained in the name of the State on the relation of the Attorney-General or Utilities Commission is not before us for decision. The exact title of the proceeding is not presently important. We will cross that bridge when we reach it. Suffice it to say that this and the other cited sections of the Code exclude the plaintiffs as proper parties plaintiff.

It follows that plaintiffs are not entitled to the appointment of a receiver as a remedy ancillary to their unliquidated claims for damages and penalties. If this is to be considered as an action in the public interest to compel the performance of a public duty, then it must be prosecuted by the official or agency whose duty it is to enforce the public right.

We do not mean to say, however, that plaintiffs may not apply for and obtain permission from the proper official or agency to prosecute an action with the same objective, as relators. 2 Elliott On Railroads, 3rd Ed., sec. 741. We merely decide that they may not do so in their own names as individual members of the public.

In this connection, however, it is a significant fact that although defendant has not operated its road for more than ten months the Commission has taken no action. Apparently it considers the facts such as to justify its acquiescence in the abandonment.

Furthermore, it may not be amiss to call attention to G. S. 62-89. It would seem that the Legislature by that Act has withdrawn from the courts the right to authorize the issuance of receiver's certificates maturing more than two years after the date of issue.

On this record the appointment of a permanent receiver with authority to reconstruct and operate the railroad belonging to the corporate defendant and to issue receiver's certificates must be held for error. However, the cause must be retained on the docket for further proceedings in respect to the several claims asserted by plaintiffs.

The cause is remanded to the end that a decree in conformance with this opinion may be duly entered.

Error and remanded.

MARCELLA HUMPHRIES v. QUEEN CITY COACH COMPANY.

(Filed 19 December, 1947.)

1. Carriers § 21a—

The liability of a carrier for injury to passengers must be based on negligence, since a carrier is not an insurer of their safety; but a carrier is under duty to exercise the highest degree of care consistent with the practical operation and conduct of its business.

2. Same—

When a passenger is injured by machinery and appliances wholly under the carrier's control, this fact is sufficient *prima facie* to show negligence.

3. Negligence §§ 19b (1), 19c—

Ordinarily a *prima facie* showing of negligence carries the case to the jury in the absence of evidence establishing contributory negligence as a matter of law.

4. Carriers § 21c—

A passenger's evidence that as she was alighting from defendant's bus, her shoe heel caught in a raised piece of steel on the floor of the bus near the steps, causing her to fall to her injury, is sufficient to make out a *prima facie* showing of negligence.

5. Trial § 22b—

On motion to nonsuit, defendant's evidence which tends to contradict or impeach plaintiff's evidence will not be considered, but so much of defendant's evidence as is favorable to plaintiff or tends to explain and make clear evidence offered by plaintiff may be considered.

6. Carriers § 21c—

Plaintiff passenger testified that she fell to her injury in alighting from defendant's bus when her shoe caught in a raised piece of steel. *Held:* Defendant's evidence that plaintiff fell, that her shoe heel was knocked off and was found on the floor of the bus, and tending to establish the fact of plaintiff's injury, is properly considered on defendant's motion to nonsuit as tending to corroborate and make clear plaintiff's evidence, and the motion to nonsuit was properly overruled.

7. Evidence § 18—

Testimony of statements made by plaintiff as to her physical condition and suffering after the injury in suit, is competent for the purpose of corroborating her testimony at the trial.

8. Trial § 17—

The general admission of evidence competent for a restricted purpose will not be held for reversible error in the absence of a request at the time that its admission be restricted.

9. Appeal and Error § 39f—

Exceptions to the charge will not be sustained when the charge read contextually fails to disclose error which is prejudicial.

SEAWELL, J., dissents.

BARNHILL, J., concurring.

APPEAL by defendant from *Bone, J.*, at June Civil Term, 1947, of ROBESON.

Civil action to recover damages for personal injuries allegedly resulting from actionable negligence of defendant.

Plaintiff alleges in her complaint these facts, briefly stated:

(1) That on 7 November, 1945, plaintiff purchased a ticket from defendant, a common carrier of passengers for hire, for safe transportation on one of its buses from Laurinburg to Wilmington, in the State of North Carolina, and became a passenger thereon.

(2) That the bus was in negligent, careless and defective condition in that there protruded from the floor or step of said bus and near the door thereof, a piece of metal or loose fastening, which was not discernible and could not be observed by passengers, including the plaintiff, while leaving said bus.

(3) That on said date as plaintiff undertook to alight from the said bus, under the instructions and directions of defendant's servant, agent and employee, the heel of her shoe became engaged and entangled with the aforesaid loose piece of metal, protruding and partially fastened to the floor or step of the bus, so that and thereby plaintiff was violently thrown against the side of said bus, down the steps thereof, by reason of which she was injured in manner and to extent specified, to her great damage.

(4) And that said injuries received by plaintiff proximately resulted from negligence of defendant in respect to the loose piece of metal in manner specified in detail.

Defendant, answering the complaint, denied the allegations of negligence, and pleaded the contributory negligence of plaintiff.

These facts appear from the record to be uncontroverted: On 7 November, 1945, plaintiff purchased a ticket from defendant, a common carrier of passengers for hire, for transportation on one of its buses from Laurinburg to Wilmington in the State of North Carolina, and became a passenger on a through bus which had a fifteen or twenty minutes stop at Lumberton. The bus, with a seating capacity of thirty-three, had aboard around 37 or 38 passengers, of whom four or five were standing when the bus reached Lumberton. When the bus stopped there, the driver told the passengers the length of time the bus would remain. Plaintiff, who was sitting on the front seat on the right-hand side of the bus on the outside of two seats, put her right hand on the guard rail, right in front of where she was sitting, and, preceded by three or four other passengers and the driver, started to get off the bus and fell, sustaining injury—of which she complains.

Plaintiff, as witness for herself, testified in the trial court: "When we reached Lumberton, the driver of the bus announced to the passengers that we had a twenty-minute stop, and I decided to get off to get some magazines . . . and when I started . . . I had my hand on the handrail, and I had shoes with heels lower than these I have on, I don't wear high heel shoes, and the next thing I remember I was lying crumpled on the platform of the bus and the weight going on my left arm, and when I roused up the driver was helping me to get up, and he said, 'I am very sorry that it happened,' and he picked me up and put me in the seat back of the driver's seat and I was losing much blood of the left hand . . . I wondered why I fell, and the driver was standing there, he was trying to stop the blood, and I looked over and said that was exactly what tripped me, and there was my heel still in the raised piece of steel and my shoe heel was caught in this piece of steel and it was still there. The heel was torn completely from the shoe . . . it was a very old bus . . . I did look where I was going . . . on this occasion because I caught the handrail as I started to get off the bus . . . I wondered why I fell and while I was sitting in the seat where the bus driver helped me to the seat, I looked and there was my heel caught in this raised piece of steel in the bus, and that is exactly where I fell and there was my shoe heel and it was right where it was pulled off my shoe, and I wear good substantial shoes."

Then on cross examination, plaintiff continued: "On this day I got on the bus over in Laurinburg,—I went up these same steps which I started down when I got to Lumberton. I couldn't see anything wrong with them at that time. I didn't see any piece of metal sticking up. I looked when I went up these steps, sure. I don't remember any piece of metal sticking up at that time,—I didn't see any . . . in Lumberton . . . I got off but I looked where I was going. I was looking down, the steps were down. I looked where I was putting my foot. I did not see metal sticking up."

On the other hand, the driver of defendant's bus, as witness for defendant, testified: ". . . I got off the bus . . . I was standing by the door . . . I saw her when she started out the door . . . she had her right hand on the guard rail and started down, first step . . . left foot hit the floor of the bus at this angle, her toe went over this way (indicating) and knocked the heel off of her shoe. She had her hand on the guard rail and she fell over and her left hand hit the hinge of the door . . . I jumped up on the step and helped her up. The lady sitting behind me got up and let her sit there. I got my first aid kit, wrapped her hand and put first aid bandage on it. Her hand was cut . . . and . . . bleeding. There was not a piece of metal sticking up on the step of that bus. The well of the bus steps is constructed all in one piece,

that type of bus. There was no metal strip sticking up on that step. The heel of her shoe came off. I found the heel of the shoe lying on the floor of the bus and picked it up. The best I recall it was two tacks that was holding the heel . . . I would say it was a medium heel . . . That heel was not caught in any part of the step. I picked the heel up. She did not show me the heel at all."

Then on cross-examination the driver continued: "I got off, then the passengers were lined up behind me coming out . . . They came out at the door. The bus was facing east,—I was facing west. The passengers . . . walked east and turned south. They come down the passageway and turned . . . The floor of the bus comes clean up to the windshield, level all the way up; no step there at all. The only step is after they turn and come south, two steps there. The guard rails are on the right-hand side as you start down the steps and on the left-hand side of the steps. A passenger sitting on the right side,—the rail would be immediately in front. There is a partition between the passenger sitting in front and the step . . . Mrs. Humphries . . . I helped her up off of the floor here in Lumberton. She was down on the floor where the first step is,—she didn't get down that first step. There is not a piece of metal strip that runs directly across that bus. The bottom of the floor is covered with linoleum. The linoleum is glued down,—no metal strips on it,—just exactly like this floor is put down. The steps are all metal. That is not where I found Mrs. Humphries' heel, it was up on the floor of the bus."

Much evidence was offered bearing upon the issue of damages. And the case was submitted to the jury upon issue of negligence, contributory negligence, and damages. The jury found that plaintiff was injured by the negligence of defendant, as alleged in the complaint, and that she, by her own negligence, did not contribute to the injury complained of, as alleged in the answer, and assessed damages. From judgment for plaintiff on the verdict, defendant appeals to Supreme Court and assigns error.

Varser, McIntyre & Henry for plaintiff, appellee.
McKinnon & Seawell for defendant, appellant.

WINBORNE, J. Defendant presents to this Court five questions for decision.

First: The denial of its motions for judgment as of nonsuit is stressed for error. In this connection when pertinent principles of law are applied to the evidence shown in the record, taken in the light most favorable to plaintiff, the rulings of the court below are appropriate.

Where the relation of carrier and passenger exists the carrier owes to the passengers the highest degree of care for their safety so far as is

consistent with the practical operation and conduct of its business. But the liability of the carrier for injuries to a passenger is based on negligence. The carrier is not an insurer of the safety of passengers. See *White v. Chappell,* 219 N. C., 652, 14 S. E. (2d), 843, and cases cited.

In actions against common carriers, the courts are generally agreed that when a passenger is injured by machinery and appliances wholly under the carrier's control, this fact is sufficient *prima facie* to show negligence. *Saunders v. R. R.,* 185 N. C., 289, 117 S. E., 4. See also 20 R. C. L., 188, Negligence, Sec. 157.

Ordinarily a *prima facie* showing of negligence carries the case to the jury in the absence of evidence establishing contributory negligence as a matter of law. *Morris v. Johnson,* 214 N. C., 402, 199 S. E., 390; *Woods v. Freeman,* 213 N. C., 314, 195 S. E., 812.

Applying these principles to the present case, the evidence of plaintiff tending to show that as she, a passenger on defendant's bus, was walking from her seat in the bus for the purpose of alighting, her shoe heel caught in a raised piece of steel in the bus and she tripped and fell, is sufficient to make a *prima facie* showing of negligence.

And in considering motion for judgment as of nonsuit at the close of all the evidence, so much of defendant's evidence as is favorable to the plaintiff, or tends to explain and make clear that which has been offered by the plaintiff may be considered; but that which tends to establish another and different state of facts, or which tends to contradict or impeach the evidence offered by plaintiff is to be disregarded. See *Atkins v. Transportation Co.,* 224 N. C., 688, 32 S. E. (2d), 209, and cases cited there.

The evidence offered by defendant in the case in hand tends to make clear and to corroborate the evidence offered by plaintiff that she fell, that the heel of her shoe was knocked off, that the shoe heel was found on the floor of the bus, that the bus driver helped her to get up from the floor and put her in seat back of the driver's seat, and that her hand was bleeding, and he gave first aid to it. This evidence may be considered on the motion for judgment as of nonsuit. But evidence that tends to contradict or impeach the evidence offered by plaintiff will be disregarded on such motion. Hence the motion for judgment as in case of nonsuit was properly overruled. *Lindsey v. R. R.,* 173 N. C., 390, 92 S. E., 166.

The second question relates to several exceptions to the ruling of the court in admitting, over defendant's objection, testimony reciting statements made by plaintiff to others as to her physical condition and suffering after she fell on the bus. The evidence to which these exceptions relate is competent for purpose of corroboration, and the record fails to show that appellant asked, at the time, that its purpose be restricted.

In such case the admission of the statements will not be ground for exception. Rule 21 of Rules of Practice in the Supreme Court, 221 N. C., 544.

The third, fourth and fifth questions pertain to the charge of the court to the jury to the effect that things were said that ought not to have been said, and things that ought to have been said were left unsaid. But a careful reading of the charge fails to disclose prejudicial error in either of these aspects.

No error.

SEAWELL, J., dissents.

BARNHILL, J., concurring: The testimony of a witness comes to us in printed form after it has first been interpreted and put in narrative form by some third party. For that reason, occasionally, it is difficult to determine just what the witness said or intended to say. This would seem to be one of those cases.

The plaintiff testified in part: "I looked over . . . and there was my heel still in the raised piece of steel and my shoe heel was caught in this piece of steel and it was still there . . . I looked and there was my heel caught in this raised piece of steel in the bus." This is the only description of the alleged cause of the accident.

If the piece of steel was "raised" as the curb of a sidewalk is raised above the level of the street or a door sill extends above the level of the floor, there is no evidence tending to show that it was other than a part of the standard construction of passenger buses. Hence no negligence is made to appear.

On the other hand, if there was a piece of steel torn or worn from its proper setting and projecting above its normal level, then it was in a state of bad repair and negligent maintenance of the passageway of the bus may be inferred.

I am persuaded the plaintiff intended to convey the meaning first indicated. Even so, the second is also a permissible interpretation of her testimony, especially in view of the statement that the shoe heel was "caught in this piece of steel." As the question is not what we think the witness meant, but what is the meaning of the testimony when interpreted in the light most favorable to the plaintiff, I am compelled to concur in the conclusion that the court below committed no error in overruling the motion to dismiss as in case of nonsuit.

In negligence cases, ordinary care is the standard of care required of all alleged tort-feasors. *Rea v. Simowitz,* 225 N. C., 575. But "ordinary care," when that term is used in defining the duty a transportation company owes to its passengers, means "the highest degree of care consistent

with the practical operation and conduct of its business." One is the standard and the other is the degree of care necessary to measure up to the standard. While there is a distinct difference, I suspect this difference, to the mind of a lay jury, is the difference between Tweedledum and Tweedledee. In any event, on this record, I am unwilling to say that the error in the charge of the court in this respect was sufficiently harmful to require a new trial.

It follows that I concur in the majority opinion.

IN THE MATTER OF THE PROBATE OF THE LAST WILL AND TESTAMENT OF JOHN S. HINE, DECEASED.

(Filed 19 December, 1947.)

1. Wills § 16—

Where the Clerk of the Superior Court probates a will in common form and records it in the manner prescribed, the record and probate is conclusive as to the validity of the will until vacated on appeal or declared void by a competent tribunal. G. S., 28-1; G. S., 31-16; G. S., 31-17; G. S., 31-18; G. S., 31-19.

2. Wills § 17—

Upon the proper filing of a caveat, G S., 31-32; G. S., 31-33; G. S., 31-36, the cause must be transferred to the civil issue docket where the proceeding is *in rem* for trial by jury, and neither party may waive jury trial, consent that the court hear the evidence and find the determinative facts or have nonsuit entered at his instance.

3. Wills § 17: Clerks of Court § 4—

While the Clerk of the Superior Court in proper instances may set aside a probate in common form, he may not do so on grounds which are properly determinable by caveat.

4. Judgments § 20a—

The power of a court to correct its records to make them speak the truth extends to clerical errors or to make the judgment entered express correctly the action taken by the court, but not to the correction of errors of law.

5. Same: Clerks of Court § 4: Wills § 16—

Where the Clerk of the Superior Court has admitted to probate in common form a purported will and two purported codicils as the last will and testament of a deceased, and caveat has been properly filed as to the second codicil and the cause transferred to the civil issue docket, the Clerk may not thereafter upon motion expunge from his records the entire probate proceedings and reprobate the purported will and second codicil on the ground that the second codicil revoked the first.

6. Clerks of Court § 4—

The Clerk of the Superior Court in the exercise of his probate jurisdiction is an independent tribunal of original jurisdiction.

7. Same: Courts § 4c—

Upon appeal to the Superior Court from action of the Clerk taken in the exercise of his probate jurisdiction, the jurisdiction of the Superior Court is derivative, and G. S., 1-276, does not apply.

APPEAL by Samuel R. Reid and Margie M. Reid, beneficiaries under the first purported codicil, and caveators to the second purported codicil to the purported last will and testament of John S. Hine, deceased, from judgment of *Clement, Resident Judge,* of Superior Court for 11th Judicial District, rendered in chambers at Winston-Salem, N. C., upon an appeal from an order entered by the Clerk of Superior Court of Forsyth County on 29 May, 1947.

These facts appear to form the basis on which the matters in controversy on this appeal rest:

John S. Hine, of Forsyth County, North Carolina, having died, DeVoe C. Clinard, who is named as a beneficiary in the purported will and second codicil and as an executor in the will, filed application on 23 February, 1946, for the probate in common form of three instruments of writing as follows:

1. A purported will of John S. Hine, dated 9 November, 1935, and identified in the record as Exhibit 317.

2. A purported codicil to the will of John S. Hine, dated 29 March, 1944, and identified in the record as Exhibit 318.

3. A purported codicil to the will of John S. Hine dated 2 September, 1944, and identified in the record as Exhibit 319.

Upon these applications, and the testimony of all of the subscribing witnesses to each of the three instruments of writing, the Assistant Clerk of Superior Court of Forsyth County found as a fact that Exhibits 317, 318 and 319 comprise the last will and testament of said John S. Hine, deceased, and, thereupon, so adjudged, and admitted same to probate in common form, and ordered same, together with the order of probate, to be registered in the Record of Wills in the Clerk's office.

Thereafter, on 18 February, 1947, Samuel R. Reid, who is named as an executor in the original will and as a beneficiary in the first codicil, Exhibit 318, and Margie M. Reid, who is named a beneficiary in the first codicil, Exhibit 318, filed in the office of the Clerk of Superior Court a caveat to the second codicil, Exhibit 319, and filed the statutory bond. Thereupon, on the same day the Assistant Clerk of Superior Court entered an order, in which, after reciting (1) the probate of the will in common form and the issuance of letters testamentary to DeVoe C.

Clinard, the executor named in one of the codicils, and (2) the filing of caveat as above stated, and (3) the transfer of the cause to the Superior Court for trial, DeVoe C. Clinard, the executor, was directed to suspend all further proceedings as required by law. The record shows that this order was served on Clinard by the sheriff on 21 February, 1947. And on 18 February, 1947, citations were issued to all persons interested under all three instruments of writing, and they were duly served.

Thereafter, on 9 April, 1947, DeVoe C. Clinard and Lettie Mabel McCuiston Clinard filed a motion and petition addressed to the Clerk of Superior Court praying that the entire probate proceedings before the Clerk, as hereinabove set out, be stricken out and expunged from the record, and that the will, Exhibit 317, and the second codicil, Exhibit 319, be probated in common form and re-recorded as such *nunc pro tunc*. The ground assigned for the motion is that the second codicil, Exhibit 319, purports to revoke the first codicil, Exhibit 318.

Pending the hearing on this motion, and on 14 April, 1947, DeVoe C. Clinard and Lettie Mabel McCuiston Clinard, filed an answer to the caveat which had been filed by Samuel R. Reid and Margie M. Reid to the second codicil, as hereinabove recited, and pray (1) that, if not already done by the Clerk of Superior Court, the court order that the probate heretofore made in common form be set aside in its entirety and that the original will, and the true codicil, the second one, be probated in common form *nunc pro tunc*, so that the record may speak the truth, and (2) that the paper writing referred to as Exhibit B, that is the first codicil, Exhibit 318, be eliminated as a part of the said will, and (3) that the jury pass upon the issue as to the paper writings legally before the court, that is, the original will and the second codicil, so as to establish same as the will of John S. Hine in solemn form upon an issue of *devisavit vel non*.

Thereafter, on 12 May, 1947, Samuel R. Reid and Margie M. Reid appeared specially before Clerk of Superior Court and moved to dismiss the Clinard petition for want of jurisdiction in the Clerk to entertain the petition or to enter an order granting the relief demanded.

Thereafter, on 29 May, 1947, the Clerk of Superior Court, upon hearing the petition of the Clinards filed 9 April, 1947, finding as a fact "that said probate was erroneously and improvidently ordered by this court and that the same should be set aside in its entirety and that the true and correct will and codicil of said John S. Hine should be probated in common form, *nunc pro tunc*," ordered that the order and probate of the will of John S. Hine, made on 9 March, 1947, "be and the same is hereby set aside, and that the entire record thereof be and the same is hereby stricken from the record in its entirety for the reason that the same was erroneously and improvidently done by this court, and it is

so ordered." And, thereupon, the Clerk proceeded to probate in common form anew the purported will, Exhibit 317, and the purported codicil, Exhibit 319, as and comprising the last will and testament of John S. Hine, deceased.

Thereafter, on 5 June, 1947, Samuel R. Reid and Margie M. Reid gave notice of appeal and appealed from the order of the Clerk to the Judge upon grounds assigned and set out in detail in their appeal.

When the appeal came on to be heard, the Judge found facts substantially as hereinabove set out, and, further, that the second codicil, Exhibit 319, appearing in the record revokes and is inconsistent with the first codicil, Exhibit 318, and that for that reason the first codicil should not have been admitted to probate upon the original application for probate in common form, and concludes as a matter of law (1) that the Clerk of Superior Court of Forsyth County had jurisdiction to entertain the Clinard petition and to enter the order of 29 May, 1947, from which the appeal was taken; (2) that there was no defect of parties to the proceeding upon the petition; (3) that the order of the Clerk should be affirmed in all respects; and (4) that each and all of the objections and exceptions taken by Samuel R. Reid and Margie M. Reid to the action and nonaction of the Clerk as set out in their appeal are overruled. And thereupon the Judge entered judgment affirming the order of the Clerk and dismissing the appeal of Samuel R. Reid and Margie M. Reid, and remanding the cause to the Clerk for proceedings in conformity with this judgment.

Samuel R. Reid and Margie M. Reid appealed therefrom to the Supreme Court and assign error.

Dallace McLennan and Ratcliff, Vaughn, Hudson & Ferrell for appellants.

Deal & Hutchins for appellees.

WINBORNE, J. This is the question presented by appellant for decision on this appeal:

After a paper writing purporting to be the will, and two other paper writings purporting to be successive codicils to the purported will of a decedent have been found by the Clerk of Superior Court to comprise the last will and testament of such decedent and, as such, has been admitted to probate in common form, and thereafter a caveat to the second codicil has been filed by two beneficiaries under the first codicil, and the cause has been transferred to the civil issue docket for trial and citations have been issued and served, and an answer to the caveat has been filed, does the Clerk of Superior Court have jurisdiction to entertain a motion to strike out, and to enter an order thereon striking out all the proceedings

relating to the probate in common form of the will comprised as aforesaid, on the ground that the second codicil revokes the first, and then to admit the will and the second codicil to probate anew in common form as of the date of the original probate? The applicable statutes afford the answer in the negative.

The Clerk of the Superior Court of each county in the State has jurisdiction, within his county, to take proof of wills and to grant letters testamentary in given cases. G. S., 28-1. And when a will has been probated in common form and recorded in the manner prescribed by statutes, G. S., 31-16, G. S., 31-17, and G. S., 31-18, the "record and probate is conclusive in evidence of the validity of the will, until it is vacated on appeal or declared void by a competent tribunal." G. S., 31-19, formerly C. S., 4145. See also *In re Will of Rowland,* 202 N. C., 373, 162 S. E., 897, and the authorities there assembled.

But at the time of application for probate of any will, and the probate thereof in common form, or at any time within seven years thereafter, any person entitled under such will, or interested in the estate, may appear in person or by attorney before the clerk of the Superior Court and enter a caveat to the probate of such will. G. S., 31-32. And upon any caveator filing bond, with sufficient surety approved by the clerk for the amount and conditioned as prescribed by the statute, the clerk shall transfer the cause to the Superior Court for trial, and shall also forthwith issue a citation to all devisees, legatees or other parties in interest, to appear at the term of the Superior Court, to which the proceeding is transferred and to make themselves proper parties to the proceeding if they choose. G. S., 31-33. Also, where a caveat is entered and bond given, the clerk of Superior Court shall forthwith issue an order to any personal representative having the estate in charge, to suspend all further proceedings in relation to the estate, except the preservation of the property and the collection of debts, etc., until a decision of the issue is had. G. S., 31-36.

Moreover, a caveat is a proceeding *in rem.* As stated in *Whitehurst v. Abbott,* 225 N. C., 1, 33 S. E. (2d), 129, in opinion by *Barnhill, J.,* "In effect, it is nothing more than a demand that the will be produced and probated in open court, affording the caveators an opportunity to attack it for the causes and upon the grounds set forth and alleged in the caveat. It is an attack upon the validity of the instrument purporting to be a will . . . The will . . . is the *res* involved in the litigation."

And the decisions of this Court, applying the statutes above cited, are uniform in holding that when a caveat to the probate in common form of a paper writing propounded as the last will and testament of a deceased person has been filed and the proceeding begun before the clerk of the Superior Court has been transferred to the Superior Court for

trial at term time, on the issue raised by the caveat, as provided by the statute, the issue must be tried by a jury and not by the judge. Nor can the propounder and the caveator waive a jury trial or submit the case to the court on agreed statement of facts, or consent that the judge may hear the evidence and find the facts determinative of the issue. See *In re Will of Roediger,* 209 N. C., 470, 184 S. E., 74. Nor may a nonsuit be entered at the instance of the propounders or other parties concerned. *Burney v. Holloway,* 225 N. C., 633, 36 S. E. (2d), 5, and cases cited.

That the clerk of Superior Court has the power to set aside a probate in common form in a proper case is not debated. Such power is recognized in these cases: *In re Johnson's Will,* 182 N. C., 522, 109 S. E., 373; *In re Meadow's Will,* 185 N. C., 99, 116 S. E., 257; *In re Smith's Will,* 218 N. C., 161, 10 S. E. (2d), 676.

But appellants do contend, and rightly so, that the power of the clerk does not extend to the setting aside of a probate of a will in common form upon grounds which should be, and in this case are raised by caveat.

On the other hand, appellees raise this question: "Does not a court at any time, on motion of a party have authority to correct clerical errors in its records so as to make them express the truth, or to correct error in expression so as to state the true intent or decision of the court?" The answer to this question is found in a portion of the quotation from McIntosh, N. C. P. & P. in Civil Cases, Section 649, set out in appellee's brief, where the rule pertaining to this subject of correcting judgments is stated as follows: "A final judgment ends the proceeding as to the matter adjudicated and is presumed to be correct, but where there are clerical errors, or the judgment entered does not express correctly the action of the court, it may be corrected to make the record speak the truth. It is the duty of the court to see that the record correctly sets forth the action taken . . . This power cannot be extended to the correction of judicial errors, so as to make a judgment different from what was actually rendered, although the latter may be erroneous . . . It is intended to correct an error in expression, and not an error in decision."

Tested by this rule, the order of the Clerk of Superior Court from which appeal was taken to the Judge of Superior Court in this case, goes far beyond the limits of the rule. It does not correct, or purport to correct the record so as to show what actually transpired in the course of the original probate proceeding. It wipes the slate clean, and starts anew. This the Clerk may not do, under the circumstances of this case.

Appellees also submit this question: "If the clerk of the court did not have jurisdiction to make such an order, by reason of the transfer of the cause to the civil issue docket, is not the error cured by the order of the resident judge of the Superior Court who heard the motion and affirmed the order of the clerk of the court?" For an answer to this

question, they point to the statute, G. S., 1-276, which provides that "Whenever a civil action or special proceeding begun before the clerk of a Superior Court is for any ground whatever sent to the Superior Court before the judge, the judge has jurisdiction; and it is his duty upon the request of either party, to proceed to hear and determine all matters in controversy in such action, unless it appears to him that justice would be more cheaply and speedily administered by sending the action back to be proceeded in before the clerk, in which case he may do so."

In this connection, it is appropriate to note that the Clerk of Superior Court in the exercise of his probate jurisdiction is an independent tribunal of original jurisdiction. *Hardy v. Turnage,* 204 N. C., 538, 168 S. E., 823; *Graham v. Floyd,* 214 N. C., 77, 197 S. E., 873. Hence in the present case the jurisdiction acquired by the Judge of Superior Court on the appeal from the order of the Clerk of Superior Court, entered in the exercise of his probate jurisdiction, is derivative. *In re Estate of Styers,* 202 N. C., 715, 164 S. E., 123. And the Judge in considering the appeal acted in appellate capacity, and did not undertake to assume jurisdiction under the provisions of G. S., 1-276.

So, after all, the decision here reverts to the question of the power of the Clerk of Superior Court to enter the order vacating the probate of the will after caveat had been filed and the cause transferred to the civil issue docket of the Superior Court for trial in term. Holding as we do that the Clerk exceeded his jurisdiction under the circumstances, there is error in the judgment of Judge of Superior Court in affirming the order of the Clerk, and the judgment is

Reversed.

DURHAM PEPSI-COLA BOTTLING COMPANY v. MARYLAND CASUALTY COMPANY AND COMMERCIAL CASUALTY INSURANCE COMPANY.

(Filed 19 December, 1947.)

1. Indemnity §§ 2b, 2c—Evidence held sufficient for jury in action on policy indemnifying insured against theft or embezzlement by employees.

The policy in suit provided indemnity for loss resulting from the larceny, theft or wrongful abstraction on the part of any employee of insured, acting directly or in collusion with others, with specific provision that the inability of insured to designate a specific employee or employees causing the loss should not prevent recovery. The evidence tended to show that the last employee to leave for the night placed money in the safe and locked it with a combination lock so that the safe could be opened without force only by a person knowing the combination, and then checked all the doors and windows and ascertained they were locked, and that during

the night it was discovered that the door of the safe was open and the cash and checks taken, and a window of the building open. Investigation disclosed that no force was used in opening the safe and there were no indications that any of the doors or windows of the building had been forced. There was evidence tending to exculpate all persons other than employees who knew or had known the combination to the safe. *Held:* The evidence is sufficient to be submitted to the jury on the issue of insurer's liability. Insurer's contention that the evidence tends only to show a burglarious entry is untenable and the fact that the wrongful abstraction was made after working hours and that no particular employee could be fixed with wrongdoing, is immaterial.

2. Indemnity § 2d—

Insured is not entitled to recover the face amount of checks abstracted from his safe in the absence of evidence that insured took reasonable action to avoid loss thereon but nevertheless suffered loss in the amount claimed.

3. Appeal and Error § 50—

Where appellee suggests it is willing to waive recovery of the particular element of damages upon which error was committed in the instructions, the cause will be remanded in order that the recovery be modified by such waiver, or, in the absence of waiver, for a new trial on the issue of damages.

APPEAL by defendant Maryland Casualty Company from *Parker, J.*, at March Civil Term, 1947, of DURHAM.

The plaintiff company operated a bottling plant in the suburbs of Raleigh. On the evening or night of 16 April, 1943, it suffered a loss of $2,472.74 in money and checks, abstracted, it is alleged, from the safe in its building "through larceny, theft, embezzlement, misappropriation, abstraction, burglary, or other fraudulent or dishonest act or acts committed by some employee of the plaintiff."

The plaintiff held two policies of insurance—one in each of the defendant companies—and sued the defendants thereupon to recover indemnity for the loss.

On the trial it appeared that the policy of the Commercial Casualty Insurance Company covered only a loss by abstraction from the safe accomplished by actual force, and holding there was no evidence of force in the sense necessary to recovery, the trial Judge let the Commercial Casualty Insurance Company out of the case on its demurrer to the evidence, by judgment of nonsuit.

Pertinent provisions of the Maryland Casualty Company policy are as follows:

"Maryland Casualty Company, Baltimore, Maryland, (hereinafter called Underwriter), in consideration of an annual premium, hereby agrees to indemnify Durham Pepsi-Cola Bottling Company

of Durham, N. C. (hereinafter called Insured) against any loss of money or other property, real or personal (including that part of any inventory shortage which the Insured shall conclusively prove has been caused by the dishonesty of any Employee or Employees) belonging to the Insured, or in which the Insured has a pecuniary interest, or for which the Insured is legally liable, or held by the Insured in any capacity whether the Insured is legally liable therefor or not, which the Insured shall sustain, the amount of indemnity on each of such Employees being Twenty-five Hundred Dollars ($2500.00) through larceny, theft, embezzlement, forgery, misappropriation, wrongful abstraction, willful misapplication, or other fraudulent or dishonest act or acts committed by any one or more of the Employees as defined in Paragraph 2, acting directly or in collusion with others, during the term of this bond as defined in Paragraph 1, and while this bond is in force as to the Employee or Employees causing such loss, and discovered and reported as provided in paragraph 4."

"That in case a loss is alleged to have been caused by the fraud or dishonesty of one or more of the Employees, and the Insured shall be unable to designate the specific Employee or Employees causing such loss, the Insured shall nevertheless have the benefit of this bond, provided that the evidence submitted reasonably establishes that the loss was in fact due to the fraud or dishonesty of one or more of the said Employees, and provided further that the aggregate liability of the Underwriter for any such loss shall not exceed the amount of indemnity carried hereunder on any one of said Employees, to wit, the amount stated in the first paragraph of this bond."

The policy defines "Employee" or "Employees" covered by the policy to mean and include "one or more of the natural persons (except directors of the Insured) who are in the regular service of the Insured in the ordinary course of the Insured's business and who are compensated by salary, wages or commissions and whom the Insured has the right to direct in the performance of service."

Omitting admissions in the answer of Maryland Casualty Company covering more formal undisputed matters, and coming to the evidence bearing on the controverted phases of the case, this may be summarized as follows:

The plaintiff's evidence tended to show that on the evening of 16 April, 1943, the several salesmen and collectors employed by the plaintiff came in, bringing with them cash collected, and some checks, which were deposited in the company's office safe, in its building above mentioned, as was customary. Evidence tended to show that the money and checks

so deposited, together with the deposits of 14 April, and 15 April, amounted to a total of $2,472.74.

Beverly Bullock testified that he put the last bag of money in the safe, closed the safe door, turned the dial, and locked it; then jerked the door to see if it was locked. This was near seven o'clock p.m. He then checked all the windows in the office and warehouse, and the front and back doors, which were closed and locked. He then went out of the door and locked it, leaving no one in the building. All windows and doors were closed and locked.

The safe had an outer door operated by a time lock, but this door was not in use. The combination dial lock referred to was on the inner door, and this door was kept locked at all times. All the employees of the Raleigh plant had keys to the building and knew the safe combination.

Those knowing the combination were listed as follows: Seven salesmen and two warehouse supervisors in the employment of the plaintiff, three former employees, and M. B. Burnette, Milton Airheart and S. T. Gaddy.

Doors were equipped with Corbin and Yale locks and windows were so constructed that when they were closed they automatically locked. There was no mechanism outside the windows by which they could be opened, it would be necessary to break a glass to enter. The doors could not be opened from the outside without a key.

A policeman of the City of Raleigh, on his regular patrol, discovered that one of the windows of the office was open 12 or 15 inches and using his flashlight through this aperture, discerned that the door of the office safe was open. He then called some of the employees, and the ensuing investigation disclosed the following conditions:

The safe was open and empty of money and checks. There were no marks on the safe indicating that actual force had been applied in opening it. There were no indications that either the doors or windows had been forced in making an entrance.

Of the persons other than employees who now knew or had previously known the combination to the safe, all were examined and the evidence tended to show that they were not in Raleigh at the time, did not participate in the affair, and knew nothing of it.

The plaintiff introduced expert evidence tending to show that the safe was of such construction and the combination of such character that it could have been opened only by one knowing and operating the combination or by the use of external force, as by "blowing" or "burning" into it; that the chance of opening by working the combination was negligible for anyone who did not know it.

At the conclusion of the plaintiff's evidence and at the conclusion of all the evidence the defendant moved for judgment as of nonsuit, which was declined, and defendant excepted.

Defendant requested the following special instruction:

> "That should you find from the greater weight of the evidence, the burden being on the plaintiff to so satisfy you, that the plaintiff is entitled to recover on the bonds executed by the defendants in favor of plaintiff, you could not answer the issue as to the amount that plaintiff should recover of defendants in an amount greater than $2,042.83, $341.29 sought to be recovered by plaintiff was according to the testimony represented by checks which checks the plaintiff has failed to show were of value and collectible."

The court stated the contention of the defendant on this point, but gave no part of the special instruction asked; but with respect thereto charged: "The Court instructs you that a worthless check is not property of value but a good and collectible check is." This is covered by defendant's exception.

The following issues were submitted to the jury:

> 1. Is the defendant Maryland Casualty Company indebted to the plaintiff, Durham Pepsi-Cola Bottling Company, under the terms of its Blanket Position Bond #4633?
> 2. If so, in what amount?

The jury answered the first issue "yes," and the second issue "$2,834.12, with interest from the first day of this term until paid."

Defendant moved to set aside the verdict. Motion was overruled and defendant excepted.

To the ensuing judgment on the verdict the defendant objected, and excepted; and appealed.

Victor S. Bryant and Robert I. Lipton for plaintiff, appellee.

R. M. Gantt for defendant, appellant.

SEAWELL, J. Under the exceptions noted, the defendant arrays the following objections to the trial:

First, that the defendant's contract of insurance does not cover the kind and character of loss shown by plaintiff, since the evidence shows a burglarious entry and abstraction from the safe while employees were not on duty; second, that there is a complete failure of proof since no evidence has been directed to any particular employee covered by the policy; and not necessarily to any employee at all; and third, that the trial judge failed to give defendant's special instruction relating to non-recoverability for the lost checks under plaintiff's evidence, which, it is contended, fails to show an actual money or property loss by their taking.

Turning to the first two objections, which may be considered together, we are of the opinion and so hold that the felonious taking of the money and things of value from the safe, as described in the evidence, would be a loss within the meaning of the terms employed in the policy providing indemnity for loss "through larceny, theft, embezzlement, forgery, misappropriation, wrongful abstraction, willful misappropriation, or other wrongful, fraudulent or dishonest act or acts," and if attributable to an employee acting directly or in collusion with others during the life of the policy, would render the defendant liable for the loss. The fact that the wrongful abstraction may have been made by an employee or employees in other than working hours does not destroy the relation between employer and employee, the nature of the trust, nor, as exemplified in this case, does it necessarily affect the superior facilities for theft, larceny, or fraudulent acts of dishonest but trusted employees against which it was intended to insure. The inability to fix the crime on any particular employee is not fatal to recovery.

The difficulty of proof where several employees are in a position of common trust is sufficiently obvious as to have become a matter of treaty between the insurer and the insured. See pertinent provisions above quoted. The evidence is sufficient to reasonably establish that the loss was due to the dishonest act of one or more of the employees, and satisfies the conditions of liability.

However, we are not sure that plaintiff is entitled to recover, as for a money loss, the face value of the lost checks, or indeed, on the present showing, anything for their loss. While the special instruction requested by defendant is, perhaps, not as ample as might have been demanded, we are inclined to the opinion that the question is raised here regarding the validity of that much of the recovery. No doubt the names of many customers who paid in checks are known and in many instances payment of the lost checks may be stopped and collection made. As between the insurer and the insured it seems that some effort of that sort might have been a duty.

On the oral argument the plaintiff's counsel expressed a willingness to abate the judgment by the amount represented by the checks.

This cause is remanded to the Superior Court of Durham County, where the plaintiff will be permitted to file waiver as to the amount of recovery representing lost checks, as appears from the record; whereupon judgment will be entered for the balance recovered as determined upon the issues; otherwise, for error in the respect mentioned judgment will be there entered directing a new trial upon the second issue.

Error and remanded.

STATE v. CLYDE LITTLE.

(Filed 19 December, 1947.)

1. Homicide § 25—

Evidence *held* sufficient to sustain verdict of guilty of murder in the first degree.

2. Criminal Law § 50f: Trial § 7—

Wide latitude is given counsel in the exercise of the right to argue to the jury the whole case, as well of law as of fact, but counsel is not entitled to travel outside of the record and argue facts not included in the evidence, and when counsel attempts to do so it is the right and duty of the court to correct the argument, either at the time or in the charge to the jury. G. S., 84-14.

3. Same—

Argument of the solicitor in the trial of a capital case that in the event of conviction there would be an appeal and in the event the decision of the lower court were affirmed, there would be an appeal to the Governor, and that not more than 60% of prisoners convicted of capital offenses were ever executed, *is held* improper and prejudicial and not justified by argument of counsel for defendant to the effect that only errors of law could be corrected by appeal and that only the Governor could correct errors of judgment on the part of the jury.

4. Same—

Where grave impropriety in the argument of the solicitor is brought to the trial court's attention it is the duty of the trial court to make correction regardless of the attitude of counsel for defendant, and the fact that upon the court's offer to make partial correction if counsel for defendant should so request, counsel for defendant remains silent, is not a waiver.

5. Same—

While ordinarily exceptions to improper argument of the solicitor should be taken before verdict, the rule *is held* inapplicable under the facts in this case where gross impropriety in the solicitor's argument was called to the court's attention and the court offered to make only partial correction if requested by counsel.

DEVIN, J., dissents.

APPEAL by defendant from *Parker, J.*, at February Criminal Term, 1947, of DURHAM.

Criminal prosecution upon bill of indictment charging that defendant with force and arms, at and in Durham County, "feloniously, willfully, and of malice aforethought, did kill and murder Minnie Little, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

On the trial below the State offered evidence tending to support the charge with which defendant stands indicted. On the other hand, defendant offered evidence tending to support his plea of not guilty by reason of his plea that he acted in self-defense. And the case was submitted to the jury with instruction that the jury might, as it found the facts to be from the evidence under the charge of the court, return one of four verdicts—guilty of murder in the first degree, guilty of murder in the second degree, guilty of manslaughter, or not guilty.

Verdict: Guilty of murder in the first degree as charged in the bill of indictment.

Judgment: Death by the administration of lethal gas as provided by law.

Defendant appeals therefrom to Supreme Court and assigns error.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

Fuller, Reade & Fuller for defendant, appellant.

WINBORNE, J. Among the several assignments of error presented by appellant on this appeal, we deem it necessary to treat only two of them.

The first relates to denial of the motions of defendant for judgment as in case of nonsuit, G. S., 15-173. As to this, without reciting the details leading up to and surrounding the homicide with which defendant is charged, it is sufficient to say that the evidence offered against defendant on the trial in Superior Court, as shown in the record on this appeal, taken in the light most favorable to the State, is sufficient to support a verdict of guilty of murder in the first degree.

The other relates to the action of the presiding judge in denying motion of defendant for a new trial because of prejudicial statements made by the solicitor for the State during the course of his argument to the jury.

The record discloses that, in making this motion, counsel for defendant, in pertinent part, stated to the court: "That during the argument of the solicitor, he stated to the jury that in all first degree cases where men were convicted there would be an appeal to the Supreme Court, and that in this case, if this defendant were convicted there would be an appeal to the Supreme Court, and that in the event the decision of the lower court should be affirmed, there would be an appeal to the Governor to commute the sentence of the prisoner; and that not more than sixty per cent of prisoners convicted of capital offenses were ever executed."

And the record further shows that, in response to suggestion by the court that counsel for defendant had opened the door, Mr. Reade, of counsel for defendant, stated that he said in arguing the case to the jury,

"that if your Honor should inadvertently commit error in the trial of the case, the prisoner might appeal to the Supreme Court, and that if the Court found that you had committed error, the Supreme Court would award a new trial only for errors of law committed in the trial of the case; and further said that the Supreme Court could not and would not undertake to correct errors of judgment on the part of jurors, and that if your Honor had not committed error in the trial of the case, the Supreme Court would leave the defendant as they found him, so far as the verdict of the jury was concerned. I further stated that, having appealed to the highest court in the State, in the event the conviction was affirmed the only appeal the prisoner would then have would be to the Governor, who alone might undertake to correct errors of judgment on the part of the jury, if it was made to appear to him that an injustice had resulted."

Then the record shows that the court interposed the following: "I knew that you said Governor—I was under the impression that you said the Governor or the Parole Officer." And, then, Mr. Reade continued, "I would not say that I did not, but what I was undertaking to do was impress, as forcefully as possible, upon the jury, that they were the sole judges of the facts, and that the court would not undertake to correct errors of judgment as to what the facts were found to be by the jury."

And the record further shows the following ruling of the court on the said motion of defendant: "The Judge was on the bench when Mr. Reade made his argument to the jury and the Court finds as a fact that he made the argument substantially as set forth in his statement to the Court on this motion in respect to that point in his speech to the jury. After Mr. Reade made his speech, the Judge stepped into the library off the court room, which has a door opening into the Bar and is not over twenty feet from the bench. The Court was there consulting the North Carolina Reports when Mr. Reade and Mr. Fuller came to the Judge and told him the argument that the Solicitor was making, as set forth substantially in Mr. Reade's statement above. The Court stated to Mr. Reade and Mr. Fuller that if they so requested, he would go back to the bench, stop the Solicitor's argument and instruct the jury to disregard his argument that in sixty per cent of the capital cases the sentence was commuted and the man did not suffer death when convicted of a capital offense but that the rest of the Solicitor's argument the Court deemed to be proper in reply to the argument that Mr. Reade had made; whereupon Mr. Reade and Mr. Fuller stated that they did not desire the Court to go back and stop the Solicitor's argument. The Court, after looking at some of the North Carolina Reports, returned to the court room and his seat upon the bench. After the Solicitor had completed his speech, he having followed Mr. Reade, the Judge before beginning his charge, waited two or three minutes, counsel for the defendant said nothing. Then the Judge called Mr. Reade to the bench and asked him did he

wish him to instruct the jury to disregard as improper the statement of the Solicitor that in sixty per cent of the capital convictions which were returned sentence was commuted to imprisonment, and Mr. Reade replied that he did not. The Court, in the library, asked Mr. Reade if he did not think he had opened the door by his argument. The Court finds the facts to be as set forth above. Motion denied. Defendant excepted."

Under the law the right of a person, put on trial upon a criminal charge, to be heard, and to have counsel in all matters necessary to his defense, and the right of counsel to argue to the jury the whole case, as well of law as of fact, is declared by this Court to be too fundamental for discussion. G. S., 84-14, formerly C. S., 203. *S. v. Hardy,* 189 N. C., 799, 128 S. E., 152. Wide latitude is given to the counsel in making their arguments to the jury. *S. v. O'Neal,* 29 N. C., 252; *McLamb v. R. R.,* 122 N. C., 862, 29 S. E., 894. However, counsel may not "travel outside of the record" and inject into his argument facts of his own knowledge or other facts not included in the evidence. McIntosh, N. C. P. & P., p. 621. *Perry v. R. R.,* 128 N. C., 471, 39 S. E., 27; *S. v. Howley,* 220 N. C., 113, 16 S. E. (2d), 705. When counsel does so, it is the right and duty of the presiding judge to correct the transgression,—and he may do so at the moment or wait until he comes to charge the jury. *S. v. O'Neal, supra; Melvin v. Easley,* 46 N. C., 386; *McLamb v. R. R., supra; Perry v. R. R., supra.*

In the *McLamb case* the Court states that "where the remarks are improper in themselves, or are not warranted by the evidence, and are calculated to mislead or prejudice the jury, it is the duty of the court to interfere."

On the other hand, while the conduct of a trial in the court below, including the argument of counsel, must be left largely to the control and discretion of the presiding judge, he, to be sure, as stated by *Walker, J.,* in *S. v. Tyson,* 133 N. C., 692, 45 S. E., 838, should be careful that nothing be said or done which would be calculated unduly to prejudice any party in the prosecution or defense of his case. *S. v. Howley, supra.*

Applying these principles to the present case, it is manifest that the statements of facts that if the defendant be convicted there would be an appeal to the Supreme Court, and that in the event the decision of the lower court should be affirmed there would be an appeal to the Governor to commute the sentence of the prisoner, and that not more than sixty per cent of prisoners convicted of capital offenses were ever executed, are matters not included in the evidence. Nor are they justified as being in answer to argument of counsel for defendant. They are calculated to unduly prejudice the defendant in the defense of the charge against him. "Who can say," as counsel for defendant ask, "to what extent the jury was influenced by the solicitor's statement that the prisoner, in the event

his appeal did not obtain a new trial, that he still had a forty per cent chance to have his sentence commuted?" We hold the remarks to be error,—and such error as called for correction by the presiding judge, *S. v. Tucker,* 190 N. C., 708, 130 S. E., 720, and cases cited. *S. v. Buchanan,* 216 N. C., 709, 6 S. E. (2d), 521; *S. v. Helms,* 218 N. C., 592, 12 S. E. (2d), 243. See also *Conn v. R. R.,* 201 N. C., 157, 159 S. E., 331.

In the *Tucker case* it is stated that "Where counsel oversteps the bounds of legitimate argument, or abuses the privilege of fair debate, and objection is interposed at the time, it must be left, as a general rule, to the sound discretion of the presiding judge as to when he will interfere and correct the abuse, but he must correct it at some time during the trial, and if the impropriety be gross, it is the duty of the judge to interfere at once."

The State contends, however, that counsel for defendant, having been given an opportunity to have the court correct the improper remarks of the solicitor, waived objection thereto. As to this, the ruling of the Judge, as shown in the record, was that, if counsel so requested, he would make only a partial correction. The matter as a whole was called to his attention, and it would seem that the gravity of the error called for a correction of the improper remarks at some time during the trial regardless of the attitude of counsel for defendant as to whether the Judge should or should not instruct the jury. Indeed, it may be doubted that the harmful effect of the improper remarks could have been removed from the minds of the jury even by full instruction.

The State also contends that exception to improper argument of solicitor not taken before verdict is not seasonable. Under some circumstances this rule is correct. But under the facts here, it is inapplicable. The cases relied upon by the State are distinguishable.

For error pointed out, defendant is entitled to a

New trial.

DEVIN, J., dissents.

THOMAS WELLS v. BURTON LINES, INC., AND CLYMAN H. JOHNSON (ORIGINAL PARTIES DEFENDANT), AND CHARLES STANLEY (ADDITIONAL PARTY DEFENDANT),

and

CHARLES STANLEY v. BURTON LINES, INC., AND CLYMAN H. JOHNSON.

(Filed 19 December, 1947.)

1. Automobiles § 18h (5)—

Where one defendant contends that the collision in suit was due solely to the negligence of plaintiff, he is in no position to press his exception to the granting of his co-defendant's motion to nonsuit.

2. Automobiles § 18h (2)—

Where defendant's own testimony is to the effect that he did not see a truck parked on his side of the highway until he was within approximately thirty feet of it, that he applied his brakes and turned cross-ways of the road and came to a stop on his left side of the highway directly in the path of another car traveling on its right side in the opposite direction, is sufficient evidence of defendant's negligence to be submitted to the jury in an action by the driver and by the occupant of such other car.

3. Evidence § 42c—

Testimony of an admission by defendant that the accident in suit was his fault, made when he visited plaintiffs in the hospital after the collision, is competent as an admission against interest by a party to the action, and the fact that it was not a part of the *res gestæ* is immaterial.

4. Appeal and Error § 39f—

When the charge of the court is free from reversible error when construed contextually, exceptions thereto will not be sustained.

APPEAL by defendant, Clyman H. Johnson, from *Rousseau, J.*, at March Term, 1947, of GUILFORD (Greensboro Division).

Civil actions to recover for personal injuries and damages to the car of Charles Stanley, sustained in an automobile collision. The actions were consolidated for trial.

The pertinent facts are as follows:

1. On 19 December, 1945, about 5:30 p.m., the plaintiff, Charles Stanley, was operating his automobile in a southerly direction on the Greensboro-Asheboro Highway about ten miles south of Greensboro. The plaintiff, Thomas Wells, was riding in Stanley's automobile as a guest passenger.

2. A tractor-trailer unit belonging to the defendant, Burton Lines, Inc., loaded with hogsheads of tobacco, had been left during the night of 18 December, 1945, by its agent on the east side of the highway, headed north. Sleet and snow had fallen and the brakes on the tractor-trailer

unit became frozen and the equipment rendered immobile. This equipment was parked partially upon the shoulder of the highway and partially on the paved portion thereof. The pavement was about 18 feet in width and the equipment of the Burton Lines, Inc., occupied 3 to 4 feet of the paved portion of the highway. Red flags were placed along the highway in both directions for several hundred feet, by the driver of the tractor-trailer unit, but no flares.

3. North of the point where the Burton Lines equipment was parked the highway is straight, level and the view unobstructed for a distance of 600 to 700 feet. To the south of the parked vehicle the road was slightly down grade, straight and the view entirely unobstructed for about 300 feet, but one could partially see a vehicle where the truck was parked for approximately a half a mile.

4. The defendant Johnson was traveling north. The automobile operated by the plaintiff Stanley had passed the Burton Lines tractor-trailer and was about 30 feet south of it when the collision occurred between his car and the Johnson car. According to the answer of the defendant, Clyman H. Johnson, the automobile of the plaintiff Stanley was being driven at a lawful rate of speed and in a lawful manner; and he does not plead contributory negligence against the plaintiffs.

5. The evidence further tends to show that the Stanley car was traveling about 25 miles per hour and the Johnson car was being driven about 40 to 50 miles per hour; that the dim headlights were on the Stanley car and no lights were burning on the Johnson car. At the time of the collision it was getting dark, but one could see how to drive without headlights. The weather was cloudy. Both plaintiffs testified that they saw the Burton Lines equipment when they were 300 to 400 feet from it. The snow on the paved portion of the highway had been scraped off, but it was icy in places.

The plaintiff Stanley testified: "I was about midway of the truck when I first saw the Johnson car . . . I would say the Johnson car when I first observed it was approximately 125 feet away." When the defendant Johnson reached a point about 50 or 60 feet south of the Burton Lines equipment, he applied his brakes and swerved or skidded to his left and collided with the plaintiff Stanley's car. The defendant had been over this road a few hours before the accident and had seen the Burton Lines equipment parked on the east side of the highway. Johnson testified that he approached the scene of the collision traveling about 25 miles per hour; that the weather was cloudy at the time; that it was between dim and dark; not what you would call pitch dark; that he did not see the truck until he got within approximately 30 feet of it, that he applied his brakes, turned cross-ways of the road, went by it and before he could do anything he was hit by the Stanley car, but then he

said he brought his car to a dead stop on the west side of the highway and that the collision "took place approximately 30 feet back of the truck on the west side of the highway." He also testified his headlights were burning and that he saw no red flags displayed along the highway or on the truck.

At the conclusion of the plaintiffs' evidence the defendant Burton Lines, Inc., moved for judgment as of nonsuit as to it. The motion was denied but upon a renewal thereof at the close of all the evidence the motion was allowed.

The issues of negligence and damages were answered in favor of the plaintiffs and against the defendant Johnson.

From the judgments entered on the verdict, the defendant Johnson appealed, assigning errors.

James E. Coltrane and D. Newton Farnell, Jr., for Thomas Wells and Charles Stanley, plaintiffs, appellees.

Smith, Wharton & Jordan and Arthur O. Cooke for Burton Lines, Inc., appellee.

Sapp & Moore for defendant, Clyman H. Johnson, appellant.

DENNY, J. The appellant assigns as error the refusal of the court below to allow his motion for judgment as of nonsuit as to both plaintiffs; and for allowing the motion of Burton Lines, Inc., for judgment as of nonsuit.

The appellant states in his brief that he "does not contend that plaintiffs were contributorily negligent, but that the plaintiff Stanley's negligence was the sole proximate cause of the collision." In view of this contention, we do not see how the appellant can contend that the court committed error in allowing the motion of the defendant Burton Lines, Inc., for judgment as of nonsuit.

We think there was sufficient evidence adduced in the trial below as to the negligence of the defendant Johnson to carry the case to the jury. According to his pleadings, the plaintiff Stanley's car at the time of the collision, was being driven at a lawful rate of speed and in a lawful manner. Moreover, his own testimony is to the effect that he did not see the parked truck on his side of the highway until he was within approximately 30 feet of it; he applied his brakes, turned cross-ways of the road, came to a dead stop on the west side of the highway directly in front of the plaintiff's approaching car. We think this evidence is sufficient to overcome a motion for judgment as of nonsuit.

The ruling of the court below in overruling the defendant Johnson's motion for judgment as of nonsuit as to both plaintiffs and allowing the motion of the Burton Lines, Inc., for judgment as of nonsuit, will be

upheld. *Weston v. R. R.*, 194 N. C., 210, 139 S. E., 237; *Smithwick v. Colonial Pine Co.*, 200 N. C., 519, 157 S. E., 612; *Powers v. Sternberg*, 213 N. C., 41, 195 S. E., 88; *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; *Stewart v. Stewart*, 221 N. C., 147, 19 S. E. (2d), 242; *Allen v. Bottling Co.*, 223 N. C., 118, 25 S. E. (2d), 388.

The plaintiffs were permitted to testify, over the objection of the appellant, to a conversation the appellant had with them while they were in the hospital, and in which conversation they testified the appellant told them the collision was his fault. The admission of this testimony is assigned as error.

It is not contended that the statement of the appellant was a part of the *res gestæ* as it was in *Austin v. Overton*, 222 N. C., 89, 21 S. E. (2d), 887, where the defendant remarked, "It was my fault." There the Court said, "The conclusion is a legal one, determinable alone by the facts. It is not supposed the defendant intended by this statement—which he denies making—to concede more than his own negligence." The appellant in the instant case denies that he told the plaintiffs that the collision was his fault. However, we think the evidence admissible under the rule stated by *Winborne, J.*, in *Hobbs v. Queen City Coach Co.* in 225 N. C., 323, 34 S. E. (2d), 211, as follows: "It is not necessary to the competency of an admission by party to the record that it shall have been made as part of the *res gestæ*. It is a rule of evidence that admissions when offered as those of a party to the record are competent against him when the admissions are against his interest, material and pertinent or relevant to an issue in the case, and offered when the declarant is a party to the record at the time of the offer. Such admissions are original, primary, independent and substantive evidence of the facts covered thereby, and may be used to make out the opponent's case by proving or disproving the facts in issue. 10 C. J. S., 1091, Evidence, *et seq.* IV Wigmore on Evidence, 3d Ed., 1078."

We have carefully examined the several exceptions and assignments of error to his Honor's charge, and some of them, if considered separate and apart from the charge as a whole, might have some merit, but when the charge is considered contextually as it must be, it is free from reversible error. *S. v. Lee*, 192 N. C., 225, 134 S. E., 458; *S. v. Elmore*, 212 N. C., 531, 193 S. E., 713; *S. v. Smith*, 221 N. C., 400, 20 S. E. (2d), 360; *S. v. Grass*, 223 N. C., 31, 25 S. E. (2d), 193.

The remaining assignments of error are without merit.

In the trial below we find

No error.

STATE v. WILLIE RICHARDSON.

(Filed 19 December, 1947.)

1. Gaming §§ 11, 12—

Sentence and fine imposed upon conviction of violating G. S., 14-291.1, is *in personam;* an order of confiscation entered under G. S., 14-299, is *in rem* and is no part of the personal judgment against the accused.

2. Same—

A defendant may comply with the personal judgment entered against him upon conviction of violating G. S., 14-291.1, and at the same time prosecute an appeal from order of confiscation entered under G. S., 14-299, whether embraced in the same judgment or not, but the failure to appeal the personal judgment, while not estopping him from further contesting the order of confiscation, forever precludes him from contesting the fact of guilt.

3. Courts § 4b—

On appeal from a municipal court, the Superior Court may not dismiss the appeal and at the same time enter an order in the cause, since the dismissal of the appeal divests it of jurisdiction.

APPEAL by defendant from *Warlick, J.,* March 31 Term, 1947, FORSYTH. Error and remanded.

Criminal prosecution on warrant charging the unlawful possession of lottery tickets or coupons in violation of G. S. 14-291.1, heard on appeal from order confiscating a truck upon which the lottery tickets were being transported at the time of defendant's arrest.

Defendant was arrested while transporting lottery tickets or coupons on a Studebaker truck. The arresting officer seized the truck as well as the tickets. On 17 December 1946, defendant was put on trial for the violation of the provisions of G. S. 14-291.1 and was convicted. (While the certificate of the deputy clerk states that the trial was had on 20 December, the judgment of the judge himself fixes the date as the 17th.) The court imposed a fine and suspended sentence. The defendant paid the fine and costs. On 18 December he appeared in said court and moved for an order releasing the truck from the custody of the officer and for its return to him. On the same day the judge of the municipal court heard the motion, denied the same, and entered his order confiscating the truck and directing its sale as provided by G. S. 14-299. In so doing, he found as a fact "that this truck was ordinarily used in the operation of a woodyard business but on the day of arrest was caught transporting lottery tickets or coupons, in violation of G. S. 14-299." The defendant appealed. Thereupon, the court, being of the opinion "defendant is in his rights in appealing the order of confiscation to have

same passed upon as a matter of law by a higher Court," entered a further order directing the sheriff, upon the execution of a good and sufficient bond in the sum of $2,000, to deliver said truck to defendant, pending said appeal.

The bond was not filed immediately. Consequently the sheriff proceeded to advertise the truck for sale under the order of confiscation. Defendant filed the required bond, pending the sale, and possession of the truck was surrendered to him.

At the second March Civil Term, 1947, Clement, J., being of the opinion the appeal involves a question civil in nature, transferred the cause to the civil issue docket.

On 18 March 1947 the sheriff of Forsyth County, after notice to defendant, filed a motion that defendant's appeal be dismissed and the cause remanded to the municipal court for execution of the order of confiscation.

The appeal, together with the motion of the sheriff, came on for hearing before Warlick, J., at the March 31 Criminal Term, 1947. After hearing the same, the court found the facts and concluded as a matter of law "*that inasmuch as Willie Richardson consented to that portion of the judgment of the Municipal Court of the City of Winston-Salem, imposing upon him a fine of $300 and costs by paying said fine and costs, and did acquiesce and consent to that portion of the judgment imposing upon him a six months suspended sentence for a period of three years by not appealing in apt time from all of the provisions of the judgment of the Municipal Court, is precluded as a matter of law from appealing a portion of said judgment, and that his Honor Leroy Sams, Judge of the Municipal Court of the City of Winston-Salem, was without legal authority to permit an appeal from that portion of the judgment ordering said Studebaker truck to be confiscated and sold . . . and the defendant, upon being adjudged guilty, did consent to said judgment of the Municipal Court and acquiesced in same by paying said fine and costs, and that said appeal now before this Court from the Order of Confiscation of said Studebaker truck is a fragmentary appeal, and is not in law tenable, and should be in all respects dismissed.*" If then, upon said conclusion, ordered that the appeal be dismissed and that the sheriff proceed to sell the truck as provided by law. The order is dated 3 April 1947. Defendant excepted and appealed.

Nat S. Crews for the State.

Joe W. Johnson and Phin Horton, Jr., for defendant appellant.

BARNHILL, J. The judgment of the court below is bottomed upon the finding that the imposition of a fine and suspended sentence and the

order of confiscation were incorporated in one judgment. Upon this finding the court concluded that defendant, by paying the fine imposed, assented to the judgment as a whole and is thereby precluded from prosecuting his appeal to the Superior Court from the order of confiscation. The conclusion is a *non sequitur*. The fine and suspended sentence is an *in personam* judgment pronounced under authority of G. S. 14-291.1 while the order of confiscation is an *in rem* decree entered under G. S. 14-299.

"The order of condemnation and sale of the vehicle seized is perforce no part of the personal judgment against the accused, albeit both are dependent upon his conviction. *S. v. Hall,* 224 N. C., 314, 30 S. E. (2d), 158; 30 Am. Jur. 551." *S. v. Maynor,* 226 N. C., 645. A defendant may comply with the one and at the same time prosecute his appeal from the other.

But on this record two judgments were entered. On 17 December 1946, defendant, upon his conviction, was fined $300 and placed under a suspended sentence. He did not appeal therefrom but instead paid the fine imposed. On the following day he filed motion in the cause to have the truck released from custody. Upon the hearing of that motion the court denied the relief prayed, confiscated the truck, and ordered its sale as provided by G. S. 14-299.

The defendant, by the verdict of guilty and judgment pronounced thereon from which he did not appeal, is forever precluded from contesting the fact of guilt. But he is not estopped thereby from further contesting the order of confiscation. He has followed the procedure heretofore approved by this Court. *S. v. Reavis, ante,* 18; *S. v. Maynor, supra,* and cited cases.

Furthermore, the court below dismissed defendant's appeal and at the same time ordered the sale of the truck. It could not do both for the dismissal of the appeal divested the court of further jurisdiction in the cause.

The order entered in the court below is held for error. The appeal must be reinstated on the docket to be heard on its merits. To that end this cause is remanded.

Error and remanded.

PEARL STEWART (STUART) v. MAGGIE STEWART WYRICK ET AL.

(Filed 19 December, 1947.)

1. Executors and Administrators § 15d: Wills § 4—

Evidence that deceased's daughter-in-law performed personal services for him in reliance upon his parol agreement to leave her all of his property by will is sufficient to overrule a demurrer to the evidence in her action against his estate, the method, but not the right, of recovery being dependent upon whether the agreement is within or without the statute of frauds.

2. Same: Frauds, Statute of, § 9—

An agreement to devise realty is within the statute of frauds, and an agreement to bequeath personalty, *simpliciter*, is not.

3. Executors and Administrators § 15d—

Where personal services are rendered and are knowingly and voluntarily accepted, the law, ordinarily, will imply a promise to pay their reasonable worth; except where the person rendering the services is so related to the beneficiary that the services will be presumed to have been rendered in obedience to the obligation of kinship, and even in those instances, the presumption may be refuted by proof of an agreement to pay or of facts and circumstances permitting the inference that payment was intended on the one hand and expected on the other.

4. Same—

When personal services are rendered with the understanding that compensation is to be made in the will of the recipient, payment therefor does not become due until death, and the statutes of limitation do not begin to run until that time. Whether plaintiff, upon the beneficiary's becoming incompetent to execute a will, could have sued for anticipated breach of the contract, is not presented.

5. Executors and Administrators § 15d: Frauds, Statute of, § 1—

A parol contract to devise realty in consideration of personal services is unenforceable under the statute of frauds, but where the services have been rendered in reliance upon the promise to devise, the law substitutes in place of the unenforceable promise a valid promise to pay the reasonable worth of the services, and recovery may be had upon *quantum meruit*, the mainspring of the statute of frauds being to prevent frauds and not to promote them.

6. Trial § 39—

A verdict, both in civil and criminal cases, may be given significance and correctly interpreted by reference to the pleadings, the facts in evidence, admissions of the parties, and the charge of the court.

7. Trial § 37: Executors and Administrators § 15d—

In an action to recover for personal services rendered deceased in reliance upon his verbal agreement to devise realty, the submission of the

issue of damages in the form of the amount plaintiff is entitled to recover for "breach" of the contract, while incorrect, will not be held for reversible error when it appears the court instructed the jury to answer the issue in the amount they found the services reasonably to be worth, and the verdict indicates no misunderstanding on the part of the jury.

APPEAL by defendant from *Parker, J.*, at May Term, 1947, of ALAMANCE.

Civil action to recover for services rendered by plaintiff to J. G. Stewart during the last 20 or 25 years of his life, it being alleged that "the said J. G. Stewart proposed to, and agreed with, this plaintiff that he would pay her for all of her said services to be rendered and for all funds advanced by her in his behalf (in purchasing their home and) for his support, by willing to her, to take effect at his death, all (of said properties so purchased and all other) property which he owned at his death."

There is ample evidence to show the contract as alleged. Plaintiff's eldest son says "he told her in my presence that he would will her everything he had if she would stay there and take care of him." Another son testifies: "I heard him say at least sixty times that he was going to let mama have everything he had." Plaintiff's husband, who is a son of J. G. Stewart, gave testimony as follows: "I heard my father say, time and time again, if my wife would stay and take care of him and look after him, he would give her everything he had and see that she had it at his death." Indeed, J. G. Stewart made a will devising and bequeathing all of his property to the plaintiff, but this was burned in a fire which destroyed their home—later rebuilt. He died intestate on 4 January, 1944, at the age of 83. At that time he owned a farm worth between $8,000 and $10,000, and personal property amounting to $50 and 13 cents in cash.

It is further in evidence that plaintiff performed her part of the contract, and rendered valuable services to the deceased during the latter part of his life—some of an onerous and menial character.

Upon the denial of liability and issues joined, the jury returned the following verdict:

"1. Did the defendant's intestate J. G. Stewart, during his lifetime, enter into a contract and agreement with the plaintiff, Mrs. Pearl Stewart, as alleged in the complaint? Answer: Yes.

"2. If so, did the plaintiff, Mrs. Pearl Stewart, render services to said J. G. Stewart in good faith, relying on a contract and agreement with him, as alleged in the complaint? Answer: Yes.

"3. If so, did the defendant's intestate J. G. Stewart breach said contract, as alleged in the complaint? Answer: Yes.

"4. Is plaintiff's action barred by the three-year statute of limitations, as alleged in the answer? Answer: No.

"5. Is plaintiff's action barred by the ten-year statute of limitations, as alleged in the answer? Answer: No.

"6. What amount, if any, is the plaintiff entitled to recover of the defendant on account of the breach of said contract? Answer: $3,500."

The court instructed the jury that if they came to answer the 6th issue, they would "answer the amount in dollars and cents that you find from the evidence . . . the services rendered by the plaintiff to J. G. Stewart were reasonably worth."

On the 4th and 5th issues, addressed to the three and ten years statutes of limitation, negative answers were directed, if the jury found the facts to be true as shown by all the evidence.

Judgment was entered on the verdict for the plaintiff, from which the defendant appeals, assigning errors.

Long & Long for plaintiff, appellee.

Thomas C. Carter and John H. Vernon for defendant, appellant.

STACY, C. J. The appeal poses the questions whether the case as made survives the demurrer, repels the plea of the statutes of limitation and withstands the challenge to the correctness of the trial.

First, the demurrer to the evidence: When services are performed by one person for another under an agreement or mutual understanding (fairly to be inferred from their conduct, declarations and attendant circumstances) that compensation therefor is to be provided in the will of the person receiving the benefit of such services, and the latter dies intestate or fails to make such provision, a cause of action accrues in favor of the person rendering the services. *Lipe v. Trust Co.*, 207 N. C., 794, 178 S. E., 665; *Grantham v. Grantham*, 205 N. C., 363, 171 S. E., 331; *Whetstine v. Wilson*, 104 N. C., 385, 10 S. E., 471; *Miller v. Lash*, 85 N. C., 52.

The method of enforcing such claim may depend upon whether it is within or without the statute of frauds. An agreement to devise real estate is within the statute. *Daughtry v. Daughtry*, 223 N. C., 528, 27 S. E. (2d), 446; *Price v. Askins*, 212 N. C., 583, 194 S. E., 824. A contract to bequeath personal property, *simpliciter*, is not. *Neal v. Trust Co.*, 224 N. C., 103, 29 S. E. (2d), 206.

In the instant case, the evidence fully justifies the finding of the jury that plaintiff rendered valuable services to her father-in-law under an agreement or mutual understanding that she would be compensated therefor in his will. Indeed, in support of the finding, it may be noted that "where services are rendered by one person for another, which are

knowingly and voluntarily accepted, without more, the law presumes that such services are given and received in expectation of being paid for, and will imply a promise to pay what they are reasonably worth." *Winkler v. Killian,* 141 N. C., 575, 54 S. E., 540; *Patterson v. Franklin,* 168 N. C., 75, 84 S. E., 18; *Ray v. Robinson,* 216 N. C., 430, 5 S. E. (2d), 127. True it is, that in certain family relationships, services performed by one member of the family for another, are presumed to have been rendered in obedience to an obligation of kinship with no thought of compensation. *Francis v. Francis,* 223 N. C., 401, 26 S. E. (2d), 907. Nevertheless, this is a presumption which may be overcome by proof of an agreement to pay or of facts and circumstances permitting the inference that payment was intended on the one hand and expected on the other. *Nesbitt v. Donoho,* 198 N. C., 147, 150 S. E., 875; *Brown v. Williams,* 196 N. C., 247, 145 S. E., 233.

The agreement here, however, is to devise real estate; it rests only in parol, and is not subject to specific enforcement. *Dunn v. Brewer,* 228 N. C., 43; *Coley v. Dalrymple,* 225 N. C., 67, 33 S. E. (2d), 477.

Second, the plea of the statutes of limitation: When personal services are rendered with the understanding that compensation is to be made in the will of the recipient, payment therefor does not become due until death, and the statutes of limitation do not begin to run until that time. *Helsabeck v. Doub,* 167 N. C., 205, 83 S. E., 241; *Freeman v. Brown,* 151 N. C., 111, 65 S. E., 743; *Miller v. Lash, supra.*

Whether the plaintiff might have sued for anticipatory breach when J. G. Stewart became incompetent to execute a will, and thus reduce the services thereafter rendered to a purely *quantum meruit* basis, is not presented by the appeal. *Patterson v. Franklin, supra; Einolf v. Thompson,* 95 Minn., 230, 103 N. W., 1026.

Third, the measure of recovery: As the contract between plaintiff and her father-in-law rests in parol and is not subject to specific enforcement, the plaintiff is entitled to recover only what her services were reasonably worth. *Grantham v. Grantham, supra.*

The contract being unenforceable under the statute of frauds, no recovery can be had upon it; no damages can be recovered on account of its breach for the same reason; and upon the same principle, the contract being unenforceable, the value of plaintiff's services cannot be concluded by its terms. *Faircloth v. Kenlaw,* 165 N. C., 228, 81 S. E., 299. In place of the unenforceable promise to devise real estate in consideration of services to be performed, the law substitutes the valid promise to pay their reasonable worth. Anno. 69 A. L. R., 95. The mainspring of the statute of frauds is to prevent frauds, not to promote them.

The form of the 6th issue, standing alone, might indicate a different basis of recovery. However, viewed in the light of the record, no serious

difficulty is encountered. It is the established rule with us, both in civil and criminal cases, that a verdict may be given significance and correctly interpreted by reference to the pleadings, the facts in evidence, admissions of the parties, and the charge of the court. *Reynolds v. Express Co.*, 172 N. C., 487, 90 S. E., 510; *S. v. Whitley,* 208 N. C., 661, 182 S. E., 338, and cases cited. As thus interpreted, we think the record should be resolved in favor of affirmance. The court instructed the jury to answer the 6th issue in whatever amount they found the plaintiff's services reasonably to be worth. This, the jury answered at much less than the value of the estate left by the deceased, which indicates no misunderstanding on the part of the jury.

A careful perusal of the entire record leaves us with the impression that the verdict and judgment should be upheld.

No error.

C. J. HILL v. J. H. LOPEZ, TRADING AS WRIGHT AND LOPEZ.

(Filed 19 December, 1947.)

1. Automobiles § 20a—

A guest in an automobile will not be held contributorily negligent as a matter of law on the ground that he knew the propensity of the driver for speeding and failure to keep a proper lookout when the evidence shows that the driver slowed down before entering an intersection with another highway and was traveling at a speed of 35 miles an hour, notwithstanding evidence that the driver did not see the truck approaching along the intersecting highway until it was called to his attention by the guest immediately before the collision. In this case the car had entered the intersection and its front was beyond the center of the intersecting highway when the truck struck its side.

2. Automobiles § 8i—

The failure of a motorist traveling upon a servient highway to stop in obedience to a sign before entering an intersection with a dominant highway is not negligence *per se* and is insufficient alone to make out a *prima facie* case of negligence, but is only evidence of negligence to be considered along with other facts and circumstances adduced by the evidence, and an instruction that failure to stop in obedience to the sign is negligence, must be held for reversible error.

3. Automobiles § 18b—

The operator of a motor vehicle is under duty to exercise that care which an ordinarily prudent person would exercise under the same circumstances for his own safety and the safety of others, but he is not under duty to anticipate negligence on the part of others, in the absence of anything which gives or should give notice to the contrary, and is

entitled to assume, and act on the assumption, that others will exercise ordinary care for their own safety.

APPEAL by defendant from *Pittman, J.*, at May Term, 1947, of STANLY.

This is a civil action to recover damages for personal injuries sustained by the plaintiff in a collision of the defendant's truck with the automobile of one Pennington in whose car the plaintiff was a passenger. The collision occurred at the intersection of Highways No. 421 and No. 102 at Spivey's Corner in Sampson County on 19 April, 1946. Both highways are of asphalt construction.

The plaintiff was a passenger in the Pennington automobile which was being operated in a westerly direction over Highway No. 421. The defendant's truck was being driven in a southerly direction over Highway No. 102.

The front of the Pennington car had passed the center of the intersection when the defendant's truck collided with it. The truck was about four feet east of the center line of Highway No. 102 when it hit the center of the Pennington car on its right side.

According to the evidence of the plaintiff the Pennington car had slowed down before entering the intersection and at the time of the collision was being driven at a speed of about 35 miles per hour; and the defendant's truck was being operated at a speed of 50 miles or better. The plaintiff did not see the defendant's truck until an instant before the collision, when he said, "Look out! We are hit!"

North of the intersection, and on the west side of Highway No. 102 there were three signs: A stop sign 59 feet from the northern edge of Highway No. 421, a slow sign approximately 200 feet north of the intersection, and a junction sign approximately 350 feet north of the intersection.

Defendant's agent drove its truck into the intersection without stopping at the stop sign.

Highway No. 421, being the dominant or arterial highway, had a junction sign 350 feet east of the intersection.

The only obstruction to the approach of the intersection of these highways was a service station located at the northeast intersection thereof.

The issues of negligence, contributory negligence and damages were answered in favor of the plaintiff. From judgment entered on the verdict, the defendant appeals, assigning error.

Morton & Williams for plaintiff, appellee.

R. L. Smith & Son for defendant, appellant.

DENNY, J. The defendant assigns as error the refusal of the court below to sustain its motion for judgment as of nonsuit on the ground that the plaintiff was guilty of contributory negligence as a matter of law.

The appellant is relying upon *Bogen v. Bogen,* 220 N. C., 649, 18 S. E. (2d), 162, and similar cases from other jurisdictions to sustain its contention. In the above case there was evidence to the effect that the guest passenger knew the driver of the car was "in the habit of operating his automobile in a reckless manner at an excessive speed and without keeping a proper lookout," and at the time of the accident was driving 60 to 70 miles per hour and "was not looking and did not see the other car" until the guest passenger called his attention to it. However, the evidence as disclosed on this record as to the manner in which the Pennington car was being driven at the time the plaintiff sustained his injury, would not justify holding that this plaintiff was guilty of contributory negligence as a matter of law. The ruling of his Honor in this respect will be upheld. *Cowper v. Brown,* 228 N. C., 213, 44 S. E. (2d), 878; *Hobbs v. Drewer,* 226 N. C., 146, 37 S. E. (2d), 121; *Henderson v. Powell,* 221 N. C., 239, 19 S. E. (2d), 876; *Groome v. Davis,* 215 N. C., 510, 2 S. E. (2d), 771.

The appellant also assigns as error the instruction of the court to the effect that if the agent of the defendant drove the defendant's truck into the intersection without heeding the warning of the stop sign "then that would be what is termed in law as negligence, and any person traveling on Highway No. 421 did have the right to assume that any person traveling on Highway No. 102 would heed the signs on Highway No. 102; that is the warning signs on Highway No. 102." This assignment of error will be upheld.

The statute, G. S., 20-158, which authorizes the State Highway & Public Works Commission to designate main traveled or through highways by erecting at the entrance thereto from intersecting highways signs notifying drivers of vehicles to come to a full stop before entering or crossing such designated highway, and providing that when such signs have been so erected it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto, also contains the following provisions: "No failure so to stop, however, shall be considered contributory negligence *per se* in any action at law for injury to person or property; but the facts relating to such failure to stop may be considered with the other facts in the case in determining whether the plaintiff in such action was guilty of contributory negligence."

The above provision of the statute was construed in the case of *Sebastian v. Motor Lines,* 213 N. C., 770, 197 S. E., 539, where it is held: "If the failure to come to a full stop before entering or crossing

a through highway in obedience to any such sign duly erected is not to be considered contributory negligence *per se* on the part of a plaintiff in any action at law for injury to person or property, but only evidence of such negligence, we think it follows as a necessary corollary or as the rationale of the statute, that where the party charged is a defendant in any such action, the failure so to stop is not to be considered negligence *per se,* but only evidence thereof to be considered with other facts in the case in determining whether the defendant in such action is guilty of negligence." Likewise, in *Groome v. Davis, supra,* this Court said: "Failure to observe the stop sign is not negligence *per se,* not even *prima facie* negligence, just evidence of negligence." Therefore, under the statute and our decisions the failure of a motorist traveling upon a servient highway to stop in obedience to a stop sign erected by the State Highway & Public Works Commission as authorized by the statute, G. S., 20-158, is not negligence, but only evidence thereof which may be considered along with other facts and circumstances adduced by the evidence, in passing upon the question of negligence. *Reeves v. Staley,* 220 N. C., 573, 18 S. E. (2d), 239.

Consequently, the failure of the driver of the defendant's truck to stop, in obedience to the stop sign erected by the State Highway & Public Works Commission on Highway No. 102, before entering the intersection with Highway No. 421, a dominant highway, was not negligence *per se,* but such failure to stop is evidence of negligence. However, such evidence standing alone would be insufficient to make out a *prima facie* case of negligence against the defendant. *Templeton v. Kelley,* 215 N. C., 577, 2 S. E. (2d), 696; *Groome v. Davis, supra; Marsh v. Byrd,* 214 N. C., 669, 200 S. E., 389.

It is the duty of the operator of a motor vehicle to exercise that degree of care for his own safety and the safety of others, which an ordinarily prudent person would exercise under similar circumstances. But as said in *Reeves v. Staley, supra,* "A motorist is not under a duty of anticipating negligence on the part of others, but in the absence of anything which gives or should give notice to the contrary, a person is entitled to assume, and to act on the assumption, that others will exercise ordinary care for their own safety. 45 C. J., 705; *Shirley v. Ayers,* 201 N. C., 51, 158 S. E., 840. See, also, *Cory v. Cory,* 205 N. C., 205, 170 S. E., 629; *Jones v. Bagwell,* 207 N. C., 378, 177 S. E., 170; *Hancock v. Wilson,* 211 N. C., 129, 189 S. E., 631; *Sebastian v. Motor Lines,* 213 N. C., 770, 197 S. E., 539; *Guthrie v. Gocking,* 214 N. C., 513, 199 S. E., 707; *Butner v. Spease, supra* (217 N. C., 82, 6 S. E. (2d), 880)."

For the reasons pointed out herein, the defendant is entitled to a new trial and it is so ordered.

New trial.

M. G. PICKETT, E. F. McLENDON AND A. B. MANGUM v. J. R. OVERMAN.

(Filed 19 December, 1947.)

Cancellation of Instruments § 9—

In plaintiffs' action for specific performance of defendant's agreement to sell stock in a close corporation, defendant admitted the allegations of the complaint but alleged in effect that he was induced to sign the contract by false representations as to the value of the stock and threats made by plaintiffs that if he did not sell, plaintiffs, through their majority control, would deprive defendant of future dividends on the stock and the bonus theretofore annually paid to stockholders. *Held:* Defendant's answer alleges fraud, undue influence and coercion practiced by plaintiffs in procuring defendant's execution of the contract, and judgment on the pleadings decreeing specific performance on the ground that the answer was insufficient to allege legal fraud, is reversed.

APPEAL by defendant from *Bone, J.,* September Term, 1947, ALAMANCE. Reversed.

Civil action to compel specific performance of a contract to convey capital stock in a close corporation.

Glenover Hosiery Mills, Inc. is a close corporation. Its stock consists of 380 shares of which plaintiffs own 270 shares and defendant owns 90 shares.

The defendant, answering the complaint filed, admits the contract, demand, tender, and ability of plaintiffs to perform on their part. In further defense he avers that the said contract is not binding and enforceable "for the reason that he was induced to sign the same by the fraud, duress and coercion of the plaintiffs, as hereinafter set out." Thereafter he pleads the representations, acts, and conduct of plaintiffs which he contends constitute fraud, undue influence and coercion.

When the cause came on for trial, after plaintiffs had offered in evidence the admissions contained in the answer, the court "being of the opinion that the facts so alleged do not constitute legal fraud and are not sufficient to bar plaintiffs' right to recover upon said written agreement," and that on the facts alleged and admitted, plaintiffs are entitled to specific performance thereof, entered judgment on the pleadings decreeing specific performance as prayed. Defendant excepted and appealed.

Cooper, Sanders & Holt for plaintiff appellees.

Thos. C. Carter and W. D. Madry for defendant appellant.

BARNHILL, J. The one question presented for decision on this appeal is this: Are the facts alleged in defendant's answer and further answer sufficient to constitute a plea of fraud, undue influence and coercion prac-

ticed by plaintiffs in procuring defendant's execution of the contract set out in the complaint and admitted in the answer? The court below answered in the negative. A careful consideration of the record leads us to the opposite conclusion.

The defendant, in support of his allegation that he was induced to sign the contract "by the fraud, duress and coercion of the plaintiffs," avers in substance that he is uneducated and inexperienced, being a machine fixer in the mill; that he had no access to the books and records of the corporation which were at all times in the custody of plaintiffs; that plaintiffs knowingly and falsely, with intent to deceive, grossly misrepresented the value of the stock, of which value he had no knowledge; that he was deceived thereby; that each stockholder was paid annually a bonus equal to 20% of the face value of his stock in addition to dividends and salaries; that plaintiffs asserted that if he did not sell, they, through their majority control, would discontinue his bonus and deprive him of all future dividends, "pictured to the defendant the many injurious consequences that would result to him if he did not sell his stock at once at the price offered"; that they continued to make threats about the methods they would use to prevent him from realizing any further income from his said stock and "did 'bulldoze' the defendant and by threats of depriving him of all future profits on his stock, and by misrepresenting the true value of his stock, did inveigle the defendant into signing said contract."

Thus, on defendant's allegations it would seem plaintiffs not only knowingly falsely represented the value of the stock to be much lower than its real value, but also, by virtue of their complete control of corporate affairs, placed defendant in the position where he was compelled to sell at their price or else suffer the loss of the income-producing quality of his stock which, in turn, would destroy or materially reduce its market or sales value. It was not a case of take it or leave it, but a case of take it or lose it. He was compelled to choose whether he would be cast against Scylla or engulfed in Charybdis. So he alleges. He is entitled to his day in court to seek to make good these allegations.

The judgment below is

Reversed.

S. S. KIRKLAND, R. S. KIRKLAND AND BESSIE KIRKLAND v. JENNIE MAE COUCH DECK AND HUSBAND, ALBERT E. DECK.

(Filed 19 December, 1947.)

Trusts § 26: Deeds § 6½—

A voluntary conveyance of property in trust to named beneficiaries for life with contingent limitation over to persons not *in esse*, is revoked as to such contingent limitation by proper deed executed by the trustee and surviving trustors within six months after the effective date of Ch. 437, Session Laws 1943, the deed of revocation being executed prior to the happening of the contingency upon which the limitation over was to vest. G. S., 39-6.

APPEAL by defendants from *Bone, J.*, at October Term, 1947, of ORANGE. Affirmed.

Plaintiffs sought recovery on a note given for the purchase of land. Defendants resisted on the ground of defect of plaintiffs' title to the land, growing out of an attempted revocation of a trust heretofore created in the land. The case was heard below on an agreed statement of facts, which may be summarized as follows:

In 1908 John B. Kirkland, James W. Kirkland, Hallie Kirkland, Bessie Kirkland, R. S. Kirkland, and S. S. Kirkland, owners of the land as tenants in common, joined in a voluntary conveyance to S. Strudwick, Trustee, in trust "for the use and benefit of Hallie Kirkland and Bessie Kirkland during the terms of their natural lives, and at their death then said trustee is to convey to the other parties of the first part or the children of such as may be dead who shall take as their parents would have done if living." John B. Kirkland, James W. Kirkland and Hallie Kirkland are dead, intestate and without issue. The three remaining grantors in the trust conveyance have no children. On 25 March, 1943, the trustee, desiring to be relieved of the trust, and the grantors desiring to revoke it, executed deed to R. S. Kirkland, S. S. Kirkland and Bessie Kirkland, the only surviving grantors in the trust conveyance, revoking the trust in the land and reconveying it to the same persons who would otherwise have been entitled under the trust and under the canons of descent. The surviving grantors joined in the deed revoking the trust, and signified their acceptance of its termination. This deed was duly recorded 26 March, 1943.

Judgment was rendered that plaintiffs' title was good, and that they recover of defendants the amount of the note. Defendants appealed.

Bonner D. Sawyer for plaintiffs, appellees.

L. J. Phipps for defendants, appellants.

DEVIN, J. The North Carolina statutes granting power of revocation of voluntary conveyances of property in trust in which there are contingent limitations over to persons not *in esse,* were brought forward in General Statutes as section 39-6. This statute permits the grantor in a voluntary conveyance in which some future interest in real property is conveyed or limited to a person not *in esse,* before such person comes into being, to revoke by deed the interest so conveyed. The statute also declares that "the grantor, maker or trustor who has heretofore created or may hereafter create a voluntary trust estate in real or personal property for the use and benefit of himself or of any other person or persons *in esse* with a future contingent interest to some person or persons not *in esse* or not determined until the happening of a future event, may at any time, prior to the happening of the contingency vesting the future estates, revoke the grant of the interest to such person or persons not *in esse* or not determined by a proper instrument to that effect." The statute was made inapplicable to trusts thereafter created which were expressly stated to be irrevocable, and it was further provided "that this section shall not apply to any instrument heretofore executed whether or not such instrument contains express provision that it is irrevocable unless the grantor, maker or trustor shall within six months of the effective date of this proviso either revoke such future interest, or file with the trustee an instrument stating or declaring that it is his intention to retain the power to revoke under this section." The proviso last quoted was added by Chap. 437, Session Laws 1943, which was ratified 4 March, 1943. The deed of revocation in the case at bar was executed 25 March, 1943, and recorded the following day, within the six months period prescribed by the Act.

The statute in which the several acts on the subject are codified as G. S., 39-6, was recently considered by this Court and its constitutionality, history and effect discussed in the opinion written for the Court by *Justice Seawell* in *Pinkham v. Mercer,* 227 N. C., 72, 40 S. E. (2d), 690. The statute, before the amendment of 1943, was also considered and given effect in *MacMillan v. Trust Co.,* 221 N. C., 352, 20 S. E. (2d), 276; *MacRae v. Trust Co.,* 199 N. C., 714, 155 S. E., 614; *Stanback v. Bank,* 197 N. C., 292, 148 S. E., 313.

It may be noted also that the trust conveyance covering the land which is the subject of the present action was voluntary and contained no provision against revocation.

The judgment of the Superior Court is

Affirmed.

WM. GRADY PRITCHARD AND MISS JOSEPHINE PRITCHARD, TRUSTEES, ESTATE OF I. W. PRITCHARD; GORDON BLACKWELL AND WIFE, ELIZABETH L. BLACKWELL, v. GLYNN FIELDS, W. G. FIELDS, ATTORNEY FOR GLYNN FIELDS, PERCY BARBER AND MRS. PERCY BARBER.

(Filed 19 December, 1947.)

Trespass to Try Title § 3: Pleadings § 24c—

In an action for damages for trespass and to enjoin further trespass upon an easement claimed by plaintiffs by dedication, the burden is on plaintiffs to establish the property right asserted, and defendants are entitled to introduce the record of withdrawal of dedication executed pursuant to G. S., 136-96, as a release or extinguishment by estoppel of record from sources to which plaintiffs were a privity, notwithstanding the absence of allegation in their answer of such withdrawal from dedication.

DEFENDANTS' appeal from *Parker, J.*, at June Civil Term, 1947, of ORANGE.

John T. Manning for plaintiffs, appellees.

Henry A. Whitfield, Bonner D. Sawyer and L. J. Phipps for defendants, appellants.

SEAWELL, J. The controversy here is over the alleged easements acquired by plaintiffs, holders by *mesne* conveyances of the titles to lots in a real estate development known as "Forest Hills," in Orange County, allegedly purchased with reference to a map which indicated as "streets" and "Parks" adjoining near-by areas. The plaintiffs brought the action to enjoin the defendants from committing acts of trespass on the dedicated areas, and interfering with their enjoyment of the easement thereupon by assertion of a private claim, and putting the property to a private use in defeat of the dedication. In their complaint they allege themselves to be possessed of certain rights, title, and interest in and to the use of a road marked on the map as "To Chase Park" and the tract designated as "Park," and ask that the defendants be enjoined from any use thereof contrary to the said interest; and demand damages for such contrary use and injury to plaintiffs' enjoyment of the easement in the property.

The defendants deny that plaintiffs have any easement or interest whatsoever in the lands described by them. The defendant Percy Barber admits that by *mesne* conveyances he is the owner of the property described, and plans to erect thereupon two dwellings.

The evidence discloses a common source of title, the Chapel Hill Insurance and Realty Co. Some of the deeds of the plaintiffs refer to a map, and some of the predecessors in title to some of the plaintiffs

testified that the map was exhibited to them when they bought, and the dedication of street and park explained to them.

While the deeds under which plaintiffs' dedication was made were recorded before the Trust Deed executed by the Chapel Hill Insurance and Realty Co. to Hogan was executed and recorded, the map under which the easements are claimed was not put on record until a later date.

The defendants hold title under the Hogan deed. That deed and the *mesne* conveyance of title therefrom, under which defendants hold, convey that area marked "Park" on the map, the way marked on the map as "To Chase Park," and the unlettered triangle to the southeast of the Chase Road.

On the trial of the cause, and after the jury had been selected but not impaneled, on an intimation by the court that defendants would not be permitted to introduce evidence of a withdrawal of the dedication under the statute G. S., 136-96, because of want of allegation thereof in their pleading, defendants moved to be permitted to amend their answer, which motion his Honor, in the exercise of his discretion, denied.

When the defendants' turn came to introduce evidence they offered evidence to identify the record containing the alleged withdrawal, and it was excluded. Defendants excepted. The defendants offered the record of the withdrawal which was rejected. Defendants excepted. In each instance the evidence was rejected on the ground that the withdrawal of dedication must be pleaded before evidence thereof could be admitted.

We do not consider the rule insisted upon applicable to the situation found in the instant case. The plaintiffs alleged that they had an easement in the lands described and the defendants denied it. The burden was upon the plaintiffs to establish the property right they claimed. If the defendants sought to produce conveyances from sources to which plaintiffs were a privy releasing or discharging the easement or could have established release or extinguishment by estoppel of record, or by judicial proceeding, they certainly would have been entitled to show it in the evidence without previous allegation or notice in the pleading. This in effect is what they sought to do.

G. S., 136-96, *ex propria vigore,* terminates claim with respect to dedication to public use "by any deed, grant, map, plat, or other means" of any parcel of land which has not been opened and used by the public within twenty years after the dedication thereof, unless the claim has been asserted within two years from and after 8 March, 1921, *provided a declaration of withdrawal thereof from public or private use by the dedicator or those claiming under him shall be filed in the office* of the Register of Deeds of the county in which the land lies. *Sheets v. Walsh,* 215 N. C., 711, 2 S. E. (2d), 861.

The defendants were entitled to introduce the record of such withdrawal and have the question presented on its merits.

It is unnecessary to pass on the other questions raised. The defendants are entitled to a new trial. It is so ordered.

New trial.

STATE v. JAMES LAW AND MATTHEW KELLY.

(Filed 19 December, 1947.)

Intoxicating Liquor § 8: Indictment § 20: Larceny § 4—

An indictment for larceny of an automobile which had been seized by officers of the law which lays the ownership of the automobile individually in one of the officers who had seized it, will not be held fatally defective, since such officer was entitled to hold the automobile and approve bond for its return, and thus had a special interest therein sufficient to obviate a fatal variance.

APPEAL by defendants from *Clement, J.*, at June Term, 1947, of FORSYTH.

Criminal prosecution on indictment charging the defendant, in one count, with the larceny of an automobile, of the value of $700.00, the property of one Oscar Morrison; and in a second count, with receiving the same automobile, knowing it to have been feloniously stolen or taken in violation of G. S., 14-71.

The evidence for the prosecution tends to show that on the night of 15 April, 1946, Oscar Morrison and Holt Neal, police officers of the City of Winston-Salem, took possession of an automobile on Mickey Mill Road in the Eastern section of the City, which they thought had been used in the transportation of non-tax-paid whiskey contrary to law, and drove it to the city lot where it was parked for the night.

During the night, the automobile was stolen from the city lot, and there is evidence, circumstantial and presumptive, tending to connect the defendants with its disappearance.

The defendants rested on their demurrers to the State's case and offered no evidence.

Verdict: Guilty as to both defendants.

Judgment: Two years on the roads as to each defendant.

The defendants appeal, assigning errors.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

William H. Boyer and Philip E. Lucas for defendant.

STACY, C. J. The case was here at the Fall Term, 1946, on an indictment which laid the ownership of the property in the City of Winston-Salem. The officer who seized the property was alone entitled to hold it, or approve bond for its return, and it was suggested the right to the property should be laid in the seizing officer or in the custody of the law. 227 N. C., 103.

In the present bill, the ownership of the property is laid in Oscar Morrison. On the hearing, it appeared that Oscar Morrison was one of the seizing officers who took possession of the automobile. The defendants have again pressed the issue of fatal variance with vigor and confidence.

Oscar Morrison, as one of the seizing officers, was entitled to hold the automobile and to approve bond for its return, thus he had a special interest therein. This suffices, we think, to overcome the demurrers to the evidence and to obviate a fatal variance. *S. v. Allen,* 103 N. C., 433, 9 S. E., 626; *S. v. Bell,* 65 N. C., 313; *S. v. Grant,* 104 N. C., 908, 10 S. E., 554.

The exceptions to the charge are too attenuate to invalidate the trial.

The verdict and judgments will be upheld.

No error.

M. P. JONES v. HUNTER R. NEISLER.

(Filed 19 December, 1947.)

1. Landlord and Tenant § 37—

The grantor of land reserved the hunting rights in himself and later gave an oral lease of the hunting rights at a stipulated sum yearly. The successor to the grantee refused to permit the lessee of the hunting rights to enter upon the property for the purpose of hunting. *Held:* The lessor cannot maintain an action against defendant for damages, since if the lease of the hunting rights is valid the lessee and not the lessor is the one who suffered the damages, whereas if the lease is void defendant cannot be made to respond in damages for refusing to recognize it.

2. Parties § 1—

Every action must be prosecuted in the name of the real party in interest. G. S., 1-57.

APPEAL by plaintiff from *Bone, J.,* at April Term, 1947, of BLADEN.

This is a civil action to recover damages against the defendant for refusing to permit one Jay Smith, to whom plaintiff had orally leased the hunting right on the land described in the record, from entering upon the property for the purpose of hunting.

The agreed facts pertinent to this appeal are as follows:

1. On 16 November, 1938, the plaintiff was the owner in fee simple of the tract of land described in the complaint and on said date he executed and delivered to his wife, Essie Maud Jones, a deed for the property, which deed contained the following reservation: "However, the said M. P. Jones does hereby reserve unto himself and except from this conveyance the hunting right on said described property for a period of ninety-nine years.

2. The defendant is now the owner of the tract of land referred to herein.

3. Sometime prior to 2 October, 1944, the plaintiff undertook to lease orally to one Jay Smith for the sum of $80.00 per year such hunting rights, if any, as were reserved to plaintiff in his deed to his wife.

4. It was agreed that the damages, if any, should be awarded in the sum of $120.00.

5. The plaintiff on 3 November, 1939, executed and delivered to Ed Mitchem *et al.* an assignment of his hunting rights on this tract of land, which instrument is duly recorded in the office of the Register of Deeds of Bladen County. However, this assignment is not to be effective until the death of the plaintiff.

Upon the foregoing facts and the admissions in the pleadings, the court was requested by the plaintiff and the defendant to render judgment in accordance with the court's opinion as to the legal rights of the parties.

The court held as a matter of law, that the plaintiff was not entitled to recover anything and entered judgment accordingly.

The plaintiff appeals, assigning error.

Clayton C. Holmes and H. L. Williamson for plaintiff, appellant.

H. H. Clark and Edward B. Clark for defendant, appellee.

DENNY, J. The record does not disclose the ground upon which the court below held the plaintiff is not entitled to recover in this action. Nevertheless, we think the contention of the defendant that the complaint does not state a cause of action against him is correct.

The plaintiff alleges he gave an oral lease of his hunting rights on the premises in question, to a third party for a valuable consideration; and brings this action for damages against the defendant for refusing to permit the lessee to exercise such rights. The date of the lease is not alleged nor is the date of its termination disclosed.

If during the period of time in question, the lessee held a valid assignment of the plaintiff's hunting rights, and was wrongfully prevented from exercising those rights by the defendant, the lessee, and not the

plaintiff, is the one who suffered damages. Every action must be prosecuted in the name of the real party in interest. G. S., 1-57. The lessee is not a party to this action. On the other hand, if the lease is void the defendant cannot be made to respond in damages for refusing to recognize it.

A determination of the validity or invalidity of the lease or assignment of the hunting rights, not being essential to a disposition of this appeal, we express no opinion thereon.

The judgment of the court below will be upheld.

Affirmed.

STATE v. JOHN PHILLIPS.

(Filed 19 December, 1947.)

1. False Pretense § 2—

A warrant charging defendant with obtaining a money advance under promise to do certain work, and with failure to perform the work, without alleging that the advances were obtained with intent to cheat or defraud, is fatally defective. G. S., 14-104.

2. Criminal Law § 56—

Where the warrant upon which defendant is tried is fatally defective, motion in arrest of judgment will be allowed even though interposed for the first time in the Supreme Court on appeal.

APPEAL by defendant from *Bone, J.*, at July Term, 1947, of DURHAM.

Criminal prosecution on warrant charging the defendant with unlawfully obtaining $27.81, as money advanced, "under promise to do certain work for Robert Dunn and did then and there fail and refuse to do the work or any part of it with the exception of one day's work."

The case was tried in the Recorder's Court and *de novo* on defendant's appeal to the Superior Court.

Verdict: "Guilty as charged in the warrant."

Judgment: Thirty days on the roads.

The defendant appeals, assigning errors.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

J. Grover Lee for defendant.

STACY, C. J. Upon the call of the case here the defendant lodged a motion in arrest of judgment for that it is not alleged the defendant

obtained the advances "with intent to cheat or defraud." G. S., 14-104. The defect is fatal, and it appears on the face of the record. *S. v. Foster, ante,* 72; *S. v. Norman,* 110 N. C., 484, 14 S. E., 968. The warrant charges no offense.

The motion is well interposed and must be allowed. *S. v. Morgan,* 226 N. C., 414, 38 S. E. (2d), 166.

Judgment arrested.

MACK WHITTED v. PALMER-BEE COMPANY, AND ROYAL INDEMNITY COMPANY.

(Filed 30 January, 1948.)

1. Master and Servant § 55d—

Facts found by the Industrial Commission under a misapprehension of law are not binding on appeal.

2. Master and Servant § 53b (3)—

Payment of medical or hospital expenses constitutes no part of compensation to an employee or his dependents under the provisions of our Workmen's Compensation Act. G. S., 97-2 (k).

3. Master and Servant § 53c—

The review of an award for change of condition must be made within twelve months from the date of the last payment of compensation pursuant to an award, and while the right to review was enlarged by ch. 823, Session Laws of 1947, to include instances in which only medical or other treatment bills are paid, the amendment provides for review in such cases only within twelve months of the date of last payment of bills for medical or other treatment. G. S., 97-47.

4. Master and Servant § 43—Report of accident as required by G. S., 97-92, is not filing of claim as required by G. S., 97-24.

Claimant was injured by accident arising out of and in the course of his employment. He reported the accident to the employer, who, on the day of the accident, reported it to the Industrial Commission as required by G. S., 97-92. Subsequently bills for medical services rendered claimant as a result of the injury were approved for payment by the Commission. No claim for compensation was filed by the employee, the employer or the insurance carrier. More than a year after the accident the employee first discovered the serious effects of the accident and requested a hearing before the Industrial Commission. *Held:* No claim for compensation having been filed within twelve months from the date of the accident and no request for a hearing having been made within that time, and no payment of bills for medical treatment having been made within the twelve months prior to the request for a hearing, the claim is barred by G. S., 97-24.

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

BARNHILL, J., concurring.

SEAWELL, J., dissenting.

APPEAL by plaintiff from *Armstrong, J.*, at November Term, 1947, of FORSYTH.

This is a proceeding for compensation, under the provisions of the North Carolina Workmen's Compensation Act, for an injury by accident arising out of and in the course of the employment of the plaintiff by the defendant, Palmer-Bee Company, on 15 June, 1944. The defendant Royal Indemnity Company was the insurance carrier of its codefendant at the time of the accident.

The plaintiff, Mack Whitted, hereinafter called "claimant," was employed as a machine setter. On the above date, while setting up a machine on the premises of his employer, a piece of slag or metal flew up and struck him in the right eye. The accident was reported to the employer on the day it occurred. The employer reported the accident to the Industrial Commission on the same day. Thereafter, small medical bills were incurred as a result of the injury, which bills were approved for payment by the North Carolina Industrial Commission and paid on 5 July, 1944, by the defendant carrier.

No claim for compensation was filed within twelve months by the claimant with the Industrial Commission for loss of wages because he lost no time from his employment on account of the accident.

On 24 June, 1946, the claimant, through his attorneys, notified the Industrial Commission that he had recently developed a cataract on his right eye and had completely lost his sight in that eye, and requested a hearing.

The opinion of the Commissioner who heard this matter and whose opinion was adopted by the Full Commission and affirmed by the Superior Court, contains the following statements and findings of fact:

"When this case was heard before the undersigned in Winston-Salem on February the 18th, 1947, it was admitted, and the Commissioner finds it as a fact from the evidence that the claimant is totally blind in his right eye. The Commissioner finds it as a fact from the evidence that this blindness is due to the injury which he sustained while working for the defendant on June the 15th, 1944. The Commissioner further finds that said blindness is due to the injury, and that the injury to the cornea of the eye precipitated a slow developing pathological condition that did not produce the blindness in the claimant's eye until approximately eighteen months after the date of the injury; and, therefore, during this time the claimant had no claim against the defendants because he had lost no time on account of the injury, and for a period

of eighteen months while this condition was developing, until it reached the maximum condition, to wit, blindness, he was not entitled to any compensation, and, therefore, did not file any claim. According to the evidence of Dr. Speas, the eye, ear, nose and throat specialist who treated this claimant originally and had examined him on numerous occasions since, testified that the abrasion to the cornea set in motion a condition that spread and formed a cataract that now makes the claimant blind, but that it took approximately eighteen months for this spread from the site of the abrasion to develop the cataract that now causes total blindness."

Whereupon it was held that since no claim was filed with the North Carolina Industrial Commission within twelve months from the date of the accident, the claim is barred by the statute of limitations.

The plaintiff appealed to the Superior Court. At the hearing on this appeal, the award of the Commission was affirmed, and the claimant appealed to the Supreme Court.

Deal & Hutchins for plaintiff, appellant.

Womble, Carlyle, Martin & Sandridge for defendants, appellees.

DENNY, J. It is contended by the appellees that the findings of fact by the Industrial Commission are conclusive on this appeal. Ordinarily this is true where the facts found are supported by any competent evidence, *Creighton v. Snipes,* 227 N. C., 90, 40 S. E. (2d), 612; *Rewis v. Ins. Co.,* 226 N. C., 325, 38 S. E. (2d), 97; *Hegler v. Mills Co.,* 224 N. C., 669, 31 S. E. (2d), 918; *Kearns v. Furniture Co.,* 222 N. C., 438, 23 S. E. (2d), 310; but where the facts are found by the Commission under a misapprehension of the law, the court is not bound by such findings. *McGill v. Lumberton,* 215 N. C., 752, 3 S. E. (2d), 324; *Stanley v. Hyman-Michaels Co.,* 222 N. C., 257, 22 S. E. (2d), 570.

The facts are not in dispute. The claimant sustained an injury by accident arising out of and in the course of his employment, on 15 June, 1944, resulting in the total loss of sight in his right eye. The accident was duly reported as required by G. S., 97-92. The serious nature of the injury was not discovered nor was it discoverable, in so far as the claimant was concerned, until more than twelve months after the date of the accident which caused it.

Therefore, upon these undisputed facts, did the court below reach the correct conclusion of law? In arriving at the answer to this question, we must determine whether or not the report of the accident given by the employer to the Commission, and the subsequent exercise of jurisdiction by the Commission in receiving and approving for payment bills for medical services rendered to the claimant as a result of the injury

sustained in the accident, meet the requisites of G. S., 97-24, the pertinent part of which reads as follows: "The right to compensation under this article shall be forever barred unless a claim be filed with the industrial commission within one year after the accident, and if death results from the accident, unless a claim be filed with the commission within one year thereafter."

The appellees are relying upon *Lineberry v. Town of Mebane,* 218 N. C., 737, 12 S. E. (2d), 252; *Winslow v. Carolina Conference Asso.,* 211 N. C., 571, 191 S. E., 403; *Lilly v. Belk Bros.,* 210 N. C., 735, 188 S. E., 319; *Wilson v. Clement,* 207 N. C., 541, 177 S. E., 797; *Wray v. Woolen Mills,* 205 N. C., 782, 172 S. E., 487, and similar cases. On the other hand, they insist that *Hanks v. Utilities Co.,* 210 N. C., 312, 186 S. E., 252, and *Hardison v. Hampton,* 203 N. C., 187, 165 S. E., 355, cases upon which the appellant is relying, are not in point.

We think an examination of these and other cases will be helpful in arriving at a proper decision on this appeal. It is clearly evident from a careful examination of the record herein that all parties have acted in good faith. The ultimate result, therefore, must rest upon the respective legal rights of the parties, based upon the undisputed facts disclosed by the record.

In the case of *Lineberry v. Town of Mebane, supra,* the claimant, on 24 July, 1939, filed with the Industrial Commission a report of an injury alleged to have been sustained by him on 31 May, 1938, while working for the defendant. It was held, "The provisions of Sec. 24, Ch. 120, Public Laws 1929 (G. S., 97-24), constitute a condition precedent to the right to compensation, and is not a statute of limitations . . . If an employee fails to file notice of his claim within twelve months after the date he sustains an injury by accident arising out of and in the course of his employment, he has no right to compensation under the express terms of the statute."

Likewise, in *Winslow v. Carolina Conference Asso., supra,* the first report of the accident which occurred on 4 June, 1934, was filed with the Industrial Commission on 28 June, 1935. Also in *Lilly v. Belk Bros., supra,* the claimant was injured in January, 1934, and the notice of the injury was not given to the Industrial Commission until July, 1935.

In *Wilson v. Clement Co., supra,* the plaintiff suffered an accident in the course of his employment on 15 August, 1929. He employed counsel and filed a claim with the Industrial Commission on 8 September, 1930. The hearing Commissioner found "that no written report of the accident by the employee, employer or insurance carrier was filed with the Industrial Commission within one year from the date of the accident," and denied a recovery. There was an appeal to the full commission, and it

found that no claim for compensation had been filed by anyone on behalf of the claimant within one year after the accident, but reversed the hearing Commissioner on other grounds. The decision of the hearing Commissioner was upheld by this Court.

In the case of *Wray v. Woolen Mills, supra,* an employee had been injured on 28 November, 1930, and the Industrial Commission had not been notified of the injury until 12 April, 1932. A claim by the injured employee for compensation was denied for failure to file his claim within twelve months from the date of the injury. However, the claimant having died as a result of his injury, on 24 August, 1932, his dependents were permitted to file a claim and an award based thereon was affirmed.

In *Hardison v. Hampton, supra,* the employee was injured on 27 March, 1930. He gave notice in writing to his employer of the accident and resulting injury on 28 March, 1930. He stated that he did not consider his injury serious, but was advised that it might terminate in a permanent rupture. On 25 August, 1930, the employer notified the insurance carrier, and thereupon at the request of the carrier reported the accident and claim for compensation to the Industrial Commission on Form 19, as prescribed by the Commission. Negotiations were entered into between the employee and the carrier. No agreement was reached. The carrier upon inquiry from the Commission suggested that in view of the attitude of the employee it saw nothing to do but have a hearing. No hearing was set, however, until it was requested by the employee more than twelve months after the accident. This Court said: "The injured employee is required by section 22 of the act to give notice to his employer of the accident which resulted in his injury. Thereafter, the employer is required to report the accident and claim of the employee for compensation to the Commission on Form 19, as prescribed by the Commission. No settlement of the claim can be made by the employer and the employee without the approval of the Commission. Section 18. If they fail to reach an agreement in regard to the compensation to which the injured employee is entitled, then either party may make application to the Commission for a hearing in regard to the matters at issue, and for a ruling thereon. Section 57. When the employer has filed with the Commission a report of the accident and claim of the injured employee, the Commission has jurisdiction of the matter, and the claim is filed with the Commission within the meaning of section 24."

In *Hanks v. Utilities Co., supra,* it was admitted that the deceased, Curtis Hanks, was at the time of his injury and death, on 6 December, 1929, in the employ of defendant and that the provisions of the Workmen's Compensation Act applied. Under date of 9 December, 1929, defendant employer, a self-insurer, reported the accident to the Industrial Commission on Form 19. The defendant admitted liability and on 26 December, 1929, reported to the Commission that it had offered to settle

the claim with the administrator of the deceased. The administrator of the deceased declined to prosecute the claim pending before the Industrial Commission, but instead instituted an action in the Superior Court of Wilkes County, under the Federal Employers' Liability Act, which ended adversely to him. Thereafter, on 23 March, 1935, a formal petition for an award and a request for a hearing was filed with the Industrial Commission. An award was made and was upheld by this Court. The Court said: "The procedure upon the consideration and determination of a matter within the jurisdiction of the Industrial Commission, agreeable to the provisions of the act and the rules and regulations promulgated by the Commission, conforms as near as may be to the procedure in courts generally. By analogy, cases should be disposed of by some award, order, or judgment final in its effect, terminating the litigation. *Employers' Ins. Ass'n v. Shilling*, 259 S. W., 236; *Todd v. Casualty Co.*, 18 S. W. (2d), 695. A final judgment is the conclusion of the law upon the established facts, pronounced by the court. *Lawrence v. Beck*, 185 N. C., 196; *Swain v. Bonner*, 189 N. C., 185.

"The record before us fails to show any final order or adjudication of any kind prior to the one appealed from.

"A claim for compensation lawfully constituted and pending before the Commission may not be dismissed without a hearing, and without some proper form of final adjudication.

"No statute of limitations runs against a litigant while his case is pending in court."

In each case cited herein upon which the appellees are relying, the Industrial Commission did not receive a report of the accident, a claim for compensation or otherwise obtain jurisdiction of the proceeding, within twelve months of the date of the accident. But in those cases upon which the appellant is relying, the Commission did obtain jurisdiction within the required statutory time. In *Hardison v. Hampton, supra,* notice of the accident and claim for compensation were given to the Commission, negotiations for settlement of the claim between the carrier and the employee were entered into and a request was made by the carrier to the Commission for a hearing, all within twelve months of the date of the accident. While in *Hanks v. Utilities Co., supra,* the Utilities Company being a self-insurer, under the Workmen's Compensation Act, promptly reported the accident to the Commission and admitted liability. Therefore, in each of the last cited cases, a claim was pending before the Commission, within twelve months from the date of the accident.

In the instant case, notice of the accident was given to the Commission on the same date it occurred, but no claim for compensation was filed with the Commission by the employer, the carrier or the employee within

twelve months of the date of the accident. Hence, none of the cases relied upon by the appellant or the appellees are on all fours with this case.

In many jurisdictions the payment of medical expenses is held to be tantamount to the payment of compensation. However, under the definition of the word "compensation" contained in G. S., 97-2, sub-section (k), payment of medical or hospital expenses constitutes no part of compensation under the provisions of our Workmen's Compensation Act. *Morris v. Chevrolet Co.*, 217 N. C., 428, 8 S. E. (2d), 484. Compensation is defined in our statute as the money allowance payable to an employee or his dependents, including funeral benefits.

G. S., 97-47, does authorize the Commission upon its own motion or upon application of any party in interest on the grounds of a change in condition, to review any award, but no such review shall be made after twelve months from the date of the last payment of compensation pursuant to an award under the provisions of our Compensation Act. And this statute was amended by 1947 Session Laws of N. C., Chapter 823, Section 1, Sub-section (6), to include a review on the grounds of change in condition "in which only medical or other treatment bills are paid," but "no such review shall be made after twelve months from the date of the last payment of bills for medical or other treatment, paid pursuant to this Act."

The record herein discloses that no award for compensation has been made at any time in favor of claimant, pursuant to the provisions of our Compensation Act; and that more than two years elapsed after the accident before he requested a hearing. Moreover, prior to the request for a hearing on 24 June, 1946, no claim for compensation was pending before the Commission upon which an award could have been made on behalf of the claimant herein; and the record does not disclose the payment of any medical bills since 5 July, 1944.

It may be regretted that we have no provision in our Workmen's Compensation Act to preserve and protect the rights of employees in cases like the one before us. We do have such provision with respect to certain occupational diseases. 1945 Session Laws, Chapter 762, G. S., 97-58. But in the light of the facts disclosed on the record before us, and the provisions contained in our Workmen's Compensation Act, we think the judgment of the court below must be upheld.

Affirmed.

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

BARNHILL, J., concurring: There are certain undisputed facts which control decision in this case. Claimant on 15 June, 1944, while engaged

in the discharge of his duties as an employee of defendant, received injury to his eye. Defendant filed a report of the accident with the Commission as required by G. S. 97-92, on form furnished by the Commission. The report, dated 15 June, 1944, received by the Commission 22 June, 1944, has printed on it by the Commission the following: "This report filed only in compliance with section G. S. 97-92, and not employee's claim for compensation." At the suggestion of defendant's agent claimant was examined by Dr. Lassiter 15 June, 1944. On June 20 he filed report and bill for services as required by statute G. S. 97-90. On 19 June claimant was examined by Dr. Speas, an eye specialist, who likewise filed with the Commission for approval his statement for services. Both doctors reported that claimant was able to return to his work from the date of the accident, and claimant lost no time on account of the accident from the date of the accident to the time defendant's plant closed in December 1945. The suggestion to the contrary notwithstanding, the claimant neither made nor filed with his employer any claim for compensation as required by G. S. 97-22 and 23.

Nothing further was done until claimant, through counsel, on 24 June, 1946, notified the Commission he desired to press his claim for compensation.

So, then, the only thing the employer did during the twelve months' period after the accident was to file a report of the accident, and the employee filed no claim with his employer as required by G. S. 97-22-23, and he filed no claim with the Commission as required by G. S. 97-24 until more than two years after the accident.

It, therefore, seems clear to me that the majority conclusion that the judgment denying an award should be affirmed is correct and in accord with the pertinent statutory provisions.

The Industrial Commission is primarily an administrative agency of the State, charged with the duty of administering the provisions of the North Carolina Workmen's Compensation Act. As such it furnishes forms for use by employers, employees and others having business with the Commission; receives and tabulates information contained in reports of accidents, G. S. 97-81; approves voluntary settlements made by employers and employees when in accord with the Act, G. S. 97-82; approves for payment bills for services rendered by doctors and others, G. S. 97-90; supervises and enforces regulations for insurance and performs various other functions looking to the proper observance of the Act by employers, employees and insurance carriers. *In re Hayes*, 200 N. C., 133; *Hanks v. Utilities Co.*, 210 N. C., 312.

At the same time it is a special or limited judicial agency, invested with certain judicial powers. As such it possesses the authority and incidents necessary to determine the rights and liabilities of employees

and employers. *Hanks v. Utilities Co., supra.* Its judicial authority is invoked by the filing of a claim for compensation and demand for a hearing. G. S. 97-24; G. S. 97-83; *In re Hayes, supra.*

But nothing in the Act prevents an employer or insurance carrier from invoking its jurisdiction to settle a controversy respecting a claim for compensation. *Hardison v. Hampton,* 203 N. C., 187; *Hanks v. Utilities Co., supra.* It is only necessary that the attention of the Commission be called to the fact, formally or informally, that the claimant is demanding compensation and the necessity for the Commission to settle the question.

While an accident may result in injury which gives rise to a claim for compensation, an accident and a claim, in fact and as contemplated by the Workmen's Compensation Act, are quite different. The employer is required to report the accident, G. S. 97-92, and the report becomes a part of the private records of the Commission, not open to the public, and the Commission, for statistical purposes, must compile the information contained in the report. G. S. 97-81.

The claim is the right of the employee, at his election, to demand compensation for such injuries as resulted from the accident. If he wishes to claim compensation he must notify his employer within thirty days after the accident, G. S. 97-22-23, and if they cannot agree on compensation, he or someone in his behalf must file a claim with the Commission within twelve months, in default of which his claim is barred. G. S. 97-24.

This requirement that he file a claim is a condition precedent to the right of recovery. *Lineberry v. Town of Mebane,* 218 N. C., 737; *Winslow v. Carolina Conference Asso.,* 211 N. C., 571; *Lilly v. Belk Bros.,* 210 N. C., 735; *Wilson v. Clement,* 207 N. C., 541; *Wray v. Woolen Mills,* 205 N. C., 782.

It is contended, however, that the report of the injury constitutes a claim and invokes the jurisdiction of the court. The form on which the report was made expressly states the contrary. This form 19 may not meet the approval of some. Even so, the authority to prescribe its contents is vested in the Commission. G. S. 97-81. It has performed that duty intelligently and in accord with the intent and purpose of the statute under which it acts.

But it is suggested that *Hardison v. Hampton, supra,* "is on all fours," and that, therefore, the question here presented has been decided. The records in the two cases do not sustain this position. Instead the facts are quite different and are easily distinguishable.

In the *Hardison case,* after notice of the accident which occurred 27 March, 1930, was filed, there were negotiations between the employee, the employer and the insurance carrier as contemplated by G. S. 97-17. The negotiations were somewhat drawn out, and the carrier became dis-

satisfied with the delay, which seems to have been due to the refusal of the employee to undergo a necessary operation. On 12 November, 1930, its agent wrote the Commission detailing the facts and the dispute, and stated: "The employer seems to feel that the injured is entitled to compensation for 350 weeks . . . In view of the injured's attitude and in view of the information which I have, I see nothing to do but have a hearing in the matter, in order that the Commission may decide what compensation benefits the injured is entitled to." Copy of the letter was sent to the employee and his counsel applied for a hearing 27 March, 1931.

The Commission properly found and concluded that this letter in effect admitted liability, presented the claim for decision and requested a hearing. It was upon this conclusion, and not on the report of the injury, it assumed jurisdiction, over the protest of employer, and made an award. It was the award founded on these facts which was affirmed by this Court, *Connor, J.*, closing his opinion with the statement:

"In the instant case, the claim of the injured employee was filed with the Industrial Commission within one year after the accident, and for that reason the employee was not barred of his right to compensation."

There is no evidence in the instant case that the employee "at the time of his injury gave notice to his employer, advising him, however, that he did not consider his injury serious, but was advised that it might become so, or that the employer notified the carrier, or that the carrier informed the Commission that no settlement had been agreed upon." The employee did nothing until more than two years after the accident.

It would seem that it might be well for those who are interested to read the record in this case as well as the one in the *Hardison case.*

Hanks v. Utilities Co., supra, factually, is as clearly distinguishable as the *Hardison case.*

The argument is likewise advanced that the Commission, by approving the doctors' bills, "made an award covering the doctors' fees which could only have been incidental to a consideration of the injury."

The doctors examining an employee after an accident are required to file a report and statement of fees for services, without which they cannot collect their remuneration. G. S. 97-90. The payment of their fees constitutes no part of the compensation. G. S. 97-2 (k). But let us take the contrary view, as it is contended that we should, and see where it leads us. The doctors reported there was no injury, and that the employee was capable of returning to work "immediately" from the day of the accident for "day or night" service. These reports were approved by the Commission. If that was an award it concluded the matter.

I can discover no formality, rigidity or uncertainty on this question, though admittedly there may be some prolixity, even in this case. Nor

do I concede to others more liberality of view in the sane interpretation and application of the Workmen's Compensation Act. But the rule of liberal construction does not require us to render decision, even in a hard case such as this, which would put at naught the established procedural practice of the Commission, contravene the plain language of the statute, and overrule former well considered decisions of this Court. The procedure is not now uncertain. It could hardly be made more simple and speedy. Certainty and security are there. The trouble is the claimant unfortunately slept on his rights, and thereby lost his remedy.

I vote to affirm.

SEAWELL, J., dissenting: I believe the case of *Hardison v. Hampton,* 203 N. C., 187, 165 S. E., 365, is in all respects on all fours with the instant case and should be controlling. Succinctly stated the *Hardison case* holds that the legal effect of filing the report of the accident and injury by the employer as required by the Workmen's Compensation Act in what is now G. S., 97-92, is to give the Industrial Commission jurisdiction of the employee's claim and the power and duty of making an award, and is sufficient to satisfy the condition imposed by Sec. 24 of the Act—now G. S., 97-24—although the employee himself had filed no formal claim with the Commission. The decision was not based on any phraseology used in making the report, but refers to the legal effect of the report itself.

In aid of the summary statement of the case furnished in the report, reference should be made to the bound volume of "Records and Briefs," Fall Term, 1932, No. 49. (See history of decisions and awards as affecting the cited sections contemporaneous with the *Hardison case* and subsequent thereto, in "North Carolina Workmen's Compensation Act, Annotated," by Professor M. S. Breckenridge and E. C. Willis, p. 96, particularly first three paragraphs.)

Whether the statute under review is considered one of limitations or as stating a condition upon which an award may be made, it was obviously not intended as thus interpreted to be rigidly enforced in such a way as to demand that the jurisdiction of the Court can only be invoked, and its machinery may only be set in motion by formal application of the injured party to the Industrial Commission for relief,—as would be required to open the doors of the courts of law.

The Industrial Commission is an administrative board created for the summary settlement of matters assigned to its jurisdiction. Essentially its creation is a retreat from the formality, rigidity, prolixity, and uncertainty of the courts of law to a more simplified procedure in which adjustment and speedy relief are *desiderata* as much as certainty and

security. Reviewing courts steeped in the juridical tradition have not always envisioned the liberality which this entails as either possible or desirable; it is, nevertheless, essential to the purposes of the new forum and when it is denied these boards lose character and become unnecessary and costly diversions from the courts of law.

The *Hardison case* is in line with the humanitarian, economic and legal philosophy out of which the Workmen's Compensation Act was born and deserves recognition in the case at bar.

Since the Industrial Commission assumed jurisdiction of the case and made an award covering the fees of the doctor—which it could only have done as an incident to its jurisdiction of the claim—it leads one to wonder how many persons may be allowed to ride in on a nonexistent jurisdiction, or one from which at least the person primarily and originally interested, and for whose benefit the Act itself was made, is excluded.

In my opinion the judgment of the court below should be reversed and the cause remanded to the Industrial Commission for a hearing upon the merits.

AMERICAN TRUST COMPANY OF CHARLOTTE, NORTH CAROLINA, AS TRUSTEE UNDER THE WILL OF WILLIAM H. WILLIAMSON (THE ELDER), AND ALSO AS EXECUTOR AND TRUSTEE UNDER THE WILL OF WILLIAM H. WILLIAMSON, JR., v. WILLIAM H. WILLIAMSON, III, A MINOR, AND MARY MARTIN WILLIAMSON, A MINOR, AND SARAH WILLIAMSON LAMB (NEE SARAH TUCKER WILLIAMSON) AND THE UNBORN ISSUE OF SAID WILLIAM H. WILLIAMSON, III, AND MARY MARTIN WILLIAMSON.

(Filed 30 January, 1948.)

1. Wills § 33h—

Where there is a devise of property with power of disposition, the rule against perpetuities relates back to the time the power of appointment is given and not the date of its exercise.

2. Same—

Where the attempted exercise of a power of disposition by will is void because violative of the rule against perpetuities, the donee dies intestate as to such property. In the instant case the original will covered such contingency by providing that should the donee die intestate the property should go to the donee's child or children.

3. Same—

Since the rule against perpetuities relates back to the time the power of appointment is given and not to the date of its exercise, the rule against perpetuities precludes the donee of the power from creating a trust which the donor could not have created had he so desired.

4. Wills § 33f—

The donee of a power of disposition is no more than a designated agent to exercise the power of appointment within the limits prescribed, and the title to the property does not vest in the donee.

5. Wills § 33h—

Testator devised certain property in trust with power of disposition by will to his son. The son, in exercising the power, devised a part of the property in trust for his children with a limited power to them to dispose of by will. *Held:* Since the son's children may or may not die within twenty-one years from the son's death, the devise of the power of disposition by will to his children is void as violating the rule against perpetuities.

6. Same—

The rule against perpetuities does not apply to charitable trusts, but it does apply to trusts created for private purposes, and a private trust must terminate within a life or lives in being and twenty-one years and ten lunar months thereafter. G. S., 36-21.

7. Wills §§ 33f, 33h—

The exercise of a power of appointment will not be held invalid *in toto* because some of the provisions thereof violate the rule against perpetuities if the provisions which violate the rule are severable from the valid provisions, and in the instant case the provisions being severable, the donee died intestate in regard to the invalid provision and, under the will of the original donor, this property vested in the children of the donee, free and clear of any restraints or other limitations.

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

APPEAL by P. C. Whitlock, guardian *ad litem* for minor defendants, William H. Williamson, III, and Mary Martin Williamson, from *Bobbitt, J.*, in Chambers at Charlotte, North Carolina, 11 October, 1947. From MECKLENBURG.

The facts necessary to a disposition of this appeal are as follows:

1. William H. Williamson, Sr., died 29 March, 1926, leaving a will which was probated in Mecklenburg County. The testator left only two children, William H. Williamson, Jr., born 5 December, 1903, and Sarah Tucker, now Mrs. Sarah Williamson Lamb, born 13 September, 1912. By this will William H. Williamson, Sr., vested in his son, William H. Williamson, Jr., a power of appointment over the property placed in trust with the American Trust Company, exercisable by William H. Williamson, Jr., after he reached the age of 23 years.

The creation of the power was in these words: "It is distinctly understood that my son, William, shall have the right to dispose of the entire estate placed in the hands of the said Trustee for his benefit hereunder by will at any time after he shall reach the age of twenty-three (23) years."

The will of William H. Williamson, Sr., provides among other things, that, "Should my son die intestate, leaving surviving child or children and a wife, then such estate shall be divided equally between said surviving child or children and wife, share and share alike, and should he die intestate, leaving only child or children, then such estate shall go to such child or children."

2. William H. Williamson, Jr., having attained the age of 23 years, died on 3 March, 1945, leaving a will which was also probated in Mecklenburg County. By this will the testator attempted to exercise the power of appointment vested in him by the will of his father, devised and bequeathed to American Trust Company, as trustee, the property held in trust for him by that company, as well as other property which he owned outright.

3. The wife of William H. Williamson, Jr., predeceased him. He left two minor children, William H. Williamson, III, born 30 May, 1931, and Mary Martin Williamson, born 13 April, 1934.

4. The pertinent provisions of the will of William H. Williamson, Jr., are as follows: "All the rest and residue of my estate, of every sort and description and wheresoever situate, including that estate left me by my father, Wm. Holt Williamson, of which the American Trust Company, Charlotte, North Carolina, is now trustee and which I have the right to will after reaching the age of 23, according to the terms of the last will and testament of said William Holt Williamson, dated the 9th day of May, 1923, I give, devise and bequeath to the American Trust Company of Charlotte, North Carolina, to be held, managed and disposed of by it upon the following trusts: . . . The part or parts of this estate held for the benefit of any issue, *per stirpes*, together with any accumulated income thereon, shall upon the beneficiary of his or her trust reaching the age of 25 be divided in two parts, one-half in value of the same shall then be given, deeded and/or transferred to such beneficiary so becoming 25 years old, in fee simple, and the other one-half held for the benefit of such beneficiary for the remainder of his or her life, the income being distributed as heretofore provided; provided, however, that such beneficiary so reaching the age of 25 is hereby given the right and authority to dispose of his or her remaining one-half share by will to only the following described and limited class of beneficiaries, viz.: to the spouse of such beneficiary, to the child or other descendants of such beneficiary, to the spouse of any child or other descendant of such beneficiary and/or to any educational, religious, charitable or other eleemosynary organization or institution; and any reference in my said will to the death of any such beneficiary intestate, shall be construed as meaning the death of such beneficiary without having wholly exercised the foregoing limited power of appointment. In the event that any of my issue shall die before

reaching the age of 25 or intestate after reaching such age, leaving no issue or issue of issue, then, in that event, such issue's share and any accumulated income thereon shall be divided and added to the share of my then surviving issue, *per stirpes,* and administered according to the provisions of this instrument governing such surviving issue's share."

The court below held as a matter of law: "Since each of the two surviving children of Wm. H. Williamson, Jr., viz.: defendants, Wm. H. Williamson, III, and Mary Martin Williamson, was more than nine (9) years of age at the date of the death of Wm. H. Williamson, Jr., the interests or estates appointed to each of them in the fund, viz.: the right of each to receive one-half (½) of his/her share of the fund in fee simple upon arrival at the age of twenty-five (25) years, and the right of each to receive at age twenty-five (25) such one-half interest in the fund of the other in the event of the other's death without issue prior to attaining the age of twenty-five (25) years, and the right of each to receive during his/her life and after attaining the age of twenty-one (21) years the entire income from the other one-half of his/her interest in the said fund, must all vest, if at all, before the expiration of twenty-one (21) years after the date of the death of Wm. H. Williamson, Jr., and are, therefore, valid and not in violation of the rule against perpetuities.

"Considering that the question as to whom, under which will and in what manner the balance and remainder of the fund remaining undistributed after the respective deaths of the minor defendants, William H. Williamson, III, and Mary Martin Williamson, will ultimately go, is presently a moot question, the answer to which is not necessary for the present purposes of this action, the Court, in its discretion, defers any present adjudication of such question, with leave to any party in interest, by motion in this cause, to move the Court for a decision thereon at any time in the future when such decision may become material and pertinent." The court thereupon entered judgment requiring the American Trust Company, Trustee, under the will of William H. Williamson, Sr., to transfer to the American Trust Company, Trustee, under the will of William H. Williamson, Jr., all of the aforesaid fund, together with any accumulated income, which it shall, until the respective deaths of the minor defendants, William H. Williamson, III, and Mary Martin Williamson, hold, administer and distribute under, and in accordance with the terms and provisions of the will of William H. Williamson, Jr.

From the foregoing judgment, P. C. Whitlock, guardian *ad litem* for the minor defendants, William H. Williamson, III, and Mary Martin Williamson, appeals and assigns error.

Whitlock, Dockery & Moore for defendants, appellants.

Elmer E. Rouzer and Robert P. Stewart for Alex R. Josephs, guardian ad litem, appellee.

Taliaferro, Clarkson & Grier for American Trust Company of Charlotte, appellee.

DENNY, J. The provisions of the will of William H. Williamson, Jr., are not challenged except in so far as the testator in the exercise of the power of appointment under his father's will, undertook to set up a trust as to one-half of the funds held in trust by the American Trust Company, Trustee, under the will of William H. Williamson, Sr., for the benefit of his children, William H. Williamson, III, and Mary Martin Williamson, for life and to give them a limited power of appointment as to the disposition of such trust fund.

There is no appeal from that part of the judgment below which in effect holds that the rule against perpetuities relates back to the time the power of appointment was given and not from the date of its exercise, which is in accord with the weight of the authorities. *Roane v. Robinson*, 189 N. C., 628, 127 S. E., 626; *White v. White*, 189 N. C., 236, 126 S. E., 612; *Chewning v. Mason*, 158 N. C., 578, 74 S. E., 357; *Norfleet v. Hawkins*, 93 N. C., 392; Gray, Rule Against Perpetuities (4th Ed.), Sec. 515, 31 Am. Jur., 857, 49 C. J., 1305; *In re Harris' Will*, 55 N. Y. S. (2d), 261; *McCreary's Estate v. Pitts*, 354 Pa., 347, 47 A. (2d), 235; *Equitable Trust Co. v. Snader*, 17 Del. Ch., 203, 151 A., 712; *Rutherfurd v. Farrar*, 118 S. W. (2d), 79 (Mo.); *Northern Trust Co. v. Porter*, 368 Ill., 256, 13 N. E. (2d), 487. It is, therefore, conceded by all parties to this action that the attempt to limit the power of disposition of any portion of the estate of William H. Williamson, Sr., beyond the lives of William H. Williamson, III, and Mary Martin Williamson, is violative of the rule against perpetuities. Gray, Rule Against Perpetuities (4th Ed.), 510, 41 Am. Jur., 69; *In re Cassidy's Estate*, 259 N. Y. S., 67; *Graham v. Whiteridge*, 99 Md., 248, 57 A., 609.

The disposition made by William H. Williamson, Jr., of his own estate as well as the other half of the trust fund held under the provisions of his father's will, is not challenged.

The appellant, however, does challenge the attempt of William H. Williamson, Jr., to include in the trust he established for the benefit of his children for their lives, the one-half of the funds held by the American Trust Company, Trustee, under the will of William H. Williamson, Sr., on the ground that such trust in so far as it relates to these funds violates the rule against perpetuities.

If the appellant's position is correct, then William H. Williamson, Jr., died intestate as to this one-half of the funds now held by the Ameri-

can Trust Company, Trustee, under the will of William H. Williamson, Sr. Moreover, the will of William H. Williamson, Sr., covers just such a contingency in that it provides that should William H. Williamson, Jr., die intestate, leaving a child or children, then such estate shall go to said child or children.

Since the power under which William H. Williamson, Jr., undertook to dispose of the residue of his father's estate, dates from the death of the donor of the power, he could not create a valid trust as to any part of his father's estate, that his father could not have created had he so desired. William H. Williamson, III, and Mary Martin Williamson, were not in being at the time of the death of William H. Williamson, Sr. The power given William H. Williamson, Jr., was a limited one. He could dispose of the trust fund by will only. He was in fact no more than a designated agent with limited power. *Hardee v. Rivers,* 228 N. C., 66, 44 S. E. (2d), 476. The title to the trust fund created by William H. Williamson, Sr., never vested in William H. Williamson, Jr., he was only given the power to dispose of it by will. Such will, however, in so far as it failed to provide for the vesting of any of these funds, free from the trust, within the time required by the rule against perpetuities, is void. Therefore, upon the facts as disclosed on the record, the latest possible date the Trustee could hold the *corpus* of the estate of William H. Williamson, Sr., would be 21 years after the death of William H. Williamson, Jr., but under the judgment below no vesting, discharged from the limitations of the trust, can take place until the deaths of William H. Williamson, III, and Mary Martin Williamson, respectively. Such deaths may or may not occur within 21 years after the death of William H. Williamson, Jr. A provision whereby title to the *corpus* of an estate may or may not vest within the time required by the rule against perpetuities does not meet the requirement of the rule. Such title must vest within the time required by the rule in order to be valid. *Hopkinson v. Swaim,* 284 Ill., 11, 119 N. E., 985; *Equitable Trust Co. v. Snader, supra; Northern Trust Co. v. Porter, supra.*

The rule against perpetuities does not apply to charitable trusts. G. S., 36-21; *Reynolds Foundation v. Trustees of Wake Forest College,* 227 N. C., 500, 42 S. E. (2d), 910; *Penick v. Bank,* 218 N. C., 686, 12 S. E. (2d), 253; *Williams v. Williams,* 215 N. C., 739, 3 S. E. (2d), 334. However, the rule does apply to trusts created for private purposes. 41 Am. Jur., 86. A trust for private purposes must terminate within a life or lives in being and twenty-one years and ten lunar months thereafter. *Springs v. Hopkins,* 171 N. C., 486, 88 S. E., 774; *Billingsley v. Bradley,* 166 Md., 412, 171 A., 351, 104 A. L. R., 274; Gray, Rule Against Perpetuities (4th Ed.), 191, *et seq.,* 41 Am. Jur., 87.

The weight of authority is to the effect that a disposition of property under a power of appointment will not be held invalid *in toto* because

some of the provisions thereof may be violative of the rule against perpetuities; provided, the provisions which are violative of the rule against perpetuities are severable from the valid provisions exercised under the power. 41 Am. Jur., 861; 49 C. J., 1300; *Parker v. MacBryde,* 132 F. (2d), 932 (Fourth Circuit); *De Charette v. De Charette,* 264 Ky., 525, 94 S. W. (2d), 1018; 104 A. L. R., 1455; *Hopkinson v. Swaim, supra; In re Carter's Estate,* 254 Pa., 565, 99 A., 79; *In re Carroll's Estate,* 280 N. Y. S., 307; *Equitable Trust Co. v. Snader, supra; Liggett v. Fidelity & Columbia Trust Co.,* 274 Ky., 387, 118 S. W. (2d), 720. In the instant case the provisions which are violative of the rule against perpetuities are severable from the valid provisions exercised under the power.

Hence, we hold that the attempt of William H. Williamson, Jr., to include in the trust for his children, any portion of the proceeds of the estate of William H. Williamson, Sr., which purported to require such funds to be held in trust for his children during their lives, is void in so far as it relates to such funds; and that the guardian of William H. Williamson, III, and Mary Martin Williamson is entitled to receive from the American Trust Company, Trustee, under the will of William H. Williamson, Sr., one-half of the funds of such estate, as the property of the aforesaid minors, free and clear of any restraints or other limitations.

The judgment of the court below, except as herein modified, is affirmed.

Modified and affirmed.

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

P. O. POOLE AND E. C. PARRISH v. W. HERMAN SCOTT, ADMINISTRATOR OF THE ESTATE OF W. M. SCOTT; W. HERMAN SCOTT AND WIFE, TINA SCOTT, OF CHATHAM COUNTY; CLYDE SCOTT AND WIFE, INEZ SCOTT; GRACE SCOTT POE AND HUSBAND, GEORGE POE, OF ORANGE COUNTY, N. C.; MARY SCOTT GATTIS AND HUSBAND, WILLIAM GATTIS, OF LOS ANGELES COUNTY, CALIFORNIA; RALPH SCOTT AND WIFE, CARRIE SCOTT, OF RICHMOND COUNTY, N. C.; CLAY SCOTT AND WIFE, VELORA SCOTT; BLANCHE SCOTT, WIDOW; T. V. SCOTT AND WIFE, ALMA SCOTT, AND OTHO SCOTT AND WIFE, HESTER MAE SCOTT, OF CHATHAM COUNTY, N. C.

(Filed 30 January, 1948.)

1. Vendor and Purchaser § 13—

Where buildings, constituting a material and substantial inducement for the execution of a contract to purchase, are destroyed by fire, the loss

will fall on the vendor, and the vendee is not required to complete the contract.

2. Vendor and Purchaser § 32—

In vendees' action to recover the proceeds of a policy of fire insurance collected by vendors, judgment on the pleadings in vendees' favor is error when the complaint fails to allege that the contract was in writing and signed by the parties to be charged, since it does not appear from the complaint that the contract was specifically enforceable at the time of the destruction of the property by fire.

3. Same—

This action was instituted by vendees to recover the proceeds of a policy of fire insurance collected by vendors. Vendees allege that they were induced to accept deed and pay the balance of the purchase price by representations that the proceeds of the policy would be paid to them. Vendors denied that they or their agent had made such representations. *Held:* The pleadings raised a controverted issue of fact for the determination of the jury, and judgment on the pleadings for vendees is error.

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

APPEAL by defendants from *Grady, Emergency Judge,* at May-June Term, 1947, of DURHAM.

Civil action to recover the proceeds of a fire insurance policy paid to the defendants.

On or about 12 August, 1944, the appellees allege they entered into a contract with W. Herman Scott, administrator of the estate of W. M. Scott, and the admitted agent of the other defendants, to purchase from the defendants approximately 137 acres of land in Chatham County for $3,000.00 and paid to W. Herman Scott $100.00 of the purchase price, the balance of $2,900.00 to be paid upon delivery to appellees of a good and sufficient deed, free and clear of all encumbrances.

The plaintiffs allege that within a few days thereafter, the appellees were given possession of the premises, entered thereon and proceeded to make improvements on said premises in the amount of $1,000.00, the major portion of said money being expended on the dwelling house on the property. It is also alleged that several weeks after the contract of purchase was entered into the plaintiffs engaged a tenant to occupy and work the farm and moved the tenant into the dwelling house on said premises.

Subsequently, it developed that there were two uncanceled deeds of trust against the property. These were not canceled until 25 April, 1945, at which time the defendants delivered a deed to the appellees, who immediately accepted it and paid the balance of the purchase price.

In the meantime, however, on or about 10 January, 1945, the dwelling house on the premises was completely destroyed by fire. It was later disclosed that the defendants carried a policy of fire insurance on said dwelling in the amount of $2,000.00 and were paid $1,800.00 by the insurance company on account of the loss of said dwelling. This action was brought to collect the $1,800.00 paid to the defendants, the plaintiffs contending they are, in law and equity, entitled to same.

When the case was called for trial, upon motion of the plaintiffs, judgment was rendered on the pleadings in favor of the plaintiffs. Defendants appealed, assigning error.

Brawley & Brawley, Oscar G. Barker, Robert I. Lipton, and Victor S. Bryant for plaintiffs, appellees.

Fuller, Reade & Fuller, W. P. Horton, and James L. Newsom for defendants, appellants.

DENNY, J. The plaintiffs contend the contract entered into by and between them and the defendants was a binding and enforceable one. However, it is not alleged that the contract was in writing and signed by the respective parties.

Moreover, it is the general rule that where a vendor contracts to convey lands and the buildings thereon are a material and substantial inducement for the transaction, and such buildings are destroyed by fire, if the contract is incomplete and unenforceable for any reason, the loss will fall on the vendor, and the vendee is not required to complete the contract. *Warehouse Co. v. Warehouse Corp.*, 185 N. C., 518, 117 S. E., 625; *In re Sermon's Land*, 182 N. C., 122, 108 S. E., 497; *Sutton v. Davis*, 143 N. C., 474, 55 S. E., 844; 66 C. J., Sec. 815, p. 1054; 55 Am. Jur., 824; Thompson on Real Property, Vol. 8, p. 532.

The plaintiffs allege that after the house on the premises was burned and prior to the payment of the balance of the purchase money they were informed and advised by W. Herman Scott, Administrator of the estate of W. M. Scott, and agent of the other defendants, that the plaintiffs would be entitled to the proceeds of the insurance policy carried on the destroyed house, when the insurance was adjusted and the proceeds paid by the insurance company; and that the plaintiffs relying upon this statement and assurance by W. Herman Scott, completed their contract with him and paid the balance of the purchase money. The defendants deny that any such agreement was made. On the contrary, the defendants allege that after the house was burned "the plaintiffs talked with the defendant W. Herman Scott, with respect to whether or not they would elect to exercise their right to purchase said property upon payment of the balance of the purchase price and advised that they would

like further time within which to consider the completion of the purchase, and requested that he keep the deed to said property until they notified him as to whether or not they would complete their purchase of said farm. That nothing was said in that conversation with the defendant W. Herman Scott with respect to insurance on said property."

The defendants further allege that they agreed to sell the 137 acre tract of land to the plaintiffs for $3,000.00 but that it was understood to be optional with the plaintiffs as to whether or not they accepted the offer.

In the light of the allegations in the pleadings, we do not think the plaintiffs are entitled to judgment thereon. Furthermore, since it does not appear that a contract existed for the conveyance of the premises described in the complaint, which could have been enforced by a decree for specific performance at the time the house on the premises was destroyed by fire, we think the plaintiffs must rely upon their alleged agreement to the effect that they would be entitled to receive the proceeds from the fire insurance policy which the defendants carried on the burned house, as soon as the adjustment was made and the proceeds of the policy were received from the insurance company. *Rutherford v. MacQueen,* 111 W. Va., 353, 161 S. E., 612. If the plaintiffs were induced to complete the contract based upon an understanding with the defendants or their agent, that the proceeds of the insurance policy in question were to be paid to them, then they are entitled to recover, otherwise not. Even so, it is for the jury to say what the facts are in this respect.

The judgment of the court below will be set aside and the cause is remanded for trial upon the issues raised by the pleadings.

Error and remanded.

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

F. G. SATTERFIELD, J. S. SATTERFIELD AND WALKER STONE, FORMERLY TRADING AND DOING BUSINESS AS SATTERFIELD AND STONE, v. JOHN T. MANNING, SUCCESSOR ADMINISTRATOR OF THE ESTATE OF SALLIE A. RIGSBEE, DECEASED.

(Filed 30 January, 1948.)

Landlord and Tenant § 8—Where lessees sue on bond for peaceful occupancy they are bound by the terms of the bond.

The action was instituted on a bond for peaceful occupancy executed by lessor, who was a life tenant of the premises. The lease provided that

lessees should have the right to remove buildings placed on the land upon termination of the lease. The bond for peaceful occupancy specifically stipulated that if lessor should be compelled to pay the penalty of the bond, lessor should be entitled to hold the improvements. Lessor died, terminating the lease prior to the expiration of the term, and title to the property passed *eo instante* to the remaindermen. *Held:* Under the terms of the bond, liability thereunder was conditioned upon the right to the improvements, and since the improvements passed with the land to the remaindermen, the demurrer of the lessor's administrator should have been sustained.

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

APPEAL by defendant from *Bone, J.*, at October Term, 1947, of DURHAM. Reversed.

Plaintiffs sued on a bond in sum of $35,000 executed by defendant's intestate to indemnify plaintiffs from any interference with their peaceful occupancy of premises which had been leased to them for a term of years by defendant's intestate. It was alleged that during the term of the lease, by reason of the death of the lessor, who had only a life estate in the property, the lease had been interrupted, and that title to the property by operation of law having passed to others the plaintiffs had been ousted.

The defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was overruled and defendant appealed.

Fuller, Reade & Fuller, Basil M. Watkins, and James L. Newsom for plaintiffs, appellees.

Brawley & Brawley, Egbert L. Haywood, and Victor S. Bryant for defendant, appellant.

DEVIN, J. This action is an aftermath of the litigation which culminated in the decision of this Court in *Haywood v. Briggs*, 227 N. C., 108, 41 S. E. (2d), 289. The transactions alleged in the complaint as the basis of the present action were considered in that case, and it was there held that upon the death of the life tenant, under whose lease the plaintiffs claimed, the title to the subject of the lease passed, *eo instante*, by operation of law, to the remaindermen, unaffected by the terms of any contract of lease between the life tenant and her lessees. The present plaintiffs were parties to that proceeding and had there claimed that under the terms of the lease it had been agreed by the life tenant that plaintiffs should have right to remove all fixtures erected on the land during the lease, and that this provision in the lease gave to the buildings erected thereunder the character of trade fixtures, and that this charac-

terization continued after the death of the life tenant, even against the remaindermen. Upon that view the plaintiffs intervened in the partition proceedings instituted by and among the remaindermen, claiming title to the buildings and right to remove them, and that question was by appeal brought to this Court, and decided against these plaintiffs. *Haywood v. Briggs, supra.*

Thereafter the plaintiffs instituted this action for recovery on the bond executed by defendant's intestate conditioned upon the quiet enjoyment of the premises by the lessees, for the term of the lease. The lease set out in the complaint was executed 1 July, 1944, for a term of five years from and after 1 July, 1945, with option of renewal, and was the last of a series of similar leases on this property beginning in 1925. The lessor died 19 September, 1945. Section 8 of the lease contains the provision on which this suit is based and is in these words:

"In consideration of the fact that the lessor has only a life estate in said property, and it being the intent and desire of the lessor to protect, hold harmless and indemnify the lessees and their heirs and assigns from any and all interference of peaceful occupancy of said premises by the lessees and their heirs and assigns the said Sallie Rigsbee, lessor, does hereby acknowledge herself bound to the lessees and their heirs and assigns in the sum of thirty-five thousand dollars ($35,000) to the payment of which the said Sallie Rigsbee, lessor, does hereby bind her heirs, administrators, executors and assigns. The condition of this stipulation is such that if the said lessees shall have peaceful and uninterrupted occupancy of said premises for the term of said lease, then this obligation shall be null and void; but if by reason of the death of the lessor during said term, or if from any cause the lessees shall be put out of possession of said premises without fault on their part, then the above named obligation shall be in full force and effect, but with the distinct agreement, however, that said obligation of $35,000 shall diminish or decrease at the rate of three thousand and five hundred dollars ($3,500) per year from July 1st, 1945, to the date or time when the lessees shall be put out of possession of said property as aforesaid. It is further agreed and understood that if the lessor shall be compelled to pay the penalty of the above named bond as therein specified that in such event the lessor and her heirs and assigns shall be entitled to hold all improvements upon said premises."

The defendant's demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action was overruled below and in this we think there was error.

The plaintiffs have bottomed their action on the bond executed by defendant's intestate in connection with the lease on the premises described. But this bond contains the provision that "if the lessor shall

be compelled to pay the penalty of the bond," the lessor "shall be entitled to hold all improvements upon said premises." From an examination of this stipulation in the light of all the facts alleged, we think the conclusion is inescapable that the right to the improvements put upon the land by the plaintiffs was an essential condition upon which liability on the bond should depend, whether the stipulation be regarded as a condition precedent or subsequent, or a covenant, and that the admitted fact of the impossibility of performance on the part of the lessees constitutes complete defense against asserted liability on the bond.

It is true the language of the last clause of the bond that in the event the lessor should be called upon to pay the penalty of the bond the lessor "shall be entitled to hold" the improvements might give rise to the view that the lessees were not required to take any affirmative action, or to do more than waive their right to the buildings, and hence that it does not affirmatively appear that there was such failure of performance on the part of lessees as would avoid liability on the bond.

But considering the entire transaction and the evident purpose of this provision, it seems clear that the intention of the parties in the use of this language was to provide as against asserted liability on the bond the consequent right to the buildings as an essential condition.

The plaintiffs having sued on the bond are bound by its terms, and we think the admitted failure of performance of the stipulation on plaintiffs' part bars recovery on the bond.

As we think the demurrer should have been sustained on this ground, it becomes unnecessary to consider the second ground of demurrer pleaded by the defendant.

For the reason stated, the judgment overruling the demurrer is

Reversed.

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

SATTERFIELD *v.* MANNING.

F. G. SATTERFIELD, J. S. SATTERFIELD AND WALKER STONE, FORMERLY TRADING AND DOING BUSINESS AS SATTERFIELD & STONE, CREDITORS OF THE ESTATE OF SALLIE A. RIGSBEE, IN THEIR OWN BEHALF AND IN BEHALF OF ALL OTHER CREDITORS OF SAID ESTATE, PLAINTIFFS, V. JOHN T. MANNING, SUCCESSOR ADMINISTRATOR OF THE ESTATE OF SALLIE A. RIGSBEE, DECEASED; MATTIE T. BITTING (DIVORCED); ROSA L. FULFORD AND HUSBAND, W. A. FULFORD; ZOA L. HAYWOOD (WIDOW); MARY E. MIDDLETON (WIDOW); WILLIS BRIGGS, GUARDIAN OF MARY E. MIDDLETON; R. H. RIGSBEE AND WIFE, LELIA H. RIGSBEE; S. C. BRAWLEY, JR., ADMINISTRATOR C. T. A. OF THE ESTATE OF W. T. RIGSBEE, DECEASED; R. M. BUSSELL AND WIFE, IDA B. BUSSELL; MRS. WYLANTA R. AYCOCK (WIDOW); WACHOVIA BANK & TRUST COMPANY, TRUSTEE; A. L. CARVER AND WIFE, MURTIS P. CARVER; CARL H. COZART AND WIFE, EVELYN F. COZART; WILLIAM W. COZART AND WIFE, LUCY F. COZART; WILLIE L. CURRIN AND WIFE, ILA F. CURRIN; NORTHWOOD REALTY COMPANY; DURHAM BANK & TRUST COMPANY; HOME SECURITY LIFE INSURANCE COMPANY; C. S. HICKS, TRUSTEE; THE LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, INCORPORATED; SYDNEY F. KEEBLE, TRUSTEE; OCCIDENTAL LIFE INSURANCE COMPANY OF RALEIGH, NORTH CAROLINA; C. E. HYRE, TRUSTEE, DEFENDANTS.

(Filed 30 January, 1948.)

APPEAL by certain of the defendants from *Bone, J.*, at October Term, 1947, of DURHAM. Reversed.

This was an action by the plaintiffs as creditors of the estate of Sallie A. Rigsbee, deceased, to require the sale of certain real property of which it was alleged she died seized, to make assets to pay the debts of the estate. The defendants, Mrs. Zoa L. Haywood, Willis Briggs, guardian of Mary E. Middleton, R. H. Rigsbee and wife, Rosa L. Fulford and husband, Mattie T. Bitting, and The Life and Casualty Insurance Co. and Keeble, Trustee, demurred to the complaint for the reasons stated in the demurrer, and, from judgment overruling their demurrer, these defendants appealed.

Fuller, Reade & Fuller, Basil M. Watkins, and James L. Newsom for plaintiffs, appellees.

Brawley & Brawley, Egbert L. Haywood, and Victor S. Bryant for defendants, appellants.

DEVIN, J. In view of the opinion in *Satterfield v. Manning, ante,* 467, holding that the demurrer to the complaint in that action should have been sustained, and that thus the alleged rights of the plaintiffs as creditors of the estate of Sallie A. Rigsbee were not upheld, it follows

that plaintiffs' proceeding as creditors against certain real estate of the decedent must fail.

For this reason, the judgment below must be

Reversed.

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

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1948

KINGSLAND VAN WINKLE AND THOMAS J. HARKINS, AS TRUSTEES UNDER THE WILL OF WILLIAM H. BERGER, DECEASED, v. LAURA R. BERGER, BERTHA B. LINNELL, ALLYNE N. BEARDSLEY, WILLIAM B. NICHOLS, DOROTHY N. MEREDITH, ARCHIE NICHOLS, THE TRUSTEES, ELDERS AND DEACONS OF ST. JOHNS REFORMED CHURCH AT MAUSDALE, PENNSYLVANIA; REBECCA APPLEMAN, ALICE A. ROBINSON,, OTHERWISE MRS. WILLIAM ROBINSON, MARY DINEEN, MRS. JESSE MARSHALL, OTHERWISE JESSIE MARSHALL, VIRGINIA ANDREWS, OTHERWISE MRS. ERNEST F. ANDREWS, JUNE SAVIDGE, MRS. FRED W. DIEHL, OTHERWISE PEARLE DIEHL, ANNIE PICKARD, MAMIE PICKARD, JANNETTE PICKARD, REVEREND RUSSELL A. PAVY, REVEREND ERNEST F. ANDREWS, PASTOR OF SHILOH EVANGELICAL AND REFORMED CHURCH OF DANVILLE, PENNSYLVANIA, THE ELDERS, DEACONS AND TRUSTEES OF SHILOH EVANGELICAL AND REFORMED CHURCH OF DANVILLE, PENNSYLVANIA, FRED W. DIEHL AND FRED W. DIEHL, AS EXECUTOR OF THE LAST WILL OF ELLA B. BUCHANAN, DECEASED.

(Filed 25 February, 1948.)

1. Wills § 34—

Where a clause disposes of property to named beneficiaries "and their respective heirs and assigns," the term "heirs and assigns" is descriptive of the estate conveyed and does not set up an independent class of legatees so as to carry the estate to persons designated by will of a beneficiary.

2. Wills § 33c—

Where a will sets up a trust with provision that the income therefrom be divided among named beneficiaries for life and the *corpus* proportionately to their issue upon their deaths, with further provision that if a beneficiary should die without issue, this share of the *corpus* should become a part of, and be distributed in accordance with, the residuary

clause, *held*, the person entitled to each share of the *corpus* is contingent upon whether each of the life beneficiaries dies with or without issue her surviving, and therefore the will sets up a contingent and not a vested limitation, and the roll must be called as to each share of the *corpus* as of the death of its life beneficiary. G. S., 41-4.

3. Wills § 32—

The rule against intestacy is merely one of construction to be applied where the phraseology is ambiguous or the intent uncertain, and the fact that a particular series of contingencies might result in partial intestacy does not render the provisions of the will invalid or justify the court in construing the language contrary to its plain and unambiguous meaning.

4. Wills § 34—

The will in suit set up a trust fund with provision that the income be divided among named beneficiaries during their respective lives and the proportionate part of the *corpus* to go to the issue of each beneficiary upon her death, with further provision that should a beneficiary die without issue the proportionate part of the trust fund should become a part of, and be distributed in accordance with, the residuary clause. The life beneficiaries of the trust fund were also named as distributees in the residuary clause. *Held:* Upon the death of one of the life beneficiaries of the trust without issue, her estate takes no interest under the residuary clause and her attempted disposition of such property by will is ineffectual.

DEFENDANTS Fred W. Diehl and Fred W. Diehl, Executor of Ella Buchanan, Deceased, appeal from *Shuford, J.*, November, 1947, Civil Term, BUNCOMBE Superior Court.

This action was brought by Kingsland Van Winkle and Thomas J. Harkins, as Trustees under the will of William H. Berger, making various persons in interest parties defendant, to have the will judicially construed respecting certain clauses and items in controversy. Among the parties defendant are Fred W. Diehl, individually, and as executor of the will of Ella Buchanan, deceased, a daughter of the testator and a beneficiary under the Berger will.

The controversy is over the fifth and sixth articles of the will, which are as follows:

"Fifth: I order and direct my Executors hereinafter named to set apart, out of my estate, the sum of Ninety Thousand Dollars ($90,000.00) either in cash derived from the sale of my securities or in securities to the amount of Ninety Thousand Dollars ($90,000.00) of which I may be possessed at the time of my decease, as they in sole judgment may decide, and to hold said sum and securities, IN TRUST, nevertheless, for the following uses and purposes, to wit, to invest the same, if uninvested, and keep the same invested, and to pay, semi-annually, May 15th and November 15th, the net income derived therefrom, in equal shares or parts, to my three daughters,

ELLA BUCHANAN, BERTHA LINNELL and ELIZABETH NICHOLS, for and during the term of their respective natural lives, free and clear of their respective debts, contracts, engagements, alienations, and anticipations, and free and clear of all levies, attachments, executions and sequestrations, and each of my three children shall receive the income from her share of said fund during the term of her natural life, and upon the death of any of them, leaving issue at the time of her death, such issue shall take and receive in equal shares or parts the principal of the share of the deceased parent in said TRUST FUND: but upon the death of any of my three children, leaving no such issue, the principal of her share in said TRUST FUND shall be added to, be and become a part of my residuary estate, and be distributed as such. Should any of my three children predecease me, leaving issue at the time of my death, such issue shall take and receive the share of said Trust Fund which would have been received by the parent surviving me.

SIXTH: All the rest, residue and remainder of my estate, real, personal and mixed, of whatsoever character and wheresoever situate, I give, devise and bequeath as follows: One-third (1/3) part thereof unto my beloved wife, LAURA R. BERGER, absolutely and forever; one sixth (1/6) part thereof unto my daughter ELLA BUCHANAN: one-third (1/3) part thereof unto my daughter, BERTHA LINNELL; one sixth (1/6) part thereof to my daughter, ELIZABETH NICHOLS, their respective heirs and assigns, absolutely and forever."

Of the beneficiaries named in these articles, Laura B. Berger, the widow, and Bertha B. Linnell, daughter, survive. Elizabeth B. Nichols died 24 September, 1940, leaving children surviving her; and Ella B. Buchanan, a resident of Pennsylvania, died 5 February, 1940, without issue, leaving a last will and testament which purports to dispose of all her property, principally by charitable devises and bequests. A bequest was made to Fred W. Diehl, who was made executor of this will. The will was properly manifested and introduced in evidence.

On the death of William H. Berger, Kingsland Van Winkle and Thomas H. Harkins, Trustees under the Berger will, went into administration of the trust. After the death of Elizabeth Nichols the proportionate part of the trust fund put to her lifetime use was distributed to her children, as provided in the will, leaving in the trust fund for the benefit of Ella B. Buchanan and Bertha B. Linnell, $60,721.38 in cash and securities.

The executor of the will of Ella Buchanan and claimants thereunder contended that they were now entitled, under her will, to a proportionate share of the one-third of the *corpus* of the trust fund theretofore put to

her use, which passed to the *residuum* at her death. The plaintiff trustees contended that any interest she had in the trust fund terminated with her death.

The trial judge, by consent of parties, heard the evidence and argument without a jury, found the facts, and rendered judgment, construing the controverted portion of the will, and ordering distribution of the disputed fund as follows:

"The Court is of the opinion and so holds that, construing and interpreting the Will of William H. Berger from the language of the instrument as a whole, to ascertain and arrive at the intention of the testator, and applying the rules of construction laid down and announced by the Courts that Ella B. Buchanan took an estate for her natural life with the contingent remainder upon her death to her issue, but if she died leaving no such issue, her share of the principal of the trust fund should go to the residuary legatees named in the Sixth Item of the Will of William H. Berger; that the roll should be called as of the death of Ella B. Buchanan to determine among what parties the residuary estate of William H. Berger should be distributed; and that Ella B. Buchanan being then dead, the principal of the fund now in the hands of the trustees and formerly held for the benefit of Ella B. Buchanan, should be distributed: two-fifths to Laura R. Berger, two-fifths to Bertha B. Linnell, and one-fifth among the four children of Elizabeth B. Nichols, equally. The Court being of the opinion that Ella B. Buchanan at her death had no interest in the residuary estate of William H. Berger which she could dispose of by her Last Will and Testament.

"IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Kingsland Van Winkle and Thomas J. Harkins, Trustees under the Last Will and Testament of William H. Berger, make distribution of the principal of the fund in their possession formerly held for the benefit of Ella B. Buchanan, together with all interest from said fund accumulated since February 5, 1947, as follows: two-fifths to Laura R. Berger, two-fifths to Bertha B. Linnell, and one-fifth among the four children of Elizabeth Nichols equally.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Trustees aforesaid pay to Fred W. Diehl, as Executor of the Will of Ella B. Buchanan, the interest on the fund formerly held for the benefit of Ella B. Buchanan from November 15, 1946, the date of the last distribution, to February 5, 1947, the date of the death of Ella B. Buchanan.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this distribution be made as of the value of the fund as nearly as possible on the actual date of distribution or as near such date as possible."

The trustees were allowed attorneys' fees in the sum of $1,500 in this proceeding and costs were awarded out of the fund still held for the benefit of Ella B. Buchanan.

From this judgment Fred W. Diehl, individually, and as executor of the will of Ella B. Buchanan, appealed.

Harkins, Van Winkle & Walton for plaintiffs, appellees.

S. G. Bernard for defendants, appellants.

SEAWELL, J. The crux of the question posed by this appeal is whether, upon the above facts, Ella Buchanan had any vested and disposable interest in the principal of the trust fund which passed into the residuary estate upon her death without issue.

Without fully stating the arguments, the construction of the Berger will offered by the appellants in support of the affirmative presents the following rationale:

Under Article 5 of the will dealing with the disposition of the *corpus* of the trust fund, the proportionate part thereof the income of which was payable to Ella Buchanan during her natural life, is transferred to the residuary estate upon her death without issue "to be and become a part of my residuary estate and be distributed as such." The residuary clause—Section 6, it is pointed out, creates an unqualified estate in the beneficiaries named therein, one of whom is Ella Buchanan, in fee as to real estate, absolute as to personalty. The conclusion is reached that since Ella Buchanan is one of these named beneficiaries, distribution must be made to her "assigns," meaning the successors to her estate by virtue of her own testamentary disposition. We do not understand the appellants to claim that the residuary clause of the Berger will *directly* bequeaths this item to them as "assigns" of her will. At any rate, the term "heirs and assigns" as used in the residuary clause of the Berger will must be understood as descriptive of the estate conveyed, and not as setting up an independent class of legatees. *Fulton v. Waddell,* 191 N. C., 688, 132 S. E., 669; *Dicks v. Young,* 181 N. C., 448, 107 S. E., 220; *Ham v. Ham,* 168 N. C., 492, 84 S. E., 840; see *Threadgill v. Ingram,* 23 N. C., 577.

The theory above suggested might have more plausibility if the fund in dispute had come under the disposing provisions of the residuary clause in some other way, or at some other time, while Ella Buchanan was still living to claim it; and, further, under conditions which did not render her succession wholly contingent.

The answer to our problem lies in the nature of the contingency upon the happening of which the partial termination of the trust takes place,

and the designated part of its principal, or *corpus,* is thrown into the residuary estate.

That event is to be regarded as the termination of a particular estate, that of the trustees, and also the disappointment of an intervening estate, contingently limited to the issue, if any, of Ella Buchanan. The death of Ella, involved in the contingency, is not merely an event, but a condition to be consummated before the principal should lose its character as a particular legacy and become part of the residuary estate.

The chronology, if we may use that term, contemplated in the will, *the time element,* is a vital consideration in its construction. That Ella Buchanan could take an interest in the will virtually created by the contingency of her own death, involves a formidable legal paradox which appellants seem to circle but not surmount.

Ninety thousand dollars was separated from the estate and put into a trust fund, dealt with *in particularis,* and made the subject of an intervening contingent bequest. Both in point of law and under the expressed phraseology of the will it was not then a part of the residuary estate, the subject of disposition under Article 6. As a matter of law it could not be in the trust fund and under obligation to a particular legacy, however contingent, and in the residuary estate at the same time; and we find no suggestion of an intent that its inclusion in that category was, or could be, retroactive. *At that time only was the residuary clause activated and clothed with testamentary authority with respect to the distribution of this fund.* G. S., 41-4; *Bowen v. Hackney,* 136 N. C., 187, 48 S. E., 633; *Burden v. Lipsitz,* 166 N. C., 523, 86 S. E., 863; *Harrell v. Hagan,* 147 N. C., 111, 60 S. E., 909; *Sain v. Baker,* 128 N. C., 256, 38 S. E., 858; *Sutton v. Quinerly, ante,* 106. Or, to put it more bluntly, it came under the operation of the residuary clause at a time when Ella Buchanan must be, and was dead and unable to take.

It is true, of course, that the intervention of a trust does not necessarily postpone the title or prevent the vesting of an interest where the person who must ultimately take is certain; although it may postpone enjoyment. That was the situation in *Coddington v. Stone,* 217 N. C., 714, 719, 9 S. E. (2d), 420, but not here. It is the contingent disposition of the *corpus* of the trust and the nature of that contingency with which we are dealing. And here the contingency renders the ultimate taker uncertain.

If we could dismiss the ever-haunting paradox to which we have referred, it still remains that the passing of the *corpus* of the trust fund into the residuary estate is itself a contingency depending upon the failure of issue, to whom it is first limited, and is, therefore, a contingency involving uncertainty of the beneficiaries, and no interest could vest in Ella Buchanan under such contingency. *Redden v. Toms,* 211

N. C., 312, 190 S. E., 490; *Deal v. Trust Co.,* 218 N. C., 483, 11 S. E. (2d), 464; *Bond v. Bond,* 194 N. C., 448, 139 S. E., 340; *Scales v. Barringer,* 192 N. C., 94, 133 S. E., 410; *Mercer v. Downs,* 191 N. C., 203, 131 S. E., 535; *Richardson v. Richardson,* 152 N. C., 705, 68 S. E., 217; *Latham v. Lumber Co.,* 139 N. C., 9, 51 S. E., 780; Fearne on Remainders, Vol. 1, pp. 216, 217; 3 Page on Wills, pp. 729, 730; *Id.,* 741, 742.

The case is not without its difficulties and the appellants' side not without its plausibilities. For instance, if the three daughters named in the will had successively died without issue, we might arrive at the legally unwelcome condition of partial intestacy. The rule against intestacy, however, is merely one of construction to be applied where the phraseology is ambiguous or the intent is uncertain. A man is not required to visualize all changes and contingencies near or remote, trivial or important, which might come about during a considerable period of time following his demise and meticulously provide against intestacy in order to make a valid will; nor may the Court, by the exercise of a hindsight better than his foresight, improve upon the testamentary disposition. Partial intestacy following the setting up and administration of a long-continuing active trust is not infrequent.

We think the court below reached the correct conclusion and the judgment is

Affirmed.

MRS. MARTHA TYSON PERLEY, WIDOW, AND SARAH MARSHA PERLEY, MINOR DAUGHTER OF ALLEN P. PERLEY, III, DECEASED, v. BALLENGER PAVING COMPANY, EMPLOYER, AND UNITED STATES CASUALTY COMPANY, CARRIER.

(Filed 25 February, 1948.)

1. Master and Servant § 55d—

The rule that the findings of fact of the Industrial Commission are conclusive on appeal when supported by any competent evidence does not preclude the courts from setting aside an award when the findings, involving mixed questions of law and of fact, are not supported by evidence.

2. Master and Servant § 4a—

An independent contractor is one who exercises an independent employment and contracts to do certain work according to his own judgment and method, without being subject to his employer except as to the result of his work.

3. Master and Servant § 39b—Evidence held to show that deceased was independent contractor and not employee at time of fatal accident.

The evidence tended to show that deceased was a licensed contract hauler, and was engaged to haul sand, gravel and concrete from the

defendant's bins to defendant's concrete mixer along a route selected by defendant, but that defendant had no control over the number of hours deceased worked or whether deceased drove his own truck or employed a driver, and that deceased paid for his own gas and oil and made his own repairs to his truck. Deceased was paid a stipulated sum per load and was also paid the hourly wage of truck drivers employed by defendant for that time lost waiting in line when the concrete mixer broke down. Deceased was killed when struck by a train at a grade crossing while hauling for defendant on the route selected. *Held:* Upon the evidence, deceased was an independent contractor and not an employee within the meaning of the Workmen's Compensation Act, G. S., 97-2 (b), and the judgment of the Superior Court affirming the award of compensation by the Industrial Commission, is reversed.

APPEAL by defendants from *Nettles, J.*, at October Term, 1947, of BUNCOMBE. Reversed.

Claim for compensation under the Workmen's Compensation Act for the death of Allen P. Perley, III. At the hearing before the Industrial Commission the plaintiffs' evidence tended to show that on the morning of 17 October, 1946, the decedent, while driving a truck loaded with materials to the defendant Paving Company's concrete mixer, between Black Mountain and Swannanoa, was struck at a railroad crossing by a train of the Southern Railway and instantly killed. The defendant Paving Company was engaged in laying base for highway paving and was using a concrete mixer which was moved as the work progressed. The materials of sand and gravel were hauled from the bins of the Grovestone Sand Company by trucks to the mixer. The distance varied, but at this time was approximately one mile. The defendant used a number of trucks of its own operated by drivers whom it employed at a wage of $1 per hour. Needing additional trucks to expedite the work, the defendant contracted with the decedent, who was a licensed contract hauler, to use his truck in hauling this material and agreed to pay him $1 per batch delivered to the mixer (a batch being the amount of material sufficient for one filling of the mixer). Similarly, the trucks of several other contract haulers were also engaged. The decedent's truck was so arranged that he could haul two batches at the time, making $2 per load as his compensation. He began hauling 10 October, and during the last 4 days before his death on the 17th hauled 76 batches. In hauling the material from the bins to the mixer it was necessary to cross the railroad at grade. Defendant's foreman, offered as a witness by the plaintiffs, testified he hired Perley's truck for this work and did not know of his own knowledge whether Perley drove his truck or not, as the check was on the number of batches the numbered truck delivered, but it seems Perley during this work did drive his own truck. Perley had previously used his truck in hauling sand for the Grovestone people to this job. The defendant's foreman testified he did not give Perley any instructions

(as to the manner of hauling) as "it was understood he would work on same basis as other trucks hired." If Perley had not been familiar with the work he would have given him instructions, which would have been that he take his truck to the sand and gravel bins first, and load his truck, and from there to the cement bin (there were two bins to go under), and from there to the mixer. The trucks were loaded by defendant's employees and unloaded by dumping in the mixer. The mixer started up at 7 a.m. and all trucks were supposed to be loaded and at the mixer by that time. Trucks hauled continually until about 4:30 p.m. In case of rain or breakdown of the mixer the trucks would be knocked off by the mixer foreman. Truck drivers expected to be told by mixer foreman when to quit. This applied to trucks owned by defendant and to those hired, like Perley's. "In case of a breakdown of the mixer so that the (loaded) trucks had to wait pending repairs for several hours, we endeavored to pay $1 per hour to the contract truck owners. The idea was not to pay for the truck but to pay for the truck owner's time while the truck was idle. Trucks did not stop at any set time for lunch, as the mixer ran continually, but were expected to fall out of line two or three at a time for lunch."

The defendant's foreman further testified that he and the superintendent selected the road the trucks would take from the Grovestone plant to the mixer and back. All the trucks went the same route. Before putting the trucks on a new route they selected the best route from existing possibilities, made repairs and tried to call all the drivers together and to give them information and instructions as to the new route to take. This was to prevent confusion. The route followed by decedent the day of his death had been selected after study of available routes. This witness further testified that needing more trucks he had asked Perley if he wanted to put his truck to work. Perley said he did, as he wanted to keep his truck busy, and he put a batch gate in his truck, There was nothing said about who was to drive it. "I hired his truck to haul batches. He could have put a man on it or he could drive it himself or anything he wanted to do." "I had no control over a man that owned his own individual truck." Witness had the right to lay off or discharge those who hauled, had the right to pay them off when no longer needed. Defendant's employees determined the mixture and weight but not the number of batches the truck owner could haul. The type of mixture was determined by the State Highway Department. A man driving his own truck could stop and work on his truck; work half a day and fall out. "We wanted a man to work all he could but could not force him to, not like an employee, hire a man to drive his truck." If a man "didn't get there until 11 o'clock you wouldn't want to run him off when he did get there." If one of defendant's trucks was disabled would

expect the driver to be there and be put to other work temporarily. Defendant's drivers were required to work regular hours, but as to Perley nothing was said about the hours required. He could haul two or three hours and then go haul for somebody else and then come back. Those who operated their own trucks were paid by the batch, and they furnished their own gas and oil. If mixer broke down we endeavored to pay the truck owner $1 per hour while waiting to dump the truck in the mixer. Defendant had right to terminate Perley's hauling contract if unsatisfactory. Some of the other contract haulers on the job hired drivers. Defendant had no control over whether the owner drove or hired a driver. The settlement was for the number of batches hauled by that truck.

The only other witness offered by plaintiffs on this question was a truck driver who drove his own truck on this same job. He also was a licensed contract hauler. He saw Perley there during the time he was hauling; said he followed the route laid out for all the drivers. Witness owned two trucks, one driven by himself and one by his brother. He was usually there when work started as he wanted to get in all the hauling he could, though he was not required to be there. "I could leave when I wanted. I was paid $1 per batch for hauls and not for hours. The mixer broke down at times when I was there during this hauling work. I was paid entirely by the loads or hauls made." If witness hired someone else to drive, witness paid the driver and defendant paid him according to loads hauled. The road used at the time was the most direct route from the cement bins. It was the most convenient way to travel. It was not the only way. "I could follow any road I pleased, but usually defendant set a road and we tried to follow it. That was the best way to get there. No one representing the defendant went along with me." If there was a line of trucks trying to get to the mixer, witness took his turn in line, but sometimes the defendant's drivers would give way to the contract haulers so they could make as many hauls as possible.

The Industrial Commission found the facts and concluded that the decedent's death resulted from injury by accident arising out of and in the course of employment by the defendant Paving Company, and made award of compensation therefor.

On appeal to the Superior Court the findings of fact and conclusions of the Industrial Commission were affirmed, and from judgment in accord therewith defendants appealed.

Finch & Taylor and Harkins, Van Winkle & Walton for plaintiffs, appellees.

Helms & Mulliss and Smathers & Meekins for defendants, appellants.

DEVIN, J. The case turns on whether the decedent at the time of his injury and death was an employee of defendant Paving Company, or an independent contractor. Defendants' appeal is based upon the ground that the evidence offered in support of the claim conclusively establishes the relationship between decedent and the defendant as that of an independent contractor rather than an employee, and that the findings and conclusions of the Industrial Commission, affirmed by the Superior Court, are not supported by the evidence.

The rule declared by the statute and uniformly upheld by this Court that the findings of fact made by the Industrial Commission, when supported by any competent evidence, are conclusive on appeal, does not mean, however, that the conclusions of the Commission from the evidence are in all respects unexceptionable. If those findings, involving mixed questions of law and fact, are not supported by evidence the award cannot be upheld. *Beach v. McLean,* 219 N. C., 521, 14 S. E. (2d), 515; *Thomas v. Gas Co.,* 218 N. C., 429, 11 S. E. (2d), 297. The generally accepted definition of an independent contractor is that he is one who exercises an independent employment and contracts to do certain work according to his own judgment and method, without being subject to his employer except as to the result of his work. *Smith v. Paper Co.,* 226 N. C., 47, 36 S. E. (2d), 730; *Greer v. Construction Co.,* 190 N. C., 632, 130 S. E., 739; *Moore v. Sales Co.,* 214 N. C., 424, 199 S. E., 605. In *Hayes v. Elon College,* 224 N. C., 11, 29 S. E. (2d), 137, the distinction between an employee entitled to benefits under the Workmen's Compensation Act and an independent contractor was discussed by *Justice Barnhill* with citation of numerous authorities. The general principle of law is well settled, but its application to individual cases frequently presents difficulties.

The evidence adduced before the Industrial Commission by the claimants in the case at bar upon which the rights of the parties must depend has been hereinbefore set out at some length. This evidence is derived from the testimony of the two witnesses offered by plaintiffs, one of these being the defendant's foreman, and the other a contract hauler engaged at the same time in work similar to that of the decedent. The testimony of defendant's superintendent, offered by defendant, was of like import.

After a careful analysis of this testimony, we reach the conclusion that the evidence characterizes the relationship of the decedent to the defendant, at the time of the injury, as that of an independent contractor, and not an employee within the purview of the Workmen's Compensation Act (G. S., 97-2 (b)), and that the findings and conclusions of the Industrial Commission to the contrary are not supported by the evidence.

The facts upon which the decisions were based in *Gulf Refining Co. v. Brown,* 93 F. (2), 870; *Burruss v. Logging Co.,* 31 P. (2), 263; *Burnett*

v. Ind. Com., 63 N. E. (2), 240; and *Ridgdell v. School Board*, 16 So. (2), 55, cited by plaintiffs, are distinguishable from the facts in the case at bar and may not be held controlling here.

The action of the court below in overruling defendants' exceptions and affirming the award must be held for error, and the judgment

Reversed.

THEODORE W. SCHAEFFER, LAURA SCHAEFFER SCHNORRENBERG AND WACHOVIA BANK & TRUST COMPANY, A CORPORATION, v. H. A. HASELTINE AND ADALINE HASELTINE.

(Filed 25 February, 1948.)

1. Wills § 31—

The intent of the testator as gathered from the four corners of the will is the guiding star in the interpretation of the instrument.

2. Same—

Apparent inconsistent provisions will be reconciled if reasonably possible so as to give effect to each in accordance with the general purpose of the will.

3. Wills § 33c—Held: Beneficiary took vested defeasible life interest with power of disposition and could exercise power of disposition before termination of prior intervening life estate.

Testator devised the home place in trust for the benefit of his wife for life and after her death for the benefit of his sisters-in-law for their lives, with power of appointment to one of them by will, and power of appointment or disposition to the other by deed or will. The will further provided that the trustee at the request of, or with the consent of testator's wife, should have the power to sell the home place and reinvest in other property, with power of disposition by will to his wife. The wife did not elect to have the home place sold. *Held:* Upon the death of testator the sisters-in-law took a vested beneficial interest for life with power of appointment or disposition, subject to the intervening life interest of the wife, subject to be defeated only in the event the wife elected to have the home place sold for reinvestment, and therefore the exercise of the power of disposition by will of one of the sisters-in-law is effective notwithstanding the fact that such sister-in-law predeceased testator's wife.

4. Wills § 33f: Deeds § 12—

Whether a conveyance of property in general terms or by general description constitutes a valid exercise of a power of disposition or appointment is to be determined in accordance with the general rule in respect to conveyances by deed, but is governed by statute, G. S., 31-43, in respect to the exercise of such power by will.

5. Wills § 33f—

Testatrix had a vested one-half life interest in the *locus* with power of disposition, subject to a prior intervening life estate, and subject to defeas-

ance at election of the prior life tenant. Testatrix died prior to the death of the first life tenant, who later died without exercising her election to defeat testatrix' interest. Testatrix devised all the rest and residue of her estate, "both real, personal and mixed, wherever situate," in trust for her niece for life and then in fee to her nephew. *Held:* The will was a valid exercise of the power of appointment of testatrix' one-half interest in the *locus*, there being nothing in the will to indicate any contrary intent. G. S., 31-43.

APPEAL by individual plaintiffs from *Nettles, J.*, in chambers in Asheville, N. C., 20 September 1947, BUNCOMBE. Affirmed.

Controversy without action to determine whether plaintiffs are entitled to specific performance of a contract of purchase and sale of real property and for directions to the plaintiff trustee.

Individual plaintiffs, having contracted to sell and convey to defendants certain residential property in the City of Asheville known as Beaufort Lodge, tendered to them a deed sufficient in form to convey said property in fee. Defendants declined to accept the deed and pay the agreed purchase price for the reason that said plaintiffs cannot convey a good and sufficient title as to a one-half interest in said property.

Thereupon, the controversy, which involves the interpretation of certain wills, was submitted to the court under G. S., 1-250, for adjudication.

On 11 June 1931 Theodore F. Davidson died testate, seized and possessed of real and personal property in Buncombe County, including the land in controversy. Except for certain specific bequests he devised all his property to plaintiff bank, in trust. The trust provisions are divided into four parts or sections. Section 1 provides for the payment of his debts and for the accounting with his wife for her funds handled by him. In section 2 he directs the trustee to hold his residence property, known as Beaufort Lodge, in special trust for his wife, Sarah L. C. Davidson, who was to continue to occupy the same if she so desired. In the event she did not occupy the residence he directs that "the Trustee shall have power to collect all income and revenues arising or received from said property and pay, semi-annually, the net proceeds to my said wife for her life, and afterwards to the persons, objects or uses she may by her last will designate." After vesting the trustee with power to sell said property and invest the proceeds, the will further provides: "Should my wife prefer, the Trustee may invest the proceeds of any sale, or so much thereof as may be necessary, in the purchase of another home or real estate; the title therefor to be conveyed to the Trustee, but to be held for the use and benefit of my wife as hereinbefore provided and subject to her testamentary disposition."

Further provisions respecting the *locus* are as follows:

"And after the death of my said wife, I will and direct the trustee hereinbefore mentioned shall hold and manage the two lots on North Liberty Street, including my residence, for the joint use and enjoyment, share and share alike, of my wife's sisters, namely LAURA CARTER . . . and MRS. FRANCES SCHAEFFER . . ., to be managed under the same trusts, conditions and limitations set forth in the devising trust to and for my wife hereinbefore set forth; but should the said Laura Carter so desire, her share and interest may be separated from the other share of her sister and be disposed of in fee, as she may by a deed or will convey or devise; but the share and interest of Frances Schaeffer shall be managed and held for her sole and separate use for her natural life and then for the use and benefit of such persons and objects as she shall by her last will and testament provide; and on failure to make such testamentary disposition, to any child or children she may leave surviving her in fee . . ."

A subsequent provision in respect to this property is as follows:

"If, for any reason, the devises to my wife's sisters, made in Section 2 of the foregoing dispositions should become void or inoperative, I will and direct the interests and estates therein mentioned shall be held and managed for such uses, persons or objects which my wife by her last Will shall designate."

In section 3 he makes certain bequests, coupled with the following provision:

"In the event any of the persons or beneficiaries under the foregoing bequests and devises shall have died before my death, or if for any cause, it shall become impracticable to carry them, or any of them, into effect, I declare such bequests lapsed, and the property and interest and estate therein mentioned shall revert to and be treated as a part of the residue of my estate."

In section 4 the testator devises "all the residue of my estate and property not otherwise herein disposed of, as well as that which shall have lapsed and reverted as provided in the next preceding paragraph hereof shall be held and used by my said Trustee for the following objects and persons:

"(2) The residue of my estate, after the dispositions, devises and bequests hereinbefore made, shall be held and employed for the uses and trusts for my wife in same manner as I have directed the real property known as 'Beaufort Lodge' and the Ten Thousand Dollars in bonds, or other securities; that is, to safely invest and manage the same, paying the income to her for her life, and one-half of the principal of what may be remaining to such person, persons or objects as she shall by her last Will and Testament, duly executed, designate."

Laura Carter predeceased Sarah L. C. Davidson, the widow. She died testate but without issue 8 December 1931. In her will, after making certain specific bequests, she devised and bequeathed to the Wachovia Bank & Trust Co. all the rest and residue of her estate "both real, personal and mixed, wherever situate" in trust, to pay the income therefrom to her two sisters, Sarah L. C. Davidson and Frances Carter Schaeffer, during their natural lives and to the survivor so long as she may live and "at the death of the survivor of my said sisters, pay the said income to my niece and namesake, Laura Schaeffer Schnorrenberg, for the balance of her natural life and, at her death, pay the remainder to my nephew, Theodore Wilhelm Schaeffer, discharged of the trust."

Sarah L. C. Davidson died testate 27 August 1934. In her will she, in Item IV thereof, specifically refers to the powers of disposition contained in her husband's will and provides: "I do hereby designate my said sisters, Laura Carter and Frances Schaeffer, as the persons who shall receive the one-half of the principal of the residuary estate of my said husband mentioned in subsection 2 of paragraph Four of his said will; and I do hereby name and designate my said two sisters, Laura Carter and Frances Schaeffer, as the parties who shall receive any and all other rights, properties and benefits which the said will of my late husband gives me the right to dispose of this my last will; and I do hereby give, devise and bequeath to my said sisters, Laura Carter and Frances Schaeffer, to be theirs, share and share alike, all the moneys, properties, rights and benefits which the said will of my late husband authorized and empowered me to dispose of, or to designate the recipient of by my last will, the same to be theirs in fee simple and absolute."

There is a codicil to her will, executed after the death of Laura, in which she takes note of Laura's death and provides: "I now will and desire and so direct that my sister FRANCES SCHAEFFER, shall have and take all and everything which I gave to my sister, Laura Carter, in and by my said will, especially that given by the Fourth Item of my said will; and I do hereby designate my said sister, Frances Schaeffer, as the person who shall receive any and all moneys, properties, rights and benefits mentioned in said Fourth Item of my said will; and I do hereby give, devise and bequeath the same to her, my sister, Frances Schaeffer, to be hers absolutely."

Frances Carter Schaeffer died testate 7 June 1938. She devised to her daughter, Laura Schaeffer Schnorrenberg, and son, Theodore W. Schaeffer, the real property known as Beaufort Lodge and two adjacent lots to be theirs, share and share alike. In that connection she provides that "In making this devise, it is my purpose and intention to exercise whatever power that was given me by the will of General Theo. F. Davidson concerning said property known as 'Beaufort Lodge,' as well as

to devise to my said children all and every right, title and interest which I have in all of said property mentioned above, the entire interest to be theirs in fee simple, share and share alike."

Thereafter, Laura Schaeffer Schnorrenberg and Theodore W. Schaeffer entered into the contract of purchase and sale which is the subject of this controversy.

The plaintiff bank joined in the submission of the controversy as a party plaintiff "for the purpose of having the Wills of Theodore F. Davidson, deceased, and Laura Carter, deceased, construed by the Court and being instructed with respect to its duties, if any, under said wills." At the same time the bank agrees that the price offered for the *locus* is reasonable and that if it be adjudged that it holds an undivided one-half interest as trustee it will join in the deed of conveyance upon the payment to it as trustee of one-half of the purchase price.

When the cause came on for hearing, Nettles, J., being of the opinion "that under the terms of General Davidson's will, Laura Carter was given a clear power of appointment over an undivided one-half interest in and to the *locus in quo,* with power to convey the same, in fee, either by deed or by will, and that the residuary clause of the will of Laura Carter was adequate in law, and did pass such interest to the plaintiff Wachovia Bank & Trust Company, as Trustee, and that the said bank, as Trustee, is now vested with the legal title to such undivided one-half interest in and to the *locus in quo,* upon the trusts as enumerated in the will of Laura Carter," adjudged: (1) that the said trustee is entitled to receive, hold, and manage an undivided one-half interest in and to the *locus* upon the trusts declared in the will of Laura Carter, deceased; (2) that the deed tendered by the individual plaintiffs is inadequate to convey a good and marketable fee simple title for Beaufort Lodge; and (3) that upon the payment of one-half of the purchase price, to wit, $5,000, to said trustee under the will of Laura Carter, said trustee shall execute a deed conveying to the defendants the one-half undivided interest therein devised to it by Laura Carter, deceased. The individual plaintiffs excepted and appealed.

Tench C. Coxe and S. G. Bernard for plaintiff appellants.
Smathers & Meekins for defendant appellees.

BARNHILL, J. Subject to the intervening life estate devised to Mrs. Davidson, a one-half interest in Beaufort Lodge was devised to the trustee for the use of Frances Carter Schaeffer for life, with power in her to appoint by will the ultimate takers. This limitation over was subject to be defeated by a sale of the property by the trustee with the consent of the widow. The property was not sold and Mrs. Schaeffer died, leav-

ing a will in which she exercised the power, designating her two children, the individual plaintiffs, as the ultimate takers. Therefore, upon the death of Martin W. Schaeffer, the individual plaintiffs became the owners in fee of the one-half interest in the *locus* which was devised to their mother for life. This was the conclusion of the court below to which no exception was entered. Its correctness seems to be conceded.

The plaintiff trustee, although not a party to the contract of purchase and sale, has ratified the same and agreed to join in the execution of the deed upon the payment to it of one-half of the purchase price. Hence this proceeding has resolved itself into a controversy over the ownership of the one-half interest therein originally devised to Laura Carter for life.

Therefore, the question posed for decision is this: Did Laura Carter by will effectively designate the ultimate takers of her one-half interest in the *locus?* If so, plaintiff trustee still holds title to a one-half interest therein for the use and benefit of *feme* plaintiff for life with remainder to plaintiff Theodore W. Schaeffer, "discharged of the trust." The court below answered the question in the affirmative. In that conclusion we concur.

It is an axiomatic rule of construction that the intent of the testator, as expressed by him, is to be ascertained from the four corners of the will, *Trust Co. v. Board of National Missions,* 226 N. C., 546, 39 S. E. (2d), 621, and cited cases, and that this intent is the guiding star which must lead to the ascertainment of the meaning and purpose of the language used. *Smith v. Mears,* 218 N. C., 193, 10 S. E. (2d), 659, and cited cases.

Where there are apparent inconsistencies in the will, they are to be reconciled, if reasonably accomplishable, so as to give effect to each in accordance with the general purpose of the will. *Holland v. Smith,* 224 N. C., 255, 29 S. E. (2d), 888.

A careful consideration of General Davidson's will in the light of these principles leads to the conclusion that he had and expressed a definite intent in respect to the *locus* in controversy.

He devised his home site to plaintiff trustee for the use and benefit of his wife for and during her natural life with power in the trustee, by and with the consent of his widow, to sell the same and reinvest the proceeds in other property. In the event it was sold and reinvested, then the widow had the power of appointment of the ultimate takers of the property so acquired.

On the other hand, if the property was held intact and not sold during the life of the first taker, then the trustee, at the death of Mrs. Davidson, was to continue to hold the same in trust for the joint use of Laura Carter and Frances Schaeffer for and during their natural lives. Mrs.

Schaeffer was vested with authority to designate the ultimate takers of a one-half interest therein by will only, but Laura Carter was granted authority to dispose of her one-half thereof in fee, either by deed or will.

Thus it appears that the testator vested the trustee with authority, at the request or by and with the consent of Mrs. Davidson, to sell the home place and thereby defeat the limitation over to the testator's two sisters-in-law. If Mrs. Davidson elected to have the property sold, thereby defeating the limitation over, then she should name the ultimate takers of the after acquired property. Hence the powers of appointment or disposition vested in Frances Schaeffer and Laura Carter were subject to be defeated by a sale during the life of the first taker.

But the property was not sold during the life of Mrs. Davidson. Hence the respective powers vested in the two sisters were not defeated.

Laura Carter, at the death of the testator, became seized of a vested beneficial interest in the Beaufort Lodge property. It is true there was an intervening life estate. Even so, she, under the will, became the beneficial owner thereof jointly with her sister, for life, with the right to claim the benefits thereof at the death of the first taker. This was a fixed interest to take effect after the particular estate was spent. *Priddy & Co. v. Sanderford,* 221 N. C., 422, 20 S. E. (2d), 341. As the one contingency, upon the happening of which her interest would be defeated, never occurred, she continued to be the owner of this beneficial interest until the date of her death, and her power of disposition was at all times exercisable by her from and after the death of the testator. Such disposition as she should make could be defeated only by a sale of the property by the trustee for reinvestment during the life of Mrs. Davidson.

In effect, she was made the agent through whom the testator selected the takers of the remainder, which was otherwise undisposed of. It was through her, in the event the property remained intact during the life of his widow, he was to become wholly testate. *Hardee v. Rivers, ante.* 66; *Trust Co. v. Williamson, ante,* 458.

In her will she made certain specific bequests of personal property and then devised "all the rest and residue" of her estate "both real, personal and mixed, wherever situate" to plaintiff trustee in trust to pay the income therefrom in equal shares to her two sisters for their natural lives and at the death of either of them to the survivor. After the death of the survivor, the trustee is required to pay the income to the *feme* plaintiff during her natural life and at her death to pay the remainder to Theodore W. Schaeffer, discharged of the trust.

The prevailing rule to be followed in determining whether a conveyance, by deed or will, of property in general terms or by general description constitutes a valid exercise of a power of disposition or appointment is to be found in 41 A. J., at page 836 *et seq.* See also Anno, 91 A. L. R.,

433. This rule applies in this State in respect to conveyances by deed. *Matthews v. Griffin,* 187 N. C., 599, 122 S. E., 465; *Denson v. Creamery Co.,* 191 N. C., 198, 131 S. E., 581; *Walsh v. Friedman,* 219 N. C., 151, 13 S. E. (2d), 250; *Tocci v. Nowfall,* 220 N. C., 550, 18 S. E. (2d), 225.

But where the question involved is as to whether the power has been exercised by testamentary devise it has been abrogated by statute and a new and different rule substituted therefor.

"A general devise of the real estate of the testator, or of his real estate in any place or in the occupation of any person mentioned in the will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend, as the case may be, which he may have power to appoint in any manner he may think proper; and shall operate as an execution of such power, unless a contrary intention shall appear by the will." G. S. 31-43; *Walsh v. Friedman, supra.*

As there is nothing in the will of Laura Carter to indicate any contrary intent, it must be construed as a valid exercise of the power of disposition. The property she had the power to devise was a part of her real estate within the meaning of the language used in her will.

In this connection it is not amiss to note that the inconsistencies in the Davidson will, certainly as they relate to this particular property, are more apparent than real. In the event the home place was held intact and not sold during the life of Mrs. Davidson, Laura Carter alone had the authority to designate the ultimate takers of her one-half interest. It was only in the event the property was sold or Laura Carter failed to convey or devise her one-half that any right or power of appointment in respect thereto accrued to Mrs. Davidson. The other powers vested in her in section 4 clearly relate to property other than the *locus.*

For the reasons stated the judgment below must be

Affirmed.

STATE v. B. O. CHOATE.

(Filed 25 February, 1948.)

1. Indictment § 13—

It is incumbent upon defendant to show that all the witnesses heard by the grand jury were disqualified or that all the testimony before the grand jury was incompetent in order to be entitled to quashal of the indictment, since quashal on this ground will not be allowed if some of the witnesses were qualified or some of the evidence before the grand jury was competent.

2. Same: Criminal Law § 81b—

Where the record on appeal fails to show what testimony was before the grand jury or what the witnesses who appeared before that body knew about the charge under investigation, defendant's exceptions relating to the denial of his motions to quash on the ground that there was no competent evidence before the grand jury, cannot be sustained.

3. Abortion § 10—

Evidence of defendant's guilt of criminal abortion *held* sufficient to overrule motions to nonsuit. G. S., 14-45.

4. Criminal Law § 29b—

Evidence of defendant's guilt of crimes other than the one charged in the bill of indictment is incompetent for the purpose of showing the character of defendant or his disposition to commit an offense of the nature of the one charged.

5. Criminal Law § 42c—

Defendant's answers on cross-examination to questions relating to collateral matters asked for the purpose of impeachment, are conclusive, and the State may not contradict the answers by other evidence.

6. Criminal Law § 29b—

As an exception to the general rule, evidence of defendant's guilt of crimes other than the one charged in the bill of indictment is admissible when such evidence tends to show *quo animo* intent, design, guilty knowledge, or *scienter* or for the purpose of identification.

7. Same: Abortion § 9a—

The general rule that evidence of defendant's guilt of crimes other than the one charged is incompetent, applies to prosecutions for abortion, and the exception to this rule is under some circumstances applicable in such prosecutions.

8. Same—

Where defendant's defense to a charge of criminal abortion is that the operation was necessary to save the life of the mother, evidence that defendant had committed previous abortions is competent to show *animus;* but where defendant denies he performed the operation charged, evidence of previous abortions committed by him is incompetent.

9. Criminal Law §§ 48d, 81c (3)—Withdrawal of prejudicial evidence after it had been with jury overnight held not to have cured error in its admission.

In this prosecution for criminal abortion, G. S., 14-45, defendant denied that he had performed the operation charged. On cross-examination the State asked him if he had not performed abortions upon several named women, and defendant denied guilt of such other offenses. Thereafter, over defendant's objections, the State was permitted to introduce testimony of several of the women named tending to show that defendant had performed illegal operations previous to the one charged in the bill of indictment. Upon the resumption of the trial the following day, the

Court instructed the jury that the testimony of these witnesses was incompetent and charged them not to consider the testimony. *Held:* The testimony was calculated to prejudice the defendant in the minds of the jurors and was not subject to correction, and a new trial is awarded.

10. Criminal Law § 54b—

Where two separate indictments are consolidated for trial and the jury returns a verdict of guilty as to one of them without saying anything in respect of the other charge, it is equivalent to a verdict of not guilty on such other charge.

APPEAL by defendant from *Bobbitt, J.*, at September Term, 1947, of SURRY.

Criminal prosecution upon two bills of indictment, one (No. 17A) charging abortion under provisions of G. S., 14-45, upon, and the other (No. 17B) murder of a certain named woman, consolidated for trial.

Defendant in apt time moved to quash the bills of indictment on the ground that there was and could not have been competent evidence before the grand jury and that the bills were returned upon hearsay and incompetent evidence. Motion denied. Defendant excepted.

Defendant pleaded not guilty.

On the trial in Superior Court, the State offered evidence tending to show that pursuant to prearrangement with defendant the woman named in the bills of indictment, accompanied by paramour, went by automobile, operated by her, from Charlotte, North Carolina, to the office of defendant in Sparta, North Carolina, arriving after dark on Friday night, 23 August, 1946, for purpose of being treated so as to bring about an abortion, and that she was so treated by him at that time, and given medicine to take according to directions, and "pills for pain"; as a result of which she died Sunday morning, 25 August, 1946, at a hotel in Elkin, North Carolina.

The defendant, as a witness for himself, denied that he treated the woman, as the State's evidence indicated. He testified that he is a physician and lives in Sparta, North Carolina; that in August, 1946, his office was on Main Street; that his brother Leff, also a physician, has office on same floor in the same building where his office is—just one front door, and one reception room,—but his office is on the right as you go in, and Dr. Leff's is on the left, both back of the reception room; that he was not at his office on Friday night, 23 August, 1946; that he did not see the woman in question until she was brought in an automobile to the front of his office on Saturday morning, 24 August, 1946, about 10 or 10:30 o'clock,—the man with her—referring to her as his wife—saying "We want a shot"; that after examining her, his findings indicated to him she needed something to stimulate her instead of dope, and he prescribed accordingly for her; that that was the only thing he did

or advised, and that he "did not at any time on any occasion administer any drug or use any instrument to bring about any premature birth or abortion on" the woman named in the bills of indictment.

Then on cross-examination defendant was asked in detail if he had performed abortion upon several named women, including Mrs. Walter Phillippi, Mrs. Gilmer Stewart and Mrs. Oscar Crouse, daughter of Mrs. John Cox, at certain times covering a period of years—and if as result thereof one of them, Mrs. Crouse, had died on 16 June, 1932. Defendant denied that he had performed abortion or given medicine to produce abortion on any one of the women.

After the defendant had closed his evidence and rested his case, the State called to the witness stand one after the other, Mrs. Walter Phillippi, Mrs. Gilmer Stewart and Mrs. John Cox, whose testimony, respectively, is the subject of exceptions by defendant.

Mrs. Phillippi testified: "I live above Speedwell, Rural Retreat, Virginia. I know Dr. Choate. I went to his office in July about two years ago." Q. "Did Dr. Choate treat you?" Objection—overruled—Exception. A. "You all know what he done." On objection the answer was stricken out, and the jury instructed to disregard the statement. But, over objection and exception by defendant, these questions and answers follow: "Q. Now, don't answer this until they have an opportunity of objecting. What, if anything, did you pay Dr. Choate? A. $35. Q. I beg your pardon? A. $35." The court instructed the jury that this evidence is not admitted for consideration as substantive evidence bearing upon the issues in the case now being tried, but is competent for consideration only as it may tend to impeach, if it does, the jury, to determine whether or not it does tend to impeach the testimony given from the witness stand by the defendant Choate. Defendant again excepts.

Also for like purpose and under like restriction, Mrs. Stewart, as witness for the State, was permitted to testify: "I live at Speedwell, Virginia. I have seen Dr. Choate." And over objections and exception by defendant these questions and answers were permitted: "Q. Where did you see him? A. I have seen him in his office in Sparta; that was two years ago in July. Q. Mrs. Stewart, who, if anybody went with you to Dr. Choate's office? A. Annie Phillippi, the lady who just testified on the stand. Q. Did Dr. Choate treat you? A. Yes."

And, for like purpose and under like restriction, Mrs. John Cox as witness for the State: ". . . I had a daughter named Dora who married Oscar Crouse. She is not living now. I know Dr. B. O. Choate, the defendant." Then over objections and exceptions by defendant, this question and answer follows: "Q. Did Dr. B. O. Choate come to your home prior to your daughter's death? A. Yes, sir."

Then after the examination of two witnesses, whose testimony was short, the evidence closed. The record discloses that thereupon defendant renewed his motion for judgment as of nonsuit, and the court stated: "I'll rule on that . . .; there's one feature of the evidence that I am a little disturbed about. I may make a modified ruling on that later."

The court then, Wednesday afternoon, 24 September, recessed until Thursday morning, 25 September, when upon the convening of court the court instructed the jury as follows:

"Gentlemen of the jury, pay particular attention to the instruction which the Court is about to give you:

"Upon the cross-examination of Dr. B. O. Choate, the defendant, he gave testimony tending to show that he did not know Mrs. Walter Phillippi and Mrs. Gilmer Stewart, and that he had no knowledge or recollection of having treated them, or either of them. Also, upon cross-examination, the defendant gave evidence tending to show that he may have seen Mrs. John Cox, but that he had no knowledge or recollection of having treated her daughter.

"The State, later, called as witnesses Mrs. Walter Phillippi, Mrs. Gilmer Stewart and Mrs. John Cox. Mrs. Phillippi and Mrs. Stewart were permitted to give evidence tending to show that they had been to the defendant's office, some two years ago, and were treated by him. Mrs. John Cox was permitted to give evidence tending to show that some years ago the defendant was in her home and treated her daughter.

"At the time when this testimony of Mrs. Phillippi, Mrs. Stewart and Mrs. Cox was admitted, the Court instructed you that it was not competent as original or substantive evidence, but was for your consideration only for a limited purpose; that is, as it might tend to impeach the credibility of the defendant as a witness.

"Upon further consideration, the Court is of the opinion, and so rules, that the testimony of Mrs. Phillippi, Mrs. Stewart and Mrs. Cox has no connection with or bearing upon the issues involved in this trial at all, but relates entirely to collateral matters, and, being irrelevant, should be entirely disregarded and excluded from consideration by you for any purpose.

"The Court, therefore, instructs you that the entire testimony of Mrs. Phillippi, Mrs. Stewart and Mrs. Cox is stricken out and withdrawn from your consideration, and the Court instructs you to eliminate the entire testimony of each of these witnesses from your minds and to disregard it as completely as if this testimony had not been given or spoken in your hearing."

The jury returned a verdict of guilty of criminal abortion as charged in the bill of indictment 17A.

Judgment was pronounced.

Defendant appeals to Supreme Court and assigns error.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

R. F. Crouse, R. J. Randolph, and Folger & Folger for defendant, appellant.

WINBORNE, J. For determination of questions raised on this appeal, only a few of the points presented require express consideration. These are:

I. The exceptions relating to denial of motions to quash the bill of indictment on the ground that there was no competent evidence before the grand jury, and that the bills of indictment were returned upon hearsay evidence:

While it is the settled law of this State that when a bill of indictment has been returned by the grand jury as a true bill, upon testimony all of which is incompetent, or upon the testimony of witnesses all of whom are disqualified by statute or by some well settled principle of law in force in this State, the bill of indictment will be quashed, on motion of defendant made in apt time, it is held that when some of the testimony is competent and some incompetent, or some of the witnesses heard by the grand jury are qualified and some disqualified, the court will not go into the barren inquiry of how far testimony which was incompetent, or witnesses who are disqualified contributed to the finding of the bill of indictment as a true bill. *S. v. Moore,* 204 N. C., 545, 168 S. E., 842; *S. v. Deal,* 207 N. C., 448, 177 S. E., 332; *S. v. Beard,* 207 N. C., 673, 178 S. E., 242; *S. v. Blanton,* 227 N. C., 517, 42 S. E. (2d), 663. See also *S. v. Levy,* 200 N. C., 586, 158 S. E., 94.

Applying this principle to the case in hand, it is sufficient to direct attention to the fact that, at the time the motions to quash the bills of indictment were made, the record on this appeal fails to show what testimony was before the grand jury, or what the witnesses who were before the grand jury knew about the charge under investigation. Hence, the point raised is not made out, and the exceptions cannot be sustained on this record.

II. The denial of motions for judgment as in case of nonsuit:

Since there must be a new trial for reasons hereinafter set forth, we refrain from a discussion of the evidence adduced on the trial. However, we say that upon a reading thereof the evidence presents a case for the jury. We so hold. Hence these exceptions are not sustained.

III. The admission of evidence tending to show the commission by defendant of other distinct independent offenses of similar nature to the one on trial, for the purpose of impeachment of defendant:

While there may be lack of uniformity in decisions of the courts of the land as to the competency of such evidence for certain other purposes, text writers and courts uniformly hold that the evidence is inadmissible for the purpose for which it was admitted on the trial below.

In Stansbury on North Carolina Evidence, Sec. 91, it is stated: "Evidence of other offenses is inadmissible if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged . . . The commission of a certain act is never directly evidential of the commission of a certain act at some other time. There is always some intermediate step in the reasoning. If there is no other connection between the two acts, it is argued that the doing of the first act shows a disposition to indulge in that kind of conduct, and from this disposition the probability of the second act is inferred. But to reason thus from one crime to another is a clear violation of the character rule; hence if the first act has no other relevancy than that, it may not be proved." See also *S. v. Beam*, 184 N. C., 730, 115 S. E., 176.

And in Wharton's Criminal Evidence, Sec. 344, the author states: "Evidence of other crimes, when offered in chief, violates both the rule of policy which forbids the State initially to attack the character of the accused and the rule of policy that bad character may not be proved by particular acts."

Moreover, ordinarily, when a witness is cross-examined concerning collateral matters, for the purpose of impeachment, his answers are conclusive, and, as to those matters, he may not be contradicted by other evidence. *S. v. Roberson*, 215 N. C., 784, 3 S. E. (2d), 277. See also *S. v. Jordan*, 207 N. C., 460, 177 S. E., 333.

Applying these principles, the evidence offered is clearly irrelevant, and incompetent, and the admission of it is error.

And, in keeping with these principles, the State, through the brief of Attorney-General filed in this Court, concedes that if the impeaching questions asked the defendant, when cross-examined as a witness, relate to collateral matters, and not to matters substantive in character, the State is bound by the answers of the witness. The State, however, makes two contentions: (1) That the evidence of the three women tending to show other offenses committed by defendant may well be competent to show *quo animo*, intent, design, guilty knowledge, or *scienter*, or for purpose of identification, and (2) that if there be error in admitting the evidence, the error is cured by the later instruction of the court in withdrawing it from the jury.

As to the first contention: In the light of the factual situation which the evidence for the State tends to show, we are of opinion that the evidence offered does not come within the purview of the exception,—especially in view of the purpose for which it was admitted.

The State relies upon the exception to the general rule as stated by *Stacy, C. J.,* in *S. v. Miller,* 189 N. C., 695, 128 S. E., 1, and often repeated and applied in other decisions of this Court:

"It is undoubtedly the general rule of law, with some exceptions, that evidence of a distinct substantive offense is inadmissible to prove another and independent crime, the two being wholly disconnected and in no way related to each other. . . . But to this there is the exception, as well established as the rule itself, that proof of the commission of other like offenses is competent to show the *quo animo,* intent, design, guilty knowledge, or *scienter,* when such crimes are so connected with the offense charged as to throw light upon this question. *S. v. Simons,* 178 N. C., 679, and cases there cited. Proof of other like offenses is also competent to show the identity of the person charged with the crime. *S. v. Weaver,* 104 N. C., 758," to which the opinion adds: "The exceptions to the rule are so fully discussed by *Walker, J.,* in *S. v. Stancill,* 178 N. C., 683, and in a valuable note to the case of *People v. Molineux,* 168 N. Y., 264, reported in 62 L. R. A., 193-357, that we deem it unnecessary to repeat here what has there been so well said on the subject."

The rule applies to charges of abortion, and, likewise, the exception is under some circumstances applicable.

It is noted, however, that the evidence of the commission of other offenses is competent to show *quo animo,* intent, design, guilty knowledge, or *scienter,* "when such crimes are so connected with the offense charged as to throw light upon the question." To like effect is the decision in *S. v. Stancill, supra,* to which reference is there made, and *S. v. Dail,* 191 N. C., 231, 131 S. E., 573.

It is also noted that in *S. v. Weaver* (104 N. C., 758), the case cited as authority for the declaration that "proof of other like offenses is also competent to show the identity of the person charged with the crime," the Court was dealing with quite different state of facts from that in hand. There the Court held that "it is an established rule of evidence that 'when, on a trial for larceny, identity is in question, testimony is admissible to show that other property which had been stolen at the same time was also in the possession of the defendant when he had in possession the property charged in the indictment.'" In other words, "in a prosecution for one crime, proof of another direct substantive crime is never admissible unless there is some legal connection between the two, upon which it can be said that one tends to establish the other or some essential fact in issue. The Courts stress the importance of this requisite, due to nature and prejudicial character of such evidence. The question of relevancy is obviously one to be decided in the light of the facts and circumstances in the particular case." 20 Am. Jur., 298, Evidence, Sec. 316.

When these principles are applied to the charge of abortion, we find in this State, the case of *S. v. Brown,* 202 N. C., 221, 162 S. E., 216, where this Court held that upon the trial of a physician for procuring an abortion testimony of a conversation between the physician and the woman as to an abortion about four months prior to the time in controversy, is irrelevant and incompetent and its admission in evidence is prejudicial to defendant and constitutes reversible error.

Also, it is stated in 1 Am. Jur., Abortion, 42, that "if the accused admits the performance of the operation but claims it was a necessary one, or that he so believed, and that he performed it without criminal intent, evidence that he had performed other criminal operations is admissible. But where there is no intimation by the accused that he performed the operation or that it was necessary to save the life of the woman and the State proves the commission of the act and the lack of necessity of performing the operation the intent is shown and evidence of other abortions on the woman is not relevant or competent."

To like effect are well reasoned decisions of the courts of other states. See *Clark v. Commonwealth* (Ky.), 63 N. W., 740; *S. v. Cragun* (Utah), 38 P. (2d), 1071; *Brunet v. The King,* 1928 Canada Law Reports, 375.

In the *Clark case* it is stated: "The question presented for our decision is, is it competent, in the investigation of a charge of murder, to allow evidence against the accused that he had committed other distinct acts entirely disconnected with the one under investigation, for the purpose of showing his probable guilt with reference to the act for which he was being tried? The argument of the Attorney-General is, and doubtless it was the view of the trial judge, that the facts above stated were admissible for the purpose of proving intent or motive on the part of the accused. It has been held, and such seems to be the settled law, that a physician may commit an abortion upon a woman, when, in his opinion, it is necessary to do so to save her life; or another may commit the abortion under the advice of a physician that it is so necessary . . . If it was shown or admitted by the defendant that he had committed the abortion, but attempted to justify it upon the ground of necessity, it is clear that the evidence indicated above would have been competent to prove his motive and intent, and to rebut or negative the idea that he was acting upon his professional judgment, and under a necessity of saving the life of the mother. In the case at bar the purpose and effect of the evidence was not so much to show intent or motive, as it was to establish primarily the guilt of the accused of having perpetrated the act of abortion. In the opinion of the majority of the Court, the admission of this evidence was error, and that it should have been rejected. We are further of the opinion, however, that it would have been competent, as above suggested, as affecting intent or motive, provided there had been proof or admission

that defendant had committed the acts resulting in the abortion, and undertook to justify that act under the plea of necessity."

And in *S. v. Cragun, supra,* a case in which decisions of many jurisdictions are fully discussed in the opinion and concurring opinion, this headnote epitomizes the holding of the Supreme Court of Utah: "In abortion prosecution, where evidence showed that accused's attempt to procure miscarriage was not in effort to save the life of prosecutrix, and accused did not claim accident or mistake, admission of evidence that accused had committed abortion on another woman prior to offense for which he was being tried, held prejudicial error."

In the case of *Brunet v. The King, supra,* the Supreme Court of Canada, after stating the question: "Was the evidence of a previous crime committed by the accused admissible?", first refers to the rule applied in the case of *The King v. Bond,* 1906—2 KB, 389, approved by 7 to 2 decision, that where it was not disputed that the accused used instruments, the defense being that they were used for a lawful purpose, the evidence given that the accused had on previous occasion used similar instruments on a certain woman to procure a miscarriage was admissible as proof of intent. And, then, referring to the case in hand, the Court said: "In the present case there was no question of proving the intent of the accused in performing an operation, the sole question being as to whether he was the party who did perform it. All the evidence, therefore, offered to show the accused had performed an illegal operation on Alice Conture in 1926 was inadmissible . . ."

While these opinions of other courts are not controlling on this Court, they lend support to our view that, on the facts of the case, as revealed by the record on this appeal, the evidence of other offenses admitted over objection of defendant was incompetent and irrelevant, and constitutes error.

Now, as to the second contention of the State, that in any event the error was cured by the later instruction of the court. It is apparent that the trial judge, when he reached the conclusion that the evidence was inadmissible, did all that he could do to remove the harmful effect of it. But it had been with the jury over night, and must have found lodgment in their minds. And evidence tending to show that defendant committed other like offenses is calculated to prejudice the defendant in the minds of the jurors, and was not subject to correction. *S. v. Little, ante,* 417, 45 S. E. (2d), 542. Conviction of a defendant under such circumstances ought not to stand.

Evidence of this character has been the subject of severe condemnation by other courts. For instance, in the case of *Commonwealth v. Shepard,* 1 Allen's Reports, 575, *Bigelow, C. J.,* of Supreme Judicial Court of Massachusetts, characterizes "evidence of another act of embezzlement by

defendant" as "a dangerous species of evidence, not only because it requires a defendant to meet and explain other acts than those charged against him, and for which he is on trial, but also because it may lead the jury to violate the great principle, that a party is not to be convicted of one crime by proof that he is guilty of another." And in *S. v. Smith* (Wash.), 174 Pac., 9, the Supreme Court of Washington says: "There is no more insidious and dangerous testimony than that which attempts to convict a defendant by producing evidence of crimes other than the one for which he is on trial."

Let it be noted that though defendant has been indicted under two separate bills of indictment, No. 17A for abortion, and No. 17B for murder, which were consolidated for trial, as hereinabove first stated, the jury returned a verdict of guilty only of the charge contained in No. 17A, without saying anything in respect of the charge in No. 17B. This is equivalent to a verdict of not guilty on the charge in No. 17B. See *S. v. Taylor,* 84 N. C., 773; *S. v. Hampton,* 210 N. C., 283, 186 S. E., 251; *S. v. Coal Co.,* 210 N. C., 742, 188 S. E., 412; *S. v. Delk,* 212 N. C., 631, 194 S. E., 94. Hence, the case will go back for re-trial only as to the charge of abortion contained in the bill of indictment No. 17A.

New trial.

JOE LENO, NELSON PITCHI, AND DAN PITCHI v. THE PRUDENTIAL INSURANCE COMPANY OF AMERICA; WACHOVIA BANK AND TRUST COMPANY, TRUSTEE, AND SPERO MOCHE.

(Filed 25 February, 1948.)

1. Mortgages § 20—

Lessees are entitled to pay the debt secured by a deed of trust to prevent threatened foreclosure in order to protect their leasehold estate in a part of the mortgaged premises, and to have the deed of trust and notes secured thereby assigned or delivered to them uncanceled under the equitable doctrine of subrogation.

2. Subrogation § 1—

A person who is not a mere volunteer is entitled to the equity of subrogation upon payment of a debt which in justice and good conscience ought to be paid by another.

3. Cancellation of Instruments § 8—

A grantee who takes the premises subject to a prior recorded lease is not entitled to attack the lease on the ground that it was procured by fraud.

4. Landlord and Tenant § 2—

A seal is not necessary to the validity of a lease.

APPEAL by plaintiffs from *Williams, J.*, at the October-November Term, 1947, of WILSON.

Civil action to restrain a threatened foreclosure of a deed of trust, which would destroy the plaintiffs' rights under certain lease agreements, and to require The Prudential Insurance Company of America to accept from the plaintiffs, Nelson and Dan Pitchi, full payment of the secured debt and to assign to them without recourse on it, or to surrender to them the uncanceled documents evidencing and securing the debt.

The facts pertinent to this appeal are as follows:

1. On and prior to 1 April, 1938, one Birdie Buford was the owner of a certain lot of land situate at the southeast corner of East Nash and Douglas Streets in the town of Wilson, N. C., on which there was erected a brick building containing, among other rooms, a corner storeroom fronting on Nash Street and extending back on Douglas Street.

2. On 1 April, 1938, Birdie Buford became indebted to The Prudential Insurance Company of America in the sum of $14,500.00, and executed her note therefor, payable in monthly installments thereafter of $107.00, until 1 December, 1954. In order to secure the payment of said note, she executed and delivered a deed of trust to the defendant, Wachovia Bank & Trust Company, Trustee, which was duly probated and recorded in the office of the Register of Deeds of Wilson County, N. C., 13 April, 1938, which deed of trust conveyed to the Trustee the land and storeroom referred to herein.

3. Birdie Buford duly executed a lease on the storeroom at the southeast corner of East Nash and Douglas Streets, to Joe Leno, on 10 September, 1940, for a period of five years to commence from 1 October, 1940, for an annual rental of $600.00, payable $50.00 per month, with full power to sublease the premises at the will of the lessee. The lease restricted the use of the premises to the operation of a cafe. It also contained a stipulation providing for a renewal thereof for an additional five years at the expiration of the term created therein, upon the same terms and conditions except the rental, which was to be increased to $60.00 per month. The lease was duly recorded on 10 September, 1940.

4. Joe Leno sublet the premises referred to herein to Nelson and Dennis (Dan) Pitchi, under a lease executed 8 February, 1945, and duly recorded in the office of the Register of Deeds of Wilson County, N. C.

5. All the defendants admitted in open court "That on September 27, 1945, Joe Leno notified Birdie Buford and Spero Moche of his intention to renew the lease for an additional term of five years beginning October 1st, 1945, and that on October 1st, 1945, rent in the amount of $60.00 for the month of October, 1945, was tendered to Spero Moche through his rental agent, R. A. Perry, and that the rent was refused and that since

October 1st, 1945, the rent has been tendered each month and paid into the office of the Clerk of the Superior Court for the use of Spero Moche."

6. A deed obtained from Mrs. Birdie S. Buford for the property involved herein, by Spero Moche, *et al.*, 21 September, 1940, was declared null and void in an opinion filed 19 April, 1944, in the case of *Buford v. Moche*, 224 N. C., 235, 29 S. E. (2d), 729.

7. On 5 July, 1945, the defendant Spero Moche entered into a contract for the purchase of this property subject to certain encumbrances and other rights including the balance due The Prudential Insurance Company of America, secured by the deed of trust referred to above and the lease from Birdie S. Buford to Joe Leno referred to herein. The deed for the property, executed by the grantors to Spero Moche on the same day the purchase agreement was executed, conveyed the premises subject to unpaid taxes for 1945, the balance due The Prudential Insurance Company of America, secured by deed of trust from Birdie S. Buford to Wachovia Bank & Trust Company, Trustee, and any and all other rights and encumbrances of record.

8. It is admitted by all the defendants "That there was a default in the payment of the debt of Birdie Buford to The Prudential Insurance Company and secured by the deed of trust to the Wachovia Bank & Trust Company, Trustee; that there was a demand by The Prudential Insurance Company on the Wachovia Bank & Trust Company, Trustee, to foreclose the deed of trust and that the property consequently was advertised for sale under foreclosure and, but for the restraining order issued herein, would have been sold under said foreclosure."

9. It is admitted by The Prudential Insurance Company of America that on 26 May, 1946, the plaintiffs herein, in an effort to preserve their estate in the property described in the deed of trust referred to herein, offered to pay to The Prudential Insurance Company all amounts then remaining unpaid on the note of Birdie Buford, and to take an assignment without recourse on said Company; but The Prudential Insurance Company refused to permit plaintiffs to pay said balance and to assign to them the security without recourse.

It is admitted by the defendants The Prudential Insurance Company of America and the Wachovia Bank & Trust Company, Trustee, that the plaintiffs were informed by The Prudential Insurance Company that the amount remaining unpaid on the note of Birdie Buford is $9,566.26, and that the plaintiffs have tendered to The Prudential Insurance Company that amount and with said tender requested the said defendant to deliver to them, properly assigned or uncanceled the note of Birdie Buford and the deed of trust securing the same. This tender was rejected and the plaintiffs deposited a certified check, payable to The Prudential Insurance Company of America, for the above amount in the office of the Clerk of the Superior Court of Wilson County.

The plaintiffs, Dan Pitchi and Nelson Pitchi, in open court offered to pay into court for the use of The Prudential Insurance Company of America, in addition to the payments already tendered and paid into the office of the Clerk of the Superior Court, any further amounts that may have become due by reason of taxes, insurance premiums, interest or any other expenditures binding upon The Prudential Insurance Company in connection with said debt and tendered judgment for any such amount.

11. The plaintiff, Nelson Pitchi, testified that he and his brother, Dan Pitchi, purchased the Red Apple Cafe from Joe Leno in February, 1945, for the sum of $7,000.00; that they have expended the sum of $4,500.00 on it since that time, and have operated it continuously as a cafe. He also testified that there is no other location available for their cafe business.

12. The defendant, Spero Moche, filed an answer and cross-action, alleging that the lease from Birdie Buford to Joe Leno was procured by fraud, and further alleging that said lease is null and void, not having been executed under seal.

In the trial below, and before the jury was impaneled, the plaintiffs made a motion for the dismissal of the answer by the defendant Moche, or for judgment on his answer as to him for that the facts alleged in the answer did not constitute any defense to plaintiffs' action for the restraining order and for subrogation. Motion denied. Exception.

The plaintiffs thereafter moved for judgment on the pleadings and admissions. Motion denied. Exception.

At the close of plaintiffs' evidence, the defendants moved for judgment as of nonsuit. The motion was allowed and the defendant Moche was given permission to take a nonsuit on his cross-action. Judgment was entered accordingly, and the plaintiffs appeal, assigning error.

Lucas and Rand for plaintiffs.

Chas. B. McLean for The Prudential Insurance Co. of America and Wachovia Bank & Trust Co., Trustee.

Connor, Gardner & Connor and J. A. Jones for defendant Moche.

DENNY, J. The primary question presented on this appeal is whether or not the equitable remedy of subrogation is available to a lessee whose enjoyment of the use of the demised property is about to be destroyed by the foreclosure of a prior deed of trust, and who, to prevent such destruction, tenders to the holder of the secured debt the full amount of the debt and expense and demands an assignment, without recourse, or a surrender to him of the uncanceled documents evidencing and securing the debt.

It is said in 50 American Jurisprudence, 699: "The right of subrogation is not necessarily confined to those who are legally bound to make the payment, but extends as well to persons who pay the debt in self-protection, since they might suffer loss if the obligation is not discharged. In this class are included subsequent encumbrancers paying off a prior encumbrance. The extent or quantity of the subrogee's interest which is in jeopardy is not material. If he has any palpable interest which will be protected by the extinguishment of the debt, he may pay the debt and be entitled to hold and enforce it just as the creditor could." See also 60 Corpus Juris, 789.

In Pomeroy's Equity Jurisprudence (5th Ed.), Vol. 4, page 637, *et seq.*, the general rule as to the right of subrogation is stated as follows: "In general, when any person having a subsequent interest in the premises, and who is therefore entitled to redeem for the purpose of protecting such interest, and who is not the principal debtor primarily and absolutely liable for the mortgage debt, pays off the mortgage, he thereby becomes an equitable assignee thereof, and may keep alive and enforce the lien so far as may be necessary in equity for his own benefit; he is subrogated to the rights of the mortgagee to the extent necessary for his own equitable protection. The class of persons coming within this description include the grantee from the mortgagor or any subsequent grantee who has taken the land simply subject to the mortgage, the heir or devisee of the mortgagor; the widow of the mortgagor or of any subsequent owner; a subsequent encumbrancer by mortgage, judgment, or otherwise; a subsequent lessee, and the like."

"The doctrine of subrogation is broad enough to include every instance in which one person, who, not being a mere volunteer, pays a debt which in justice, equity and good conscience ought to be paid by another." Jones on Mortgages (8th Ed.), Vol. 2, p. 570.

A lessee for a term of years is entitled to subrogation when, in order to preserve his lease, it becomes necessary for him to pay off a lien superior thereto. *Averill v. Taylor,* 8 N. Y., 44; *Hamilton v. Dobbs & Robinson,* 19 N. J. Eq., 227; *Bacon v. Bowdoin,* 43 Metcalf's Rep., 591 (Mass.); *Dundee Naval Stores Co. v. McDowell,* 65 Fla., 15, 61 Sou., 108; *Wunderle v. Ellis,* 212 Pa., 618, 62 A., 106; *Hopkins Mfg. Co. v. Ketterer,* 237 Pa., 285, 85 A, 421; *Dollar Savings Bank v. Duff,* 269 Pa., 29, 112 A., 23; *Schenectady Savings Bank v. Ashton,* 201 N. Y. S., 288, 206 App. Div., 345.

In the case of *Averill v. Taylor, supra,* the facts were on all fours with the case before us, the lease covered only a part of the mortgaged premises, and the Court said: "A court of equity would not be obliged to enforce a redemption that was merely frivolous, and for vexation. In a case like the present, the mortgagor is bound in equity and good con-

science to permit his lessee to do that, which according to his contract, he ought himself to have done. As he has not paid his debt, which was his duty, for the protection of his tenants, he has no right to object that they should pay it, and upon such payment be subrogated to the original rights of the mortgage creditor."

In *Hamilton v. Dobbs & Robinson, supra,* the Court held: "The tenant, or other person, like a second mortgagee or judgment debtor, having a right to redeem, has not, perhaps, strictly the right to demand a written assignment of the bond and mortgage; but he stands by redemption in place of the mortgagee, and will be subrogated to his rights against the mortgagor and the reversioner. He has the right to have the bond and mortgage delivered to him uncanceled, which, in such case, is, in equity, and may be, at law, a complete assignment of them." See *Sherrill v. Hood,* 208 N. C., 472, 181 S. E., 330; *Wilson v. Trust Co.,* 200 N. C., 788, 158 S. E., 479; and *Liles v. Rogers,* 113 N. C., 197, 18 S. E., 104.

It is said in *Wunderle v. Ellis, supra:* "There is no solid reason why the principle of subrogation, that where a party asserting a legal right can be fully secured in it and at the same time the interests of another in the subject-matter can be protected from impending injury, should not be applied in regard to the assignment of a mortgage and in favor of a lessee, as well as to any other case to which the principle is applicable."

Applying the equitable principles laid down in the above cited authorities to the undisputed facts disclosed by the record herein, the plaintiffs' exception to the granting of defendants' motion for judgment as of nonsuit must be sustained.

The plaintiffs also except and assign as error the refusal of his Honor to dismiss the answer filed by the defendant, Moche, or to give judgment on the pleadings against him for the relief sought by the plaintiffs.

The defendant, Moche, undertakes to set up a cross-action against the plaintiffs, and to have the court, in the exercise of its equitable powers, set aside the lease held by Joe Leno from Birdie Buford; and to require plaintiffs to give bond in the sum of $20,000.00, to indemnify the defendant, Moche, "in respect to the payment of reasonable rental value of the said premises for rents which have already accrued, and which may accrue pending the trial and final adjudication of" this action.

As a matter of fact, the lease from Birdie Buford to Joe Leno, under which the plaintiffs now hold possession of the premises occupied by the Red Apple Cafe, was executed and filed of record 10 September, 1940, eleven days prior to the execution of the deed from Birdie Buford to Spero Moche, *et al.,* which deed was declared invalid by this Court in an opinion filed 19 April, 1944, and reported in 224 N. C., 235, 29 S. E. (2d), 729. Furthermore, the deed under which the defendant, Moche,

now claims his equity of redemption in the mortgaged premises, was not executed until 5 July, 1945, and conveyed the property subject to all rights and encumbrances of record. Moreover, the validity of the lease held by Joe Leno was unsuccessfully attacked in a summary proceeding in ejectment by the defendant, Moche, in the case of *Moche v. Leno,* in which the validity of the lease was upheld in the opinion filed in this Court 26 February, 1947, and reported in 227 N. C., 159, 41 S. E. (2d), 369.

The defendant Moche's cross-action is without merit in law or equity, and should have been stricken from the pleadings.

The plaintiffs assign as error the refusal of the trial judge to grant their motion for judgment for the relief prayed for, on the pleadings and admissions.

We think on the pleadings, the undisputed facts, and admissions disclosed by the record, the plaintiffs are entitled to the relief which they seek in this action. Therefore, the judgment of the court below is reversed and this cause is remanded to the end that judgment may be entered in accord with this opinion.

Reversed.

RALPH D. TUTTLE v. JUNIOR BUILDING CORPORATION.

(Filed 25 February, 1948.)

1. Corporations § 6a (1)—

A corporation is bound by the acts of its stockholders and directors only when they act as a body in regular session or under authority conferred at a duly constituted meeting, and they cannot bind the corporation by their separate individual acts or declarations, even though they constitute a majority.

2. Corporations § 21—

Since stockholders and directors cannot bind the corporation by their individual acts and declarations, evidence of declarations made by stockholders and directors is incompetent and ineffectual to show a ratification of an alleged unauthorized act performed in the name of the corporation by its officers.

3. Corporations § 22—

Corporate directors are trustees of its property, and usually a corporation may sell, transfer and convey its corporate real estate only when authorized to do so by its board of directors. G. S., 55-48; G. S., 55-26 (10). In the present case the statutory provisions were supplemented by stipulation in defendant's bylaws.

4. Corporations §§ 6a (2), 22—

In the absence of charter or bylaw provision to the contrary, the president of a corporation is the general manager of its corporate affairs, and his contracts made in the name of the corporation in the general course of business and within the apparent scope of his authority are ordinarily enforceable, but ordinarily he has no power to sell or contract to sell the real or personal property of the corporation without authority from its board of directors.

5. Corporations § 22—

Where a corporation is authorized to, and does in fact, engage in the business of buying and selling real estate as a part of the corporate stock in trade, the authority of its officers to bind the corporation in respect thereto may be implied from the nature of its business, the duties necessary to be performed by its officers, the relation of the property to the corporate business and to its other property, and the principle that corporate officers, in the absence of express limitations, have implied power to do all acts on behalf of the corporation which are necessary or proper in the performance of their duties.

6. Same—

Where a corporation authorized by its charter to engage in the business of buying and selling real estate, denies that its officers had authority to sell the real estate in question, evidence tending to show that the corporation had never exercised its corporate authority to deal in real estate, that the *locus* was the only real property it ever owned, and that it was organized primarily for the purpose of acquiring and holding the *locus*, is competent to repel any inference of implied authority on the part of its officers to make the conveyance.

7. Same—

A deed in proper form, executed in the name of a corporation by its president, or in his absence by its vice-president, attested by its secretary, to which the corporate seal is affixed, is *prima facie* valid.

8. Same—

Evidence on the part of plaintiff tending to show that deed in proper form executed for defendant corporation by its officers, had the corporate seal affixed and was deposited in escrow, makes out a *prima facie* case that the corporate officers had authority to execute the deed, entitling plaintiff to the submission of appropriate issues to the jury, but does not shift the burden of proof, which rests upon plaintiff throughout to establish the validity of the contract.

9. Corporations § 9—

The fact that proceedings at a stockholders' meeting are not recorded is not fatal, and the proceedings may be proved by parol testimony.

10. Corporations § 22—Authority of corporate officers to execute deed held question for jury on conflicting evidence.

Plaintiff's evidence tended to show defendant corporation was authorized by its charter to deal in real estate, that subsequent to a meeting of stock-

holders held after proper notice, officers of the corporation executed deed in proper form with corporate seal affixed, conveying real estate of the corporation to plaintiff, and deposited same in escrow. The deed was withdrawn from escrow without plaintiff's knowledge or consent before he could tender balance of the purchase price. Defendant denied authority of its officers to execute the deed and offered evidence that at the stockholders' meeting the matter was informally discussed and it was agreed to instruct the officers to execute the deed, but that no formal vote was taken and no record of the meeting entered in the corporate minutes, that the *locus* was the only realty owned by the corporation and that the corporation was organized primarily for the purpose of acquiring and holding the *locus*. *Held:* The authority of the corporate officers to execute the deed was an issue of fact for the determination of the jury upon the conflicting evidence.

11. Appeal and Error § 39f—

Where the charge of the court, considered contextually, is in accord with the applicable principles of law, exceptions to excerpts therefrom cannot be sustained.

APPEAL by plaintiff from *Bobbitt, J.*, at October Term, 1947, of STOKES. No error.

Civil action to compel specific performance of a contract of purchase and sale.

This cause was here on former appeal. *Tuttle v. Building Corp.*, 227 N. C., 146. The substance of the evidence offered by plaintiff is there stated. In that hearing the defendant offered no testimony.

At the hearing below the defendant offered testimony tending to show that while the directors and stockholders met informally and discussed plaintiff's offer to purchase the *locus in quo*, there was no formal meeting or formal action either by the stockholders or directors, accepting the offer of plaintiff or authorizing the sale or the execution of a deed.

There was evidence that notice of a meeting was issued, that a meeting was held and adjourned until the next day, and at the adjourned meeting it was informally agreed to instruct the defendant's attorney, who also was a director, to prepare a deed, but no formal vote was had and no record of the meeting was entered in the corporate minutes.

A deed prepared by the attorney was executed in the name of the corporation by its vice-president, in the absence of the president who was then in the Army. It was attested by the secretary of the corporation, the corporate seal was affixed thereto, and its execution was duly acknowledged. This deed was delivered to the bank in escrow and later withdrawn without the consent of plaintiff and before he tendered the balance of the purchase price.

The *locus in quo* is the only real estate defendant has ever owned. Therefore, it has not heretofore purchased or sold any other real estate

under the power contained in its charter and has never engaged in the real estate business.

The jury answered the first issue submitted, to wit, "1. Did the defendant corporation enter into a valid contract with the plaintiff to sell and convey the Junior Building Corporation property for the sum of Ten Thousand Dollars, as alleged in the complaint?", "No."

The court below thereupon entered its judgment in favor of the defendant and plaintiff excepted and appealed.

P. W. Glidewell, Sr., and A. C. Davis for plaintiff appellant.

R. J. Scott and Fred Folger for defendant appellee.

BARNHILL, J. This appeal presents three questions for decision: (1) Was evidence of statements made by stockholders and directors, as individuals, after the withdrawal of the deed from the bank, competent against defendant; (2) Was evidence tending to show that defendant had never owned any other property or made any other sales of real property incompetent and inadmissible on the question of the implied authority of its officers; and (3) After proof of the regular execution of a deed by its officers does the burden of proof shift to defendant to prove want of authority. We must answer in the negative.

A corporation is bound by the acts of its stockholders and directors only when they act as a body in regular session or under authority conferred at a duly constituted meeting. "As a rule authorized meetings are prerequisite to corporate action based upon deliberate conference, and intelligent discussion of proposed measures." *O'Neal v. Wake County,* 196 N. C., 184, 145 S. E., 28; *Duke v. Markham,* 105 N. C., 131; *Nimocks v. Shingle Co.,* 110 N. C., 20; *Pinchback v. Mining Co.,* 137 N. C., 172; *Hill v. R. R.,* 143 N. C., 539; *Everett v. Staton,* 192 N. C., 216, 134 S. E., 492; *Davenport v. Drainage District,* 220 N. C., 237, 17 S. E. (2d), 1.

"The separate action, individually, without consultation, although a majority in number should agree upon a certain act, would not be the act of the constituted body of men clothed with corporate powers." Angel & Ames on Corporations, sec. 504. "Indeed the authorities upon this subject are numerous, uncontradicted, and supported by reason." *Duke v. Markham, supra; Printing Co. v. Herbert,* 137 N. C., 317; *Pinchback v. Mining Co., supra; Hill v. R. R., supra.*

If stockholders and directors cannot bind the corporation by their individual acts and declarations, *a fortiori* an unauthorized act performed in the name of the corporation by its officers cannot thereafter be ratified by such acts or declarations. Hence the court below properly excluded the evidence of declarations made by stockholders and directors after the

sale had been repudiated and the deed withdrawn from escrow. *Rumbough v. Improvement Co.,* 112 N. C., 751; *Gazzam v. Insurance Co.,* 155 N. C., 330, 71 S. E., 434; *Bank v. Toxey,* 210 N. C., 470, 187 S. E., 553; *R. R. v. Smitherman,* 178 N. C., 595, 101 S. E., 208.

Directors are trustees of corporate property, G. S. 55-48; *Pender v. Speight,* 159 N. C., 612, 75 S. E., 851; *Teague v. Furniture Co.,* 201 N. C., 803, 161 S. E., 530; *Braswell v. Morrow,* 195 N. C., 127, 141 S. E., 489; *Roscower v. Bizzell,* 199 N. C., 656, 155 S. E., 558, and usually, a corporation may sell, transfer, and convey its corporate real estate only when authorized to do so by its board of directors. G. S. 55-26 (10).

These statutory provisions (G. S. 55-48; G. S. 55-26 (10)), are supplemented by a stipulation in defendant's bylaws as follows:

"Full executive power shall be vested in the board of directors in the transaction of any and all business of the corporation of any and every nature during the term of their office."

The record fails to disclose that any of these powers were ever delegated to the defendant's officers.

In the absence of a charter or bylaw provision to the contrary, the president of the corporation is the general manager of its corporate affairs. *Phillips v. Land Co.,* 174 N. C., 542, 94 S. E., 12; *Trust Co. v. Transit Lines,* 198 N. C., 675, 153 S. E., 158; *White v. Johnson and Sons, Inc.,* 205 N. C., 773, 172 S. E., 370; *Lumber Co. v. Elias,* 199 N. C., 103, 154 S. E., 54; *Warren v. Bottling Co.,* 204 N. C., 288, 168 S. E., 226. His contracts made in the name of the company in its general course of business and within the apparent scope of his authority are ordinarily enforceable. 2 Fletcher, Cyc. Corporations, 467, sec. 592; *Huntley v. Mathias,* 90 N. C., 101; *Wynn v. Grant,* 166 N. C., 39, 81 S. E., 949; *Powell v. Lumber Co.,* 168 N. C., 632, 84 S. E., 1032; *Brimmer v. Brimmer,* 174 N. C., 435, 93 S. E., 984. But, usually, he has no power to bind the corporation by contract in material matters without express authority from the directors or stockholders. *Lumber Co. v. Elias, supra;* 2 Fletcher Cyc. Corporations, 440, sec. 557.

"The president of a corporation has no implied or inherent authority, merely by virtue of his office or as incident thereto, to sell and convey or to contract to sell the real or personal property of the corporation, without authority so to do from the board of directors, even though he is both president and general manager, and over a period of years is left with the entire management and control of the affairs of the corporation. Nor can he, merely by virtue of his office, enter into a valid contract to exchange the same, or make a valid conveyance of corporate property, although authority is sometimes presumed." 2 Fletcher, Cyc. Corporations, 508, sec. 605; *Duke v. Markham, supra; Buchwald Trans-*

fer Co. v. Hurst, 19 Ann. Cas., 619, and note; 13 A. J., 882, sec. 904; G. S. 55-26 (10).

The rule limiting the authority of officers in respect to the sale of real property is not, however, inflexible. Where a corporation is authorized to and does in fact engage in the business of buying and selling real estate and its officers are in the habit of conveying the property purchased as a part of the corporate stock in trade with the silent approval or acquiescence of the board of directors, authority so to do will be implied. *Brimmer v. Brimmer, supra; Watson v. Manufacturing Co.*, 147 N. C., 469. In determining whether the rule must be applied, the business in which the corporation is engaged, the duties necessary to be performed by its officers, the relation of the property dealt with to the business and to its other property, the surrounding circumstances and the principle that corporate officers have "the implied power, in the absence of express limitations, to do all acts on behalf of the corporation that may be necessary or proper in performing" their duties must be considered. Clark on Corporations, 494; *Brimmer v. Brimmer, supra; Lumber Co. v. Elias, supra.*

Here the defendant was authorized by its charter to engage in the business of buying and selling real estate. In the light of that fact, evidence tending to show that it has never exercised its corporate authority so to do; that the *locus* is the only real property it ever owned; and that it was organized primarily for the purpose of acquiring and holding this particular tract was pertinent and competent to repel any inference of implied authority in its officers, arising out of its course of business, to make the conveyance. Hence exceptions thereto cannot be sustained.

A deed in proper form, executed in the name of a corporation by its president, or in his absence by its vice-president, attested by its secretary, to which its corporate seal has been affixed, is *prima facie* valid. The presence of the seal raises a presumption of authority having the force of *prima facie* evidence that its execution was the act of the corporation and that the seal was affixed thereto by legally exercised authority of the company. *Duke v. Markham, supra; Clark v. Hodge*, 116 N. C., 761; *Edwards v. Supply Co.*, 150 N. C., 173, 63 S. E., 740; *Bank v. Oil Co.*, 157 N. C., 302, 73 S. E., 93; *Lumber Co. v. Lumber Co.*, 185 N. C., 237, 117 S. E., 10; *Trust Co. v. Transit Lines, supra; Morris v. Basnight*, 179 N. C., 298, 102 S. E., 389.

Hence proof of the due execution of the deed for the *locus* with the corporate seal affixed thereto and its delivery in escrow made out a *prima facie* case for plaintiff which required the submission of appropriate issues to the jury. *Tuttle v. Building Corp.*, 227 N. C., 146; *Duke v. Markham, supra; Morris v. Y. & B. Corp.*, 198 N. C., 705, 153 S. E., 327. But this did not shift the burden of proof. The de-

fendant was merely put to the election whether it should go forward with proof in rebuttal or risk a verdict on the *prima facie* case established by plaintiff. The burden of establishing the validity of the contract rested on the plaintiff throughout the trial. *Davenport v. Drainage District, supra; Bank v. Construction Co.*, 203 N. C., 100, 164 S. E., 621; *White v. Hines*, 182 N. C., 275, 109 S. E., 31; *Woods v. Freeman*, 213 N. C., 314, 195 S. E., 812.

The authority of the officer to execute the deed was challenged by the denial of the defendant. The evidence thereon was conflicting. Hence it was a question for the jury. *Phillips v. Land Co.*, 174 N. C., 542, 94 S. E., 12; *McCall v. Institute*, 189 N. C., 775, 128 S. E., 349; *Warren v. Bottling Co., supra.*

There is evidence that defendant stockholders held a meeting to discuss this particular sale and there are circumstances tending to show that the sale was approved at that meeting. Indeed, it seems to be admitted that it was agreed that Scott should prepare the deed. The failure to record these proceedings is not fatal. *Benbow v. Cook*, 115 N. C., 325. Proceedings of a corporate meeting of stockholders or directors are facts and they may be proved by parol testimony when they are not recorded. *Bailey v. Hassell*, 184 N. C., 450, 115 S. E., 166; *Everett v. Staton, supra; Asbury v. Mauney*, 173 N. C., 454, 92 S. E., 267.

But the court in its charge gave the plaintiff the full benefit of his contention as to the force and effect of what happened at this meeting. The jury simply discounted the testimony and failed to find therefrom that the sale was authorized.

The charge of the court, considered contextually, was in accord with the principles of law heretofore stated. Plaintiff's exceptions to excerpts therefrom cannot be sustained.

Plaintiff made out a persuasive case. There was, however, evidence in rebuttal. Hence it was essentially a question of fact for the jury and they have answered under instructions free from error. Their verdict and the judgment thereon must stand.

No error.

J. M. NICHOLS, ADMINISTRATOR OF THE ESTATE OF ALLEN NICHOLS, DECEASED, v. J. M. GOLDSTON, TRADING AND DOING BUSINESS AS GOLDSTON MOTOR EXPRESS,

and

OLA P. HIX, ADMINISTRATRIX OF THE ESTATE OF DAVIS JEFFERSON HIX, DECEASED, v. J. M. GOLDSTON, TRADING AND DOING BUSINESS AS GOLDSTON MOTOR EXPRESS.

(Filed 25 February, 1948.)

1. **Automobiles § 18h (2)—**

Plaintiffs' evidence tending to show that defendant's tractor with trailer was being driven at a speed of 35 miles per hour and entered an intersection with another highway without slackening speed or giving signal or warning, and collided with the truck in which plaintiffs' intestates were riding, which had already entered the intersection, *is held* sufficient to overrule defendant's motions as of nonsuit on the issue of negligence notwithstanding that defendant's vehicle was being operated upon the dominant highway. G. S., 20-141 (b) (3); G. S., 20-141 (c).

2. **Automobiles § 8i—**

The failure of the driver traveling along a servient highway to stop before entering an intersection with a dominant highway in obedience to signs of the State Highway Commission, is not negligence *per se* but is evidence of negligence to be considered with other facts in the case in determining the question of proximate cause. G. S., 20-158.

3. **Trial § 22a—**

Upon motion to nonsuit, the evidence tending to support plaintiffs' claim must be construed most favorably to them and they are entitled to every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom.

4. **Negligence § 19e—**

Proximate cause is an inference of fact, to be drawn from other facts and circumstances of the case, and it is only when but one inference can be drawn from the facts in evidence that the court may determine the question as a matter of law.

5. **Automobiles § 18h (3)—**

Plaintiffs' evidence tended to show that their intestates, operating a truck along a servient highway, reduced speed from 30 to 20 miles per hour but failed to stop in obedience to highway signs before entering an intersection with a dominant highway, and that defendant's truck, traveling along the dominant highway at a speed of 35 miles per hour, entered the intersection without slackening speed or giving warning, and that the vehicle in which intestates were riding had already entered the intersection when it was struck by defendant's vehicle. *Held:* The granting of defendant's motion to nonsuit cannot be sustained on the theory of contributory negligence, since the question of proximate cause is one for the jury upon the evidence.

NICHOLS *v.* GOLDSTON; HIX *v.* GOLDSTON.

APPEAL by plaintiffs from *Bobbitt, J.*, at September Term, 1947, of ROCKINGHAM. Reversed.

Separate actions by the administrator of the estate of Allen Nichols, deceased, and by the administratrix of the estate of Davis J. Hix, deceased, against the defendant J. M. Goldston for damages for wrongful death of their intestates, resulting from collision of motor trucks, were by consent consolidated for trial.

From the evidence offered it appeared that on the morning of 28 July, 1945, plaintiffs' intestates, Nichols and Hix, jointly operating a motor truck owned by J. B. Greer, were traveling west along highway #158 leading from Reidsville to Winston-Salem, and at the intersection of this highway with highway #220, leading from Greensboro to Madison, collided with the tractor and trailer unit of defendant Goldston which was at the time being driven north by defendant's driver Harry W. Odell. As result of the collision both plaintiffs' intestates Nichols and Hix were killed, and defendant's driver so seriously injured that he has lost all recollection of the collision and of happenings immediately before and after. Highway #158 had been designated by the State Highway and Public Works Commission as subordinate to #220, and there were appropriate signs along the side and marks on the surface of #158 notifying drivers of vehicles on that highway to stop before crossing the intersection.

According to plaintiffs' evidence the Goldston truck was being driven at a speed of 35 miles per hour and the driver, without slackening speed, sounding horn, or applying brakes, drove into the intersection at a time when the Greer truck had already entered the intersection, and then turned to the left just as the trucks came together. The Greer truck, in which plaintiffs' intestates were riding, as it approached the intersection slowed down from 30 to 20 miles per hour and had entered the intersection before the defendant's truck reached it. The defendant's evidence on the other hand tended to show the speed of the Greer truck as 35 miles per hour, and that it entered the intersection without slowing down, and that both trucks reached the intersection at approximately the same time.

At the close of all the evidence defendant's renewed motion for judgment of nonsuit was allowed, and from judgment dismissing the action, plaintiffs appealed.

Trivette, Holshouser & Mitchell, Hayes & Hayes, and J. Hampton Price for plaintiffs, appellants.

Smith, Wharton & Jordan and H. L. Fagge for defendant, appellee.

DEVIN, J. The plaintiffs' appeal presents the question of the propriety of the judgment of involuntary nonsuit. Considering the evidence

in the light most favorable for the plaintiffs, it appears that defendant's truck, a tractor and trailer unit, was being driven toward and into an intersection of two busy highways at a speed of 35 miles per hour, and that the driver without slackening speed or giving signal or warning, or applying brakes, drove into the intersection at a time when the truck in which plaintiffs' intestates were riding, coming from defendant's right, had already entered the intersection. The statute then in force placed speed restriction on motor vehicles with trailer attached at 30 miles per hour. G. S., 20-141 (b) 3; G. S., 20-141 (c). We think there was evidence of negligence on the part of the defendant. *Swinson v. Nance*, 219 N. C., 772, 15 S. E. (2d), 284.

However, it is urged that the ruling of the court below should be upheld on the ground that contributory negligence on the part of plaintiffs' intestates conclusively appears from the evidence, for the reason, chiefly, that they failed to heed the highway signs warning drivers of motor vehicles approaching the intersection from the east to stop before attempting to cross, as required by G. S., 20-158. This statute, while imposing the duty on motorists to heed highway traffic signs, adds this pertinent proviso: "No failure to stop, however, shall be considered contributory negligence *per se* in any action at law for injury to person or property, but the facts relating to such failure to stop may be considered with the other facts in the case in determining whether the plaintiff in such action was guilty of contributory negligence."

This provision has been considered in several recent decisions, notably, *Hill v. Lopez, ante*. 433, 45 S. E. (2d), 539; *Swinson v. Nance*, 219 N. C., 772, 15 S. E. (2d), 284; *Pearson v. Stores Corp.*, 219 N. C., 717, 14 S. E. (2d), 811; *Groome v. Davis*, 215 N. C., 510, 2 S. E. (2d), 771; *Sebastian v. Motor Lines*, 213 N. C., 770, 197 S. E., 539; *Kennedy v. Smith*, 226 N. C., 514, 39 S. E. (2d), 380.

In view of the language of the statute and the decisions of this Court in cases involving collisions between motor vehicles at highway intersections, it seems well settled that a party may not be precluded solely by reason of his failure to stop as enjoined by a traffic sign. His failure to do so is evidence of negligence, but the question of proximate cause remains to be answered before the rights of the parties can be determined.

Was the evidence in this case such as to warrant the trial judge in holding as a matter of law that the negligence of plaintiffs' intestates was the proximate cause of their injury and death, and, upon this view, sustaining the motions to nonsuit?

In considering the question of nonsuit, under the rule, the evidence tending to support plaintiffs' claims must be construed most favorably for them, and they are "entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn

therefrom." *Nash v. Royster,* 189 N. C., 408, 127 S. E., 356. The question of proximate cause is ordinarily one for the jury. It is only when but one inference can be drawn from the facts in evidence that the court may declare that an act or omission is the proximate cause of an injury. *Lineberry v. R. R.,* 187 N. C., 786 (793), 123 S. E., 1. In the language of *Justice Barnhill* in *Conley v. Pearce-Young-Angel Co.,* 224 N. C., 211, 29 S. E. (2d), 740, "Proximate cause is an inference of fact, to be drawn from other facts and circumstances. . . . 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 this is rarely the case. Hence, what is the proximate cause of an injury is ordinarily a question for the jury. . . . It is to be determined as a fact in view of the circumstances of fact attending it." Numerous decisions are cited by *Justice Barnhill* in substantiation of this rule. That the act in question is in violation of a statute does not take it out of the rule. *Conley v. Pearce-Young-Angel Co., supra.*

In *Reeves v. Staley,* 220 N. C., 573, 18 S. E. (2d), 239, cited by appellee, the collision occurred at a junction of highways. The automobile in which the plaintiff's intestate in that case was riding was driven from a subordinate road into the dominant highway at an undiminished speed of 35 to 40 miles per hour and in front of an oncoming truck. There it was said in the opinion of the Court written by *Justice Winborne* that the failure of the driver to stop was "evidence of negligence to be considered with other facts in the case in determining whether he was guilty of negligence. When so considered the evidence of his conduct makes him guilty of negligence as a matter of law." The circumstances of that case indicated such a failure on the part of the driver to exercise due care as to be regarded by the Court as conclusive on the question of proximate cause.

Here the plaintiffs' evidence tended to show that their intestates reduced the speed of their vehicle from 30 to 20 miles per hour, and had already entered the intersection before the defendant's truck reached it. While the defendant's evidence tended in some respects to contradict that of the plaintiffs, this, under the rule, does not help the defendant on his motion for nonsuit.

For the reasons stated we are of opinion, and so hold, that on the evidence presented the plaintiffs were entitled to have their case submitted to the jury under appropriate instructions, and that the judgment of nonsuit must be

Reversed.

STATE v. EDWARD MINTON.

(Filed 25 February, 1948.)

1. Criminal Law § 52a—

Circumstantial evidence is insufficient to sustain a conviction unless the circumstantial facts shown on the hearing are of such a nature and so connected or related as to point unerringly to the defendant's guilt and exclude any other reasonable hypothesis.

2. Criminal Law § 31d—

The fact that finger-prints corresponding to those of an accused are found in a place where a crime was committed is without probative force unless the circumstances are such that the finger-prints could have been impressed only at the time the crime was perpetrated.

3. Criminal Law § 52a—Circumstantial evidence as to identity of defendant as perpetrator of crime held insufficient to be submitted to jury.

Defendant was charged with breaking and entering, larceny and receiving. The State's evidence tended to show that the glass in the entrance door of a lunchroom was broken and the place entered during the night, and two 25c pieces taken from the cash drawer, that defendant had been a patron of the shop on the night of the crime until it was closed and that he was one of some ten or eleven persons who were standing around the front of the shop when the proprietor locked the door in closing for the night, that a thumb print corresponding to defendant's was found on a part of the broken glass which had been on the outside of the door about 15 inches from the knob, that blood was found on several pieces of glass, that two 25c pieces were found in defendant's possession, and that defendant had one or more little cut places, which appeared to be fresh, in the palm of his hand. The State introduced evidence that defendant stated he had cut his hand with a razor a short time prior to his apprehension. *Held:* The circumstantial evidence was insufficient to be submitted to the jury, and defendant's motion to nonsuit is allowed in the Supreme Court on appeal. G. S., 15-173.

APPEAL by defendant from *Williams, J.*, at September Term, 1947, of EDGECOMBE.

The defendant, Edward Minton, was tried upon a three-count bill of indictment charging him with perpetrating these offenses on 26 January, 1946: (1) Breaking and entering the shop of the Coastal Lunch in Tarboro with intent to commit larceny therein contrary to G. S., 14-54; (2) Larceny of "two twenty-five cents pieces of the value of fifty cents" of the moneys of the Coastal Lunch; and (3) Receiving "two twenty-five cents pieces of the value of fifty cents" of the moneys of the Coastal Lunch with knowledge that the same had theretofore been feloniously stolen by another.

In its effort to sustain the charges against the accused, the State was compelled to rely entirely upon the circumstances set out below.

At the time named in the indictment, the State's witness Braddy was engaged in the retail sale of beer, sandwiches, and other articles at a shop known as the Coastal Lunch on North Main Street in Tarboro. Persons resorting to the Coastal Lunch for the purpose of trade entered the shop through a front door which was "half glass and wood with the glass panel at the top and the wood at the bottom." The defendant visited the Coastal Lunch during business hours on the night in question for the lawful object of buying beer. He consumed "four or five beers" on the premises and tarried in the shop with other customers until closing time. Braddy shut the Coastal Lunch about eleven-thirty o'clock on the night in question and departed from the premises some twenty minutes later after securely locking the front door. At that time the accused and some nine or ten other persons were standing upon the sidewalk or street in front of the Coastal Lunch. Two twenty-five cent coins were left in the cash drawer in the shop.

At seven o'clock on the following morning, it was discovered that the glass in the upper portion of the front door had been broken out, and that shattered glass was scattered over the floor of the shop. Blood was seen upon the jagged edge of a piece of broken glass sticking in the molding at the lower right-hand corner of the upper half of the door. Several finger-prints were observed upon a piece of glass lying upon the floor of the shop. This piece of glass was submitted to a finger-print expert for examination. The only legible finger-print thereon corresponded with the print of the left thumb of the defendant. It was determined by fitting pieces of broken glass together that this legible print had originally appeared upon the outside surface of the glass about fifteen inches from the door knob, which was located on the right side of the door. The accused is right-handed. There was "no way of knowing what time or when that fingerprint was put on the glass" or "whose the other fingerprints were because they had been smeared." An inspection of the cash drawer in the shop disclosed that the two twenty-five cent pieces were missing.

A short time later police officers went to the home of the defendant situated several blocks from the Coastal Lunch. They found him in bed asleep, waked him, and accused him of having broken and entered the Coastal Lunch. The defendant immediately denied his guilt in the premises, stating that he had been a customer at the Coastal Lunch on the previous night, that he had returned to his home about midnight, and that he had been at home ever since. The officers observed one or more little cut places that "looked to be fresh cuts" in the palm of the defendant's right hand, and found "two quarters . . ., an English penny, a pack of smokes and a pack of gum" on the dresser in the defendant's bedroom. In response to questions asked by the officers, the accused

stated that he had cut his right hand with a razor blade a short time before while making billfolds out of leather and that he had earned the money on the dresser by selling billfolds made by him.

The State also offered testimony tending to show that at some undisclosed time in the past the defendant had unlawfully broken and entered "the White Cigar store" and stolen money therefrom. This evidence was admitted over the objection and exception of the defendant, who did not testify on the trial below.

Testimony was presented in behalf of the accused indicating that he was at home asleep when the breaking and entering of the Coastal Lunch occurred and when the coins were removed therefrom. The disposition of this appeal in this Court renders it unnecessary to set out this evidence or to consider and determine whether the trial judge erred in admitting the testimony of the State tending to show that the defendant had committed a crime in the past similar in nature to the offenses charged in the present indictment.

The jury returned a general verdict of guilty. From sentence pronounced upon such verdict, the defendant appealed, assigning errors.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

Cameron S. Weeks for defendant, appellant.

ERVIN, J. The defendant places his chief emphasis in this Court upon his exceptions to the refusal of the trial court to grant his motion for judgment of nonsuit made when the State rested its case and renewed after all the evidence was concluded.

The State relies entirely upon circumstantial evidence. It is an established principle in the administration of criminal law that circumstantial evidence is insufficient to sustain a conviction unless the circumstantial facts shown on the hearing are "of such a nature and so connected or related as to point unerringly to the defendant's guilt and exclude any other reasonable hypothesis." *S. v. Harvey, ante,* 62, 44 S. E. (2d), 472. See, also, in this connection: *S. v. Coffey, ante,* 119, 44 S. E. (2d), 886; *S. v. Madden,* 212 N. C., 56, 192 S. E., 859.

It is undoubtedly proper to contend that the circumstances adduced by the State in the case at bar give rise to a strong suspicion that the accused is guilty of one or more of the offenses set out in the indictment. Yet, it cannot be gainsaid that these circumstances are quite compatible with a reasonable conclusion that the defendant is wholly innocent.

It is to be noted that there is not a syllable of testimony in the record indicating that the quarters lying upon the dresser in the bedroom of the accused were the twenty-five cent pieces removed from the cash drawer

in the Coastal Lunch. Any contention to that effect is merely conjectural.

The testimony that the print of the left thumb of the defendant appeared upon the outside surface of a piece of glass which originally occupied a position near the knob of the front door of the Coastal Lunch has no legitimate tendency to show that he was present when the shop was broken and entered and the coins were taken therefrom. The fact that finger-prints corresponding to those of an accused are found in a place where a crime was committed is without probative force unless the circumstances are such that the finger-prints could have been impressed only at the time when the crime was perpetrated. 20 Am. Jur., Evidence, section 358; 16 A. L. R., Annotation, 370; 63 A. L. R., Annotation, 1324. The thumb print of the defendant was found in a public place. There were finger-prints upon the same piece of glass other than that identified as the defendant's. The finger-print expert called to the stand by the State testified that there was "no way of knowing" when the defendant's thumb print was impressed upon the glass near the door knob, or "whose the other finger-prints were." There is not a scintilla of evidence to negative the reasonable assumption that the left thumb print of the accused was put upon the glass when he entered the shop during business hours on the night in question for the lawful purpose of buying beer in response to the implied invitation extended to the public by the operator of the Coastal Lunch.

The circumstances that the sharp edge of a piece of broken glass sticking in the molding of the door of the shop was bloody and that the defendant had one or more little cut places "that looked like fresh cuts" in the palm of his right hand are as consistent with innocence as they are with guilt upon the record here. The State itself offered in evidence the reasonable explanation of the accused that he had cut his hand with a razor blade while engaged in making billfolds out of leather.

The testimony offered by the State over the defendant's objection and exception to the effect that at some time in the past the defendant had committed a crime similar in nature to those set out in the indictment had no tendency to establish the defendant's guilt in the case at bar. Nothing was shown justifying any inference that the former crime of the defendant and the offenses now charged against him were necessarily committed by the same person.

The circumstances relied on by the State are inconclusive and do not lead to a satisfactory deduction that the accused, and no one else, perpetrated the crimes alleged in this action. All of these circumstances can be true, and the defendant can still be innocent. Consequently, the trial court erred in refusing to dismiss the action. The defendant's motion

for judgment of nonsuit is sustained on this appeal in conformity to G. S., 15-173.

Reversed.

STATE v. HARVEY GRANT.

(Filed 25 February, 1948.)

Homicide §§ 11, 27f—

A person who is the victim of an unprovoked assault while on his own premises is not required to retreat before he can justify fighting in self-defense regardless of whether the assault is felonious or not, and an instruction which predicates his right of self-defense upon a felonious assault being made upon him or, in the event of a non-felonious assault, his duty to retreat to the wall, must be held for prejudicial error.

APPEAL by defendant from *Alley, J.*, at October-November Term, 1947, of SWAIN.

Criminal prosecution upon indictment charging defendant with the murder of one Roy Woods.

When the case was called for trial the solicitor announced that the State would not ask for a verdict of murder in the first degree, but would ask for a verdict of murder in the second degree, or manslaughter, as the facts may warrant.

The defendant entered a plea of not guilty, and, on the trial in Superior Court, relied upon the principle of self-defense.

The evidence offered by the State, as shown by the record on this appeal, tends to show, briefly stated, this factual situation: Roy Woods came to his death on the afternoon of 9 September, 1946, as the result of a wound in his forehead inflicted by a gun in the hands of defendant at the store of defendant in Swain County, North Carolina. At the time of the homicide the building in which defendant operated a store was located, and fronted on the right side of, and about twenty-five feet from the highway, going west, at a point just east of the bridge over Nantahala River. The building, a one-room structure, was sixteen feet in width by about twenty feet in length. In the front of the building there were (1) a door,—three feet in width, in the center, and (2) a window on each side of the door. The door was about twenty inches from the window on the right, and about six and a half feet from the right-hand corner of the building. The bottoms of the windows were about four and a half feet from the ground. There were no other doors or windows in the building.

The only persons present at the time were Enoch Brendle, the defendant, and Roy Woods. Brendle testified as a witness for the State, and defendant testified in his own behalf.

The evidence for the State and for the defendant is in substantial accord up to the instant of the shooting. It tends to show that on the afternoon of 9 September, 1946, Roy Woods came to the store of defendant; that at that time defendant was sitting on a box in the door and Brendle was sitting on the ground to one side of the door; that Woods sat down on the ground on the other side; that the three of them sat in these positions and talked for about twenty minutes; that then Woods accosted defendant about a quarrel he had had with members of Woods' family the day before, and threatened to stomp him; that, though defendant begged Woods not to hurt him, saying he was not able to fight him, Woods pulled him out of the door, and crossed and twisted his arms, pulling and squeezing him, and slung him back into the door; that defendant "just hit the door with his hand," as Brendle says, and "hitting on his hands and knees" as defendant says, and went in behind the counter, with Woods pursuing him, and two shots followed,—according to the State's evidence,—one as Woods was running out of the store and the other as Woods was at the right-hand window after having run to the right-hand front corner and turned back two steps; but as defendant says, "I reached up and got my gun and fired a shot and Woods went out of the door, and he made a turn and there was another shot fired, and everything seemed to go kind of blank until I came to the door and Woods was laying on the ground . . . I fired the shot because he made those threats, and I wasn't able to fight him and I was afraid he would kill me. My health was bad. My physical condition is bad. I have arthritis, and I have silicosis of the lungs, that is a type of tuberculosis. I weigh 127 . . . I have practically no use of my arms and shoulders . . . My right arm is in the worse condition. I can't raise it to my mouth . . . I shot to stop him . . . I was defending my own life . . . He made a turn and was coming back toward the building when the second shot was fired." The evidence further tends to show that Woods weighed 150 to 160 pounds; that defendant and Woods were brothers-in-law, and that defendant held no ill-will toward Woods.

Verdict: Guilty of manslaughter.

Judgment: Imprisonment in the State's Prison for a term of three (3) years and assigned to do labor under the supervision of the State Highway and Public Works Commission, etc.

Defendant appeals therefrom to Supreme Court and assigns error.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

Edwards & Leatherwood for defendant, appellant.

WINBORNE, J. Defendant challenges on this appeal the appropriateness and correctness of the instructions given to the jury by the trial

judge as to the law of self-defense upon the facts of this case. It is pointed out that the right of self-defense interposed by plea of the defendant, and upon which he relies as justification of his act in shooting Roy Woods, is made to depend upon the establishment by the defendant to the satisfaction of the jury, among other legal requisites, that at the time of firing the fatal shot Roy Woods was making a felonious assault upon him; and that, if at the time the fatal shot was fired Roy Woods were making a nonfelonious assault upon defendant, defendant had retreated to the wall, within the meaning of the law.

While it is conceded that the theory of the charge as given may be entirely correct when applied to a different set of facts, defendant points out and contends that it is inapplicable to a case, such as the present one, where the party assaulted is at the time in his own place of business. The point is well made, and is supported by the uniform decisions of this Court. Here the evidence shows that the defendant was in his own place of business at the time the fatal shot was fired.

Ordinarily, when a person, who is free from fault in bringing on a difficulty, is attacked in his own dwelling or home or place of business or on his own premises, the law imposes upon him no duty to retreat before he can justify fighting in self-defense,—regardless of the character of the assault. *S. v. Harman*, 78 N. C., 515; *S. v. Bost*, 192 N. C., 1, 133 S. E., 176; *S. v. Glenn*, 198 N. C., 79, 150 S. E., 663; *S. v. Bryson*, 200 N. C., 50, 156 S. E., 143; *S. v. Roddey*, 219 N. C., 532, 14 S. E. (2d), 526; *S. v. Anderson*, 222 N. C., 148, 22 S. E. (2d), 271; *S. v. Pennell*, 224 N. C., 622, 31 S. E. (2d), 857; *S. v. Minton, ante*, 15, 44 S. E. (2d), 346, and numerous other cases. See also *S. v. Spruill*, 225 N. C., 356, 34 S. E. (2d), 142, where the cases on the subject are assembled.

The principle is expressed in *S. v. Harman, supra*, in opinion by *Reade, J.*, in this manner: "If prisoner stood entirely on defensive and would not have fought but for the attack, and the attack threatened death or great bodily harm, and he killed to save himself, then it was excusable homicide, although the prisoner did not run or flee out of his house. For, being in his own house, he was not obliged to flee, and had the right to repel force with force and to increase his force so as not only to resist but to overcome the assault."

Again, in *S. v. Bryson, supra*, *Stacy, C. J.*, speaking to the subject, said: "The defendant being in his own home and acting in defense of himself, his family and his habitation . . . was not required to retreat, regardless of the character of the assault," citing *S. v. Glenn, supra*, and *S. v. Bost, supra*.

And in *S. v. Pennell, supra*, the principle is restated by *Barnhill, J.*: "Defendant was in his own place of business. If an unprovoked attack was made upon him and he only fought in self-defense, he was not required to retreat, regardless of the nature of the assault."

Applying these principles, the doctrine of retreat has no place in the present case, and it is immaterial whether the assault was felonious or nonfelonious.

It must be observed, however, that this principle does not relieve the defendant of burden of satisfying the jury as to the essential elements of principle of law as to the right of self-defense available to one assaulted in his own place of business.

The error pointed out is prejudicial to the defendant, and on account thereof he is entitled to a

New trial.

MRS. ANNIE A. BAUM, ADMINISTRATRIX OF T. A. BAUM ESTATE, SUBSTITUTE PLAINTIFF FOR T. A. BAUM, DECEASED, v. GIRARD FIRE & MARINE INSURANCE COMPANY.

(Filed 25 February, 1948.)

1. Insurance § 61—

A provision in a policy of marine insurance "warranted free of particular average unless caused by the vessel or interest being stranded, sunk, burnt, on fire or in collision," means insurer exempts itself from liability from a particular peril or loss unless such loss arises from "being stranded, sunk, burnt, on fire or in collision."

2. Same—

A policy of marine insurance indemnifying against loss caused by "collision" does not cover loss occasioned by contact between the vessel and a submerged obstruction.

APPEAL by plaintiff from *Parker, J.*, at October Term, 1947, of DARE.

In April, 1941, the defendant issued to T. A. Baum and others as their respective interests might appear, a policy of insurance on a Fairbanks-Morse 100 H.P. Diesel Engine, Serial No. 760519, in the scow type ferry "Emperor." This engine, however, was installed in the plaintiff's ferry boat "Dare," and was never operated in the "Emperor."

On or about 3 May, 1941, while proceeding from Roanoke Island to Mann's Harbor, the propeller of the "Dare" struck some submerged object which plaintiff alleges damaged the engine. The plaintiff alleges the defendant is liable to the estate of her intestate under the terms of the policy for the damages sustained.

The plaintiff T. A. Baum, having died after the institution of this action, the administratrix of his estate was substituted as party plaintiff.

The pertinent parts of the policy are as follows: "It is further mutually agreed that this policy does not cover bursting or explosion of

boilers, collapsing of flues or injury, derangement or breakage of machinery and/or any expenses in consequence thereof or any loss of or damage to any such parts and/or to any other parts of the vessel directly or indirectly resulting from such occurrences, unless the Assured shall establish that such occurrences were caused solely by sinking, stranding, collision with another vessel or burning."

Attached to the policy is a mimeographed rider, reading as follows:

"(1) This insurance covers only upon ONE FAIRBANKS-MORSE-100 H.P. DIESEL ENGINE. SERIAL NUMBER 760519.

"(2) Warranted free of particular average unless caused by the vessel or interest being stranded, sunk, burnt, on fire or in collision."

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

Martin Kellogg, Jr., and John H. Hall for plaintiff.

W. A. Worth for defendant.

DENNY, J. The appellant excepts and assigns as error the refusal of the trial judge to admit certain evidence which would tend to show that the plaintiff requested the Agent of the defendant to issue the policy of insurance involved herein, on the engine in question in the ferry boat known as the "Dare."

Conceding but not deciding that the exclusion of this testimony was erroneous, we do not think it is material to a decision on this appeal.

If it be conceded that the policy covers the engine in question, the defendant denies liability on the ground that the policy does not cover the type of accident which the plaintiff alleges caused the damages to the engine. Therefore, the real question before us is whether or not the contact of the propeller of the "Dare" with some submerged object in the channel near Mann's Harbor, was a collision within the meaning of the policy issued by the defendant.

The provision in the rider, which constitutes a part of the contract, and reads as follows: "Warranted free of particular average unless caused by the vessel or interest being stranded, sunk, burnt, on fire or in collision," simply means the insurer exempts itself from liability from a particular peril or loss unless such loss arises from "being stranded, sunk, burnt, on fire or in collision." 45 C. J. S., 945.

The language of the insurance contract proper, expressly exempts the defendant from any liability growing out of a collision except where the collision is with another vessel. The rider, however, does not contain such express limitation. Therefore, it becomes necessary to ascertain

what is ordinarily meant by "collision" when used in a marine insurance policy.

In 45 C. J. S., 936, it is said: "Injury to, or loss of, the insured vessel or goods by collision comes under the risk of perils of the sea, . . . and the word 'collision' in a policy means the act of two ships or navigable objects striking together. It does not include the striking against a submerged or sunken object, or other stationary, nonfloating object. On the other hand, it has been held that the term 'collision' includes the impact of a vessel with other nonnavigable floating objects, provided such collision is accidental." *Lehigh & Wilkes-Barre Coal Co. v. Globe & Rutgers Fire Ins. Co.*, 6 F. (2d), 736; 43 A. L. R., 215; *Cline v. Western Assur. Co.*, 101 Va., 496, 44 S. E., 700; *Burnham v. China Mut. Ins. Co.*, 189 Mass., 100, 109 A. St. Rep., 627, 75 N. E., 74; *Carroll Towing Co., Inc., v. Aetna Ins. Co.*, 196 N. Y. S., 698, 203 App. Div., 430; *Newtown Creek Towing Co. v. Aetna Ins. Co.*, 163 N. Y., 114, 57 N. E., 302; 11 C. J., 1011.

In *Lehigh & Wilkes-Barre Coal Co. v. Globe & Rutgers Fire Ins. Co., supra,* the Court held the steering of a vessel under tow in a narrow channel, so that it scrapes the side of the channel to its injury, is not a collision within the meaning of a marine insurance policy insuring against collision.

In the case of *Cline v. Western Assur. Co., supra,* the vessel came in contact with some "sunken or floating obstruction" and was damaged. The plaintiff sought to recover damages, and alleged such damages were caused by collision. The decision of the Court is succinctly stated in the syllabus of the case, as follows: "The term 'collision' in a contract of marine insurance means the act of ships or vessels striking together, and does not embrace the striking of a sunken or floating substance." However, in the case of *Carroll Towing Co. v. Aetna Ins. Co., supra,* the Court had before it the question whether a contact between a vessel and a floating, but nonnavigable, object constituted a "collision," within the meaning of that word as used in a policy of marine insurance. The Court held that accidental contact with a floating, but nonnavigable, object would constitute a collision within the meaning of the term as employed in a policy of marine insurance.

In *Burnham v. China Mut. Ins. Co., supra,* the Court had under consideration several policies of insurance. Some of the policies insured against "the risk of collision sustained" and others against "loss sustained by collision with another vessel." The Court said: "We are of opinion that the two forms meant the same thing, namely, collision with another vessel." Whereupon the plaintiff was denied recovery under the policies. His ship had struck a vessel, sunk several hours before. The Court held the plaintiff's vessel had not come in contact with another vessel within the meaning of the policies.

The authorities are almost unanimous in holding that contact between a vessel and a submerged obstruction is not a "collision" within the meaning of that word, as used in a policy of marine insurance. Therefore, we hold that the policy of insurance involved herein does not cover the accident which the plaintiff alleges caused the damage to the insured property.

The judgment of the court below, is

Affirmed.

W. G. PENLAND v. SOUTHERN RAILWAY CO., ET AL.

(Filed 25 February, 1948.)

1. Railroads § 4—

Evidence tending to show that plaintiff driver, when within 38 feet of defendant's track, had an unobstructed view in the direction from which the train approached from 150 to 300 feet, that he saw a dim light down the track but failed to recognize it as the headlight of the approaching engine, although others in the car with him did recognize it, that plaintiff proceeded across the tracks and was struck by defendant's train, *is held* to disclose contributory negligence barring recovery as a matter of law. G. S., 1-183.

2. Negligence § 19c—

Contributory negligence *ex vi termini* signifies contribution rather than independent or sole cause, and it is not necessary that contributory negligence be the sole proximate cause, but it bars recovery if it is a proximate cause or one of the proximate causes of the injury.

APPEAL by defendants from *Gwyn, J.*, at July-August Term, 1947, of SWAIN.

Civil action to recover damages for personal injuries to plaintiff alleged to have been caused by the negligence of the corporate defendant and the engineer of its train.

The plaintiff is a taxi driver in the Town of Bryson City. On the evening of 6 December, 1943, about 8:30 or 9:00 p.m., with three passengers in his automobile, he approached a much-traveled grade crossing on Everett Street which is traversed by three tracks of the corporate defendant. He slowed down, but did not stop before entering upon the crossing and was struck by defendant's train as he reached the center or main line track. He says he looked to his left, "and while I observed no train or engine, I saw a very dim light a considerable distance down the track; that is the way the train was coming; I was on the side the engine was coming. . . . I couldn't say I didn't see a light, because I had crossed there at different times and all times of night, but I never saw anything

I recognized as being the light of an engine. Q. What you mean is this: You didn't recognize it as being an engine light, though it might have been one? A. It could have been I guess. . . . I couldn't say whether I saw a light or not; if I did I didn't recognize it as being an engine light until it was just right there above me. . . . It was drizzling rain and a little foggy. . . . I don't deny that I might have seen a dim light, but I did not recognize it as being an engine light. That is right, I wouldn't say I did or did not. . . . I was thoroughly acquainted with the crossing, and knew that trains passed over it at any and all times and knew they passed both ways. . . . I looked first to the left and did not see any object and I looked back to the right, and I was turning my head back and the headlight was right over me—seems like it flashed on, or I just saw it. . . . I was going across the track, very slowly, not over 8 miles, when I looked up and the headlight apparently flashed on. It hit just like that."

For a distance of 38 feet before reaching the main line track, plaintiff had an unobstructed view, in the direction the train was coming, anywhere from 150 to 300 feet.

A passenger in plaintiff's car saw the beam of light of the approaching train and called plaintiff's attention to it, but he "kept on going" and did not stop. The plaintiff was hard of hearing. While the plaintiff was "knocked out" by the impact, he was able to resume his taxi-driving on the afternoon of the following day. His injuries later proved to be more serious than first thought.

From verdict and judgment for the plaintiff, the defendants appeal, relying principally upon the court's refusal to dismiss the action as in case of nonsuit.

T. D. Bryson, Jr., for plaintiff, appellee.

W. T. Joyner and Jones & Ward for defendants, appellants.

STACY, C. J. Conceding the existence of negligence on the part of the defendants, which is stressfully denied, we think the case is controlled by the fact that plaintiff drove his automobile upon the railroad crossing in the face of an on-coming train which he saw, or, in the exercise of reasonable care, should have seen. This negligence on his part contributed to the injury, and bars recovery. *Swaim v. High Point,* 214 N. C., 672, 200 S. E., 373; *Bailey v. R. R.,* 223 N. C., 244, 25 S. E. (2d), 833; *Goodwin v. R. R.,* 220 N. C., 281, 17 S. E. (2d), 137.

In order to defeat an action like the present, it need not appear that plaintiff's negligence was the sole proximate cause of the injury, as this would exclude any idea of negligence on the part of the defendants altogether. *Absher v. Raleigh,* 211 N. C., 567, 190 S. E., 897. It is enough

if it contribute to the injury as a proximate cause, or one of them. *McKinnon v. Motor Lines, ante,* 132; *Tarrant v. Bottling Co.*, 221 N. C., 390, 20 S. E. (2d), 565; *Beck v. Hooks,* 218 N. C., 105, 10 S. E. (2d), 608; *Wright v. Grocery Co.*, 210 N. C., 462, 187 S. E., 564. Indeed, the very term "contributory negligence" *ex vi termini* signifies contribution rather than independent or sole cause. *Fulcher v. Lumber Co.*, 191 N. C., 408, 132 S. E., 9.

The plaintiff says he saw a dim light in the drizzling rain and fog, but did not recognize it as the headlight of an engine. His familiarity with the surroundings may have lulled him into carelessness or insecurity, nevertheless his failure to discern and appreciate the obvious renders him contributorily negligent as a matter of law. *McCrimmon v. Powell,* 221 N. C., 216, 19 S. E. (2d), 880; *Miller v. R. R.*, 220 N. C., 562, 18 S. E. (2d), 232; *Tart v. R. R.*, 202 N. C., 52, 161 S. E., 720; *Eller v. R. R.*, 200 N. C., 527, 157 S. E., 800; *Harrison v. R. R.*, 194 N. C., 656, 140 S. E., 598. He may not recover when his negligence concurs with the negligence of the defendants in proximately producing the result. *Davis v. Jeffreys,* 197 N. C., 712, 150 S. E., 488; *Construction Co. v. R. R.*, 184 N. C., 179, 113 S. E., 672.

There is no contention that the atmospheric condition was such as to affect plaintiff's vision. *Meacham v. R. R.*, 213 N. C., 609, 197 S. E., 189. The fact is, he did see a dim light down the track, but failed to recognize it as the headlight of an engine. Having seen, it was his duty to take note and heed. This he omitted to do. Furthermore, when pressed on cross-examination, the plaintiff declined to say whether he "did or did not" see the engine light. Others in the car with him saw it and called his attention to it, but he "kept on going" and did not stop. His hearing was not good. *Johnson v. R. R.*, 214 N. C., 484, 199 S. E., 704.

The demurrer to the evidence or motion to dismiss the action as in case of nonsuit was well interposed. G. S., 1-183.

Reversed.

WILMA T. GARRETT v. FELTON S. GARRETT AND LOIS FESLER

(Filed 25 February, 1948.)

1. Torts § 4—

Where two or more persons unite or intentionally act in concert in committing a wrongful act, or participate therein with common intent, they are jointly and severally liable for the resulting injuries.

2. Same—

A complaint alleging that one defendant, acting pursuant to a joint purpose, went to plaintiff's residence and dragged her out of the house to a point beyond the lights, where the other defendant was lying in wait, and that then both defendants forcibly carried her into the street where they publicly assaulted and beat plaintiff, alleges a joint tort, and defendants' demurrer for misjoinder of parties and causes was properly overruled.

APPEAL by defendants from *Morris, J.*, in chambers, 27 December 1947, PASQUOTANK. Affirmed.

Civil action to recover damages for physical injuries resulting from a wrongful assault and battery, heard on demurrer to the complaint.

Plaintiff alleges that she and defendant Garrett are husband and wife, living in a state of separation; that on the night of 10 September 1947 "the defendants, acting in concert and with joint and common purpose and intent, wrongfully, unlawfully and maliciously" went to the residence of plaintiff "where the defendant Fesler being thereto aided and assisted by the defendant Felton S. Garrett, secretly and without warning, maliciously and forcibly seized this plaintiff and dragged her from the house" out to a point beyond the lights where Garrett was lying in wait; that then both defendants forcibly carried her into the street where they publicly assaulted and beat her to the extent she suffered painful bruises, abrasions, lacerations, and contusions, all to her "great indignity and humiliation." After further alleging the injuries in detail, she prays judgment for both actual and punitive damages.

The defendants filed a written demurrer for misjoinder of parties and causes of action.

On the hearing below, the court overruled the demurrer and granted the defendants time within which to answer. Defendants excepted and appealed.

Wilson & Wilson for plaintiff appellee.

J. Henry LeRoy for defendant appellants.

BARNHILL, J. It is a generally accepted rule that where two or more persons unite or intentionally act in concert in committing a wrongful act, or participate therein with common intent, they are jointly and severally liable for the resulting injuries. *S. v. DeHerrodora,* 192 N. C., 749, 136 S. E., 6; *Williams v. Lumber Co.,* 176 N. C., 174, 96 S. E., 950; *Trust Co. v. Peirce,* 195 N. C., 717, 143 S. E., 524, and cases cited; *Moses v. Morganton,* 192 N. C., 102, 133 S. E., 421. See also 52 A. J., 448-50 and notes where copious authorities are cited.

"Where there is a common intent to assault and beat, or where the parties are all present at the beating, as principals, either in the first or second degree, or are guilty as abettors by reason of counsel or encouragement given beforehand, each is guilty of the whole, and in such case joint damages would alone be proper." *Smithwick v. Ward,* 52 N. C., 64; *Meints v. Huntington,* 276 Fed., 245, 19 A. L. R., 664.

Plaintiff has clearly alleged common purpose and intent and concert of action on the part of defendants in committing an assault upon her. Hence, under the rule stated and the authorities cited, the complaint is not open to attack for misjoinder of parties and causes of action. What plaintiff may be able to prove at the final hearing is another matter with which we are not presently concerned.

The judgment below is

Affirmed.

ED. EMERY, ET AL., v. LITITZ MUTUAL INSURANCE CO.

(Filed 25 February, 1948.)

1. Insurance § 25d—

Insured paid the premium on a policy of fire insurance on his barn at the rate for a "private stable," and not the much higher rate for a "livery stable." The policy provided that insurer should not be liable for loss if the hazard were increased by any means within the control or knowledge of insured. Insured testified, "I work in the winter and rent horses in the summer," that he had run a riding academy but closed that business when he moved to the premises in question, and had only four horses at the time of the fire, that he never rented horses to anybody and that the barn was private. The fire occurred in the winter. *Held:* Plaintiff's evidence, even though contradictory or equivocal, does not justify nonsuit on the theory that plaintiff's evidence shows no liability to him on the policy in suit.

2. Trial § 22c—

Contradictions, discrepancies or equivocations in plaintiff's testimony affect his credibility but do not justify nonsuit.

APPEAL by defendant from *Nettles, J.,* at December Term, 1947, of BUNCOMBE.

Civil action to recover on a policy of insurance.

For about seven years the plaintiff operated a riding academy on Dorch Street in the City of Asheville, where he kept 20 to 25 saddle horses for hire. On 28 August, 1946, he purchased a cabin and barn on Vivian Street from C. D. Hendrix, and immediately had the defendant insure the same against fire for a period of three years, with loss payable

to the mortgagee, as interest may appear, subject to mortgage clause attached. The cabin was insured for $1,000 and the barn for $1,500. The three-year premium was $16.88 for occupancy of dwelling by owner and "private stable." If the barn had been classified as a livery stable, the rate on this alone would have been $81.75 for the three-year period.

The policy provides: "Conditions Suspending or Restricting Insurance. Unless otherwise provided in writing attached hereto this company shall not be liable for loss occurring (a) while the hazard is increased by any means within the control or knowledge of the insured."

The plaintiff took possession of the property on the day of purchase. In about two months thereafter, he sold most of his horses, retained only five, which he moved to the barn, and all of his saddle equipment he put in the cabin. From the cabin, he continued to rent these five horses for hire. They were in the barn on the night of 14 January, 1947, when it was destroyed by fire. One had been sold. Four belonged to the plaintiff. The barn was worth about $2,200.00.

Speaking of the kind of business he did at the Hendrix place, the plaintiff said: "I ran a riding academy, but the barn was private. . . . I work in the winter and rent horses in the summer. . . . Q. Your business is running this riding academy for hiring horses and it has been that right along for seven years? A. In the summer. . . . After I bought the Hendrix property I did not run a riding academy. I closed the business on Dorch Street, and just moved the stuff to the cabin and stored the horses. . . . I never rented the horses to anybody. . . . There were no saddles in the barn. . . . It was private."

The defendant offered to return the premium paid by plaintiff, and demurred to the evidence. Overruled; exception.

There was a verdict for the plaintiff and judgment thereon, from which the defendant appeals, assigning as principal error the refusal of the court to sustain the demurrer to the evidence.

Jones & Ward for plaintiffs, appellees.

Smathers & Meekins for defendant, appellant.

STACY, C. J. The appellant seeks to pose the question whether nonsuit is proper on plea of avoidance when plaintiff's own evidence shows no liability to him under the policy in suit. *Alspaugh v. Ins. Co.*, 121 N. C., 290, 28 S. E., 415.

A careful perusal of the record leaves us with the impression that it falls short of presenting the question. At most, the plaintiff's testimony is equivocal on the issue of avoidance, or increased hazard within the meaning of the policy. This carries the case to the jury. *Shell v. Roseman*, 155 N. C., 90, 71 S. E., 86. Discrepancies and contradictions, even

in plaintiff's evidence, are for the twelve and not for the court. *Bank v. Ins. Co.*, 223 N. C., 390, 26 S. E. (2d), 862. The equivocation in plaintiff's testimony affected his credibility, but did not work a dismissal of the action. *Ward v. Smith*, 223 N. C., 141, 25 S. E. (2d), 463. Counsel for the defendant, no doubt, made full use of this equivocation in his argument.

Moreover, the mortgagee, who is also a plaintiff and interested by virtue of the loss-payable clause in the policy, may stand in an even stronger position than the owner on the motion to nonsuit. But we do not reach this point.

In the absence of the charge, which is not sent up, it is presumed the jury was properly instructed, both in respect of the evidence and the law arising thereon. *S. v. Hargrove*, 216 N. C., 570, 5 S. E. (2d), 852; *S. v. Jones*, 182 N. C., 781, 108 S. E., 376.

On the record as presented, the motion to nonsuit was properly overruled. The appeal is limited to this one question.

No error.

STATE v. FREDERICK SUTTON.

(Filed 25 February, 1948.)

Rape § 23—

Evidence tending to show that defendant, in a drunken condition, went to the office where prosecutrix worked, asked her a question, and after she had answered, continued to stare at her, that prosecutrix went out in the hall and defendant, an adult male, followed and continued to stare at her, causing prosecutrix to become frightened and run up the steps followed by defendant, so that prosecutrix, frightened by implied threat of force, was caused to go where she otherwise would not have gone, *is held* sufficient evidence to sustain a verdict of guilty of assault on a female by a male over 18 years of age.

DEFENDANT'S appeal from *Parker, J.*, January Term, 1948, WASHINGTON Superior Court.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

P. H. Bell and E. L. Owens for defendant, appellant.

SEAWELL, J. The defendant was tried in the Recorder's Court of Washington County on a warrant charging him with assault on a female, he being a male over 18 years of age, and on conviction and sentence to 12 months service on the public roads under supervision of the State

Highway Commission, he appealed to the Superior Court where the case was tried *de novo* on the warrant, and resulted in conviction and a sentence of six months on the roads. The defendant appealed, assigning errors.

His challenge to the validity of the trial rests principally on the refusal of the court to sustain his demurrer to the evidence, and allow his motion to nonsuit because of its insufficiency, and on the alleged prejudicial error in the instruction to the jury containing a summation of the evidence relating to defendant's conduct on the occasion of the alleged assault.

While the court in a full charge stated and reviewed all the evidence *in extenso,* the challenged paragraph sufficiently epitomizes the evidence on which the State relies to serve the purpose of this review, and we quote:

> "If the State of North Carolina has satisfied you beyond a reasonable doubt from the evidence in this case, the burden of proof being upon the State to so satisfy you, that Frederick Sutton, at and in Washington County, was a male person, over 18 years of age, and that on the 27th day of October, 1947, he did intentionally, unlawfully, and willfully go into the office of the Clerk of the Superior Court of Washington County and ask Mrs. Louise Allen, a female person, where was the Sheriff's office, and after Mrs. Allen told him, that he stood and stared at her without moving, that Mrs. Allen went out into the hall and stood on the first step leading to the courtroom and that the defendant came out into the hall and stared at Mrs. Allen; that Mrs. Allen pointed in the direction of the Sheriff's office and that as the defendant continued to stare, Mrs. Allen stepped up the steps two more steps, and the defendant stepped towards her two steps, still staring at her, and that Mrs. Allen became frightened and ran up the steps and that the defendant ran up the steps behind her; that Mrs. Allen was screaming; and if you further find beyond a reasonable doubt from the evidence in this case that this was an intentional show of violence or an intentional display of force by the defendant that caused Mrs. Allen reasonably to apprehend imminent danger and that it put Mrs. Allen in fear and thereby forced Mrs. Allen to leave the Clerk's office and to leave the floor of the hall in front of the Clerk's office and to run upstairs to the courtroom, it will be your duty to return a verdict of guilty as charged in the warrant."

There was evidence in support of all the facts thus summarized, and we do not find the instruction subject to criticism as a matter of law or affected with prejudicial error. *S. v. Williams,* 186 N. C., 627, 120 S. E.,

224; *S. v. Daniel*, 136 N. C., 571, 48 S. E., 544; *S. v. Jeffreys*, 117 N. C., 743, 23 S. E., 175; *S. v. Hampton*, 63 N. C., 13; *S. v. Mierfield*, 61 N. C., 108; *S. v. Strickland*, 192 N. C., 253, 134 S. E., 850; *S. v. Davenport*, 156 N. C., 597, 609, 72 S. E., 7.

While the defendant's evidence shows him to be a man of good character, and also develops that he did want to talk with the sheriff, and subsequently did so, and while he denies any purpose to molest Mrs. Allen, it was also in evidence that he was drunk, and he admits that he was "high."

On the evidence the case was for the jury and the motion for judgment of nonsuit was properly denied. The case closely parallels *S. v. Williams, supra*, and that authority is, we think, controlling.

We find

No error.

STATE v. CECIL RAY DANIEL.

(Filed 25 February, 1948.)

1. Criminal Law § 80b (5)—

The record in this case, while somewhat deficient and wanting in clarity, *is held* to contain sufficient matter to give the Supreme Court jurisdiction of the appeal, and the State's motion to dismiss is overruled.

2. Criminal Law § 52b: Constitutional Law § 33—

It is improper for the court to charge the jury that upon defendant's own testimony he is guilty of the offense charged and that the jury must return such verdict, and thereupon to sentence defendant.

APPEAL by defendant from *Williams, J.*, at September Term, 1947, of WILSON.

Criminal prosecution on indictment charging the defendant with assault with a deadly weapon resulting in serious injury.

On the night of 2 July, 1946, a dance was held at the "piccolo joint" in Lucama, which was attended by the defendant and Bud Rountree. Rountree says he tried to take care of the defendant as he was drinking and had his arm shot off when they reached his home. The defendant says he shot the prosecuting witness because he, Rountree, was drinking and intruding into his home frightening his wife and children.

The record discloses that at the close of the evidence, the court used this language:

"Gentlemen of the jury, there is no evidence in this case indicating that Rountree had any weapon or that he attempted to use any weapon at any time. Under the defendant's own statement he would be guilty

of assault with a deadly weapon and you must return such verdict. His sentence is six months, Mr. Clerk."

The record further recites that "the jury did not leave the room and did not raise their hands in voting for a conviction of the defendant of assault with a deadly weapon."

From the judgment imposed, the defendant appeals, assigning errors.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

Sharpe & Pittman, Wiley L. Lane, Jr., Robert A. Farris, and Harry C. Finch for defendant.

STACY, C. J. While the transcript is somewhat deficient, as well as wanting in clarity, we think enough appears on the record, especially in view of the recitals in the judgment, to give us jurisdiction of the appeal. Hence, the motion to dismiss will be overruled. *S. v. Daniel*, 121 N. C., 574, 28 S. E., 255; *S. v. Butts*, 91 N. C., 524.

In addition to the peremptoriness of the charge, which seems to have silenced the jury, *S. v. Godwin*, 227 N. C., 449, 42 S. E. (2d), 617, there is neither plea nor verdict to support the judgment. *S. v. Walters*, 208 N. C., 391, 180 S. E., 664.

A new trial seems necessary. It is so ordered. See *Blake v. Smith*, 163 N. C., 274, 79 S. E., 596.

New trial.

C. C. RAWLS AND WIFE, MARTHA MAGNOLIA RAWLS; PATTIE EARL PERKINS AND HUSBAND, JARVIS PERKINS; C. C. RAWLS, JR.; JESSIE DARE REYNOLDS AND HUSBAND, OTTO REYNOLDS; L. D. ROOK AND WIFE, ELIZABETH RAWLS ROOK; JOHNNY RAWLS, HUBERT RAWLS, ROY MARTIN RAWLS, GENE RONALD RAWLS, JOANNA RAWLS, AND GLORIA RAWLS, THE LAST FOUR BEING MINORS AND APPEARING BY THEIR NEXT FRIEND, CLARENCE W. GRIFFIN, v. C. B. ROEBUCK, SHERIFF OF MARTIN COUNTY, AND SHAPLEIGH HARDWARE COMPANY, A CORPORATION.

(Filed 25 February, 1948.)

1. Wills § 33b—

In this jurisdiction the rule in *Shelley's case* is a rule of law.

2. Same: Husband and Wife § 14—

Under the rule in *Shelley's case* a devise to R. and his wife during their natural lives and then to R.'s lawful heirs, vests the fee simple in the male devisee subject to the life estate of his wife, and does not create an estate by entireties.

RAWLS *v.* ROEBUCK.

APPEAL by defendants from *Williams, J.*, in Chambers at Tarboro, North Carolina, 12 November, 1947. From MARTIN.

This is an action to restrain the defendants from selling certain lands under execution.

The essential facts are as follows:

1. The land now sought to be sold under execution was devised to C. C. Rawls and wife, Martha Magnolia Rawls, in 1918, by J. H. Rawls, in the following language: "This piece of property hereinafter described I loan to Crummel Cruesoe Rawls and his wife during their natural lives then to Crummel Cruesoe Rawls' lawful heirs described as follows," etc.

2. On 19 November, 1941, Shapleigh Hardware Company obtained a judgment in the Superior Court of Martin County against C. C. Rawls (Crummel Cruesoe Rawls) for $702.97, together with certain interest and costs, which judgment was duly docketed in the office of the Clerk of the Superior Court of Martin County on 21 November, 1941.

3. C. C. Rawls and wife, on 13 February, 1942, executed a deed to C. H. Manning for whatever interest C. C. Rawls might have in the lands devised to him by J. H. Rawls.

4. On 18 September, 1947, the defendant, C. B. Roebuck, Sheriff of Martin County, under and by virtue of an execution directed to him from the Superior Court of Martin County, to satisfy the above mentioned judgment, advertised for sale on 27 October, 1947, all the right, title and interest which C. C. Rawls had in the lands referred to herein, on 21 November, 1941, the date said judgment was docketed.

5. A temporary restraining order was issued 18 October, 1947, and the defendants ordered to show cause why the order should not be continued until the final hearing.

When this cause came on for hearing below, the court held that C. C. Rawls and wife held the property referred to herein, on 21 November, 1941, as tenants by the entireties and that the judgment of the defendant, Shapleigh Hardware Company, was not a lien upon the interest of C. C. Rawls which passed to him under the will of J. H. Rawls, and that the conveyance from C. C. Rawls and wife, to C. H. Manning, conveyed said lands "free from any lien of said judgment." Whereupon the restraining order theretofore issued was made permanent. The defendants appealed, assigning error.

Peel & Manning for plaintiffs.

Henry C. Bourne for defendants.

DENNY, J. The devise from J. H. Rawls to C. C. Rawls and wife, is for their natural lives and then to the heirs of C. C. Rawls. Under the rule in *Shelley's case,* which has been firmly established in this jurisdic-

tion as a rule of law, C. C. Rawls took the devised property in fee simple, subject to the life estate of his wife. *Cotten v. Moseley,* 159 N. C., 1, 74 S. E., 454; *Smith v. Smith,* 173 N. C., 124, 91 S. E., 721; *Daniel v. Harrison,* 175 N. C., 120, 95 S. E., 37; *Hartman v. Flynn,* 189 N. C., 452, 127 S. E., 517. Therefore, the judgment docketed against C. C. Rawls by the Shapleigh Hardware Company, on 21 November, 1941, became a lien on his interest in the devised property.

Consequently, the judgment of the court below is erroneous, and is Reversed.

HESTER A. McKINNEY v. L. H. DILL AND WIFE, MAY DILL.

(Filed 25 February, 1948.)

Appeal and Error § 2—

The court, being of opinion that plaintiff's proof failed to correspond in some respects with her complaint, ordered a mistrial. Defendants appealed for failure of the court to rule on their motions to nonsuit, and plaintiff appealed on account of the statement of the court that the complaint needed amendment to conform to the proof. *Held:* Both appeals are premature and are dismissed.

APPEAL by plaintiff and defendants from *Nettles, J.,* at September Term, 1947, of MADISON. Both appeals dismissed.

Carl R. Stuart for plaintiff.

J. M. Bailey, Jr., for defendants.

PER CURIAM. At the close of plaintiff's evidence the defendants moved for judgment of nonsuit. The trial judge, without ruling on the motion, expressed the view that the plaintiff's evidence did not in some respects correspond with her complaint, and in his discretion and *ex mero motu* withdrew a juror and ordered a mistrial, with permission to the plaintiff to amend her complaint. The defendants appealed, for that the court failed to rule on their motion to nonsuit, and plaintiff likewise appealed on account of the statement by the court that the plaintiff's complaint needed amendment to conform to the proof.

It is apparent that both appeals are premature, and must be dismissed. No judgment or final order, or order affecting a substantial right, has been entered below, and the cause remains on the docket of the Superior Court of Madison for such proceedings as may seem advisable to the parties. *Johnson v. Ins. Co.,* 215 N. C., 120, 1 S. E. (2d), 381. See also *Ten'Broeck v. Orchard,* 79 N. C., 518.

The defendants' demurrer *ore tenus,* interposed for the first time in this Court, is not presently presented.

Plaintiff's appeal: Dismissed.

Defendant's appeal: Dismissed.

ANNIE JAMERSON v. EZRA LOGAN, ADMR., C. L. FREEMAN.

(Filed 3 March, 1948.)

1. Wills § 4: Frauds, Statute of, § 9—

An indivisible contract to devise real and personal property comes within the statute of frauds. G. S., 22-2.

2. Frauds, Statute of, § 3—

Denial of the contract as alleged is sufficient to raise the defense of the statute of frauds, since it places the burden upon plaintiff of establishing the contract by competent evidence, and if the contract be within the statute, the writing itself is the only competent evidence to prove its existence.

3. Trial § 14—

Where, upon the overruling of an objection by the adverse party to a question, counsel, the witness not having answered, formulates the question in different language and the witness answers, the failure to object to the second question cannot be held a waiver of the objection to the first question.

4. Frauds, Statute of, § 4—

Defendant's failure to object to parol evidence offered to show the existence of the contract is not a waiver of his defense of the statute of frauds, *a fortiori* if the evidence admitted without objection does not tend to show the existence of the contract but tends only to support a recovery on implied *assumpsit,* since the denial of the contract casts the burden on plaintiff to establish his cause of action by legal evidence.

5. Frauds, Statute of, § 1—

Our statute of frauds affects not only the enforcement of contracts coming within its terms but also their validity.

6. Appeal and Error § 51c—

Expressions in opinions of the Supreme Court must be considered with a view to the circumstances of their use in order to be correctly understood.

7. Wills § 5d: Executors and Administrators § 15d—

Where recovery for breach of an alleged contract to devise and bequeath is precluded by the statute of frauds, evidence that plaintiff rendered per-

sonal services to deceased in reliance upon the agreement warrants the submission of the case to the jury upon implied *assumpsit* or *quantum meruit*, without amendment of the complaint.

APPEAL by defendant from *Sink, J.*, at September Term, 1947, of RUTHERFORD.

Civil action for breach of alleged contract.

The plaintiff was reared in the home of C. L. and Dora Freeman. In 1933 she married Haywood Jamerson. It is alleged that C. L. Freeman consented to the marriage only on condition that plaintiff and her husband "live with him, or on his place, and look after him during his lifetime and that all of his property at his death would go to Annie Forney, now Annie Jamerson," subject to the life occupancy and use by his wife, Dora Freeman. Plaintiff and her husband lived in the home of the Freemans, or on their place, from 1933 until after the death of C. L. Freeman in 1939. During this time plaintiff rendered valuable services to the Freemans—much of it of an onerous and menial character.

C. L. Freeman left a will in which all of his personal property was bequeathed outright to his wife, and all of his land was devised to his wife "to use as she may desire during her natural life, and if upon her death there should be a surplus left of any of said land which she has not disposed of, then in that case I suggest and request that she leave same to Annie Jamerson, whom we have raised from infancy." The estate consisted of land worth from $10,000 to $15,000, and personal property valued at $2,500.

Haywood Jamerson testified that when he sought C. L. Freeman's consent to marry his niece, he replied: "Annie is the only dependence I have, and if you and she marry I want you to come and stay in the house with us, and what is here will be hers after I am dead, . . . subject to my wife possession as long as she lives. . . . He told me several times that he wanted Annie to have what he had after his wife's death; he wanted her to have all he had. . . .

"Q. I wish you would state, if you know, how Annie was to be paid for her services?"

Defendant objects; overruled; exception.

"Q. Go ahead and state, if any time, Cal Freeman said at any time while you and Annie were living there as to what her compensation for services rendered was to be.

"A. All I ever heard she was to get all of his property that was left after his death."

Dwight Logan testified that Cal Freeman told him that "he intended Annie Jamerson to have the biggest part of his property."

Lester Logan testified that he heard Cal Freeman say that Annie "was like one of his kids, that he would do anything for her."

Upon denial of liability and issues joined, the jury returned the following verdict:

"1. Did the plaintiff, Annie Jamerson, during the lifetime of the said C. L. Freeman, enter into a contract as alleged in the complaint? Answer: Yes.

"2. If so, did the plaintiff, Annie Jamerson, on her part, comply with all of her obligations under said contract? Answer: Yes.

"3. Did the said C. L. Freeman breach said contract, as alleged in the complaint? Answer: Yes.

"4. What amount, if any, is the plaintiff entitled to recover? Answer: $10,000."

From judgment on the verdict, the defendant appeals, assigning errors.

Don C. Young and W. K. McLean for plaintiff, appellee.

Hamrick & Hamrick, R. S. Eaves, and Sidney L. Truesdale for defendant, appellant.

STACY, C. J. We think the plaintiff has misconceived her rights and remedies.

Conceding, without deciding, that the complaint contains sufficient allegation of a special promise on the part of C. L. Freeman to devise and bequeath all of his real and personal property to the plaintiff in consideration of services to be rendered by her—the theory upon which the case was tried—we think the action, as thus encompassed and tried, must fail because the promise falls within the statute of frauds and is not in writing. G. S., 22-2; *Stewart v. Wyrick, ante,* 429; *Coley v. Dalrymple,* 225 N. C., 67, 33 S. E. (2d), 477. An agreement to devise real property is within the statute of frauds, as is also an indivisible contract to devise real and personal property. *Grady v. Faison,* 224 N. C., 567, 31 S. E. (2d), 760.

"Where the plaintiff declares upon a verbal contract, void under the statute of frauds, and the defendant either denies that he made the contract or sets up another and a different agreement, testimony offered to prove the parol contract is incompetent and should be excluded on objection." *Browning v. Berry,* 107 N. C., 231, 12 S. E., 195; Anno. 158 A. L. R., 89, *et seq.*

The defendant does not specially plead the statute of frauds, but he denies the contract in his answer. *Grantham v. Grantham,* 205 N. C., 363, 171 S. E., 331. This put the plaintiff to proof and required her to make out her case, "as a denial of the execution of the contract in the answer was sufficient to protect the defendant from liability under the statute of frauds, and it was not necessary to plead the statute specially." *Miller v. Monazite Co.,* 152 N. C., 608, 68 S. E., 1; *McCall v. Industrial*

Institute, 189 N. C., 775, 128 S. E., 349; *Price v. Askins,* 212 N. C., 583, 194 S. E., 248; McIntosh on Procedure, 486. Indeed, it is said in a number of cases that the denial of the contract is equivalent to a plea of the statute. *Ebert v. Disher,* 216 N. C., 36, 3 S. E. (2d), 301; *McCall v. Industrial Institute, supra.* The effect of the defendant's denial was to impose upon the plaintiff the burden of showing a written contract which complies with the statute of frauds, if he would recover on the contract or for its breach. *Henry v. Hilliard,* 155 N. C., 372, 71 S. E., 439, 49 L. R. A. (N. S.), 1; Anno. 158 A. L. R., 122-124.

It is settled by numerous decisions that if the contract be denied, or a contract different from the one alleged is set up, or if the contract be admitted and the statute of frauds specially pleaded, parol evidence is inadmissible to show the existence or terms of the agreement. *Henry v. Hilliard, supra; Holler v. Richards,* 102 N. C., 545, 9 S. E., 460; *Morrison v. Baker,* 81 N. C., 76; *Dunn v. Moore,* 38 N. C., 364. "Where the plaintiff sues upon a contract, the performance of which he seeks to enforce specifically in equity, or for the breach of which he seeks to recover damages at law, he must establish the contract by legal evidence, and if it is required by the statute to be in writing, then by the writing itself, for that is the only admissible proof." *Winders v. Hill,* 144 N. C., 614, 57 S. E., 456; *Balentine v. Gill,* 218 N. C., 496, 11 S. E. (2d), 456; *Morrison v. Baker, supra.*

As a *dernier ressort,* the plaintiff contends that the defendant waived the defense of the statute when he permitted the witness, Haywood Jamerson, to answer the last question propounded to him without objection. (See question and answer above set out.) There are several answers to this contention. In the first place, it will be noted that objection was entered to the question next immediately preceding the one propounded to the witness, and the last question was but another way of formulating the same question which had just been the subject of objection. Secondly, it may be doubted whether this last question and answer, even if admitted without objection, make out a promise on the part of C. L. Freeman to leave his property to the plaintiff by will. *Browning v. Berry, supra.* Thirdly, it was held in *Grantham v. Grantham, supra,* that where there was a denial of the contract the defense of the statute was not waived by a failure to object to the parol evidence offered on the hearing. The holding is supported by several earlier decisions. *Gulley v. Macy,* 84 N. C., 434; *Morrison v. Baker, supra; Bonham v. Craig,* 80 N. C., 224; *Barnes v. Brown,* 71 N. C., 507; *S. c.,* 69 N. C., 439; *Allen v. Chambers,* 39 N. C., 125. See Note, 49 L. R. A. (N. S.), pp. 12 and 18; also 158 A. L. R., 138. The defendant's failure to object to evidence would not perforce work an abandonment of his defense or a waiver of the denial of the contract. *Barnes v. Teague.* 54 N. C., 278; *Hall v. Misenheimer,* 137 N. C., 183, 49 S. E., 104; *Neal v. Trust Co.,*

224 N. C., 103, 29 S. E. (2d), 206; *Harvey v. Linker,* 226 N. C., 711, 40 S. E. (2d), 202. *Cf. Allison v. Steele,* 220 N. C., 318, 17 S. E. (2d), 339. Moreover, in view of the theory of the trial the defendant may have considered any evidence of a parol agreement irrelevant and of no avail to the plaintiff in making out her case. *Luton v. Badham,* 127 N. C., 96, 37 S. E., 143; *Jordan v. Furnace Co.,* 126 N. C., 143, 35 S. E., 247. "As the agreement was denied in the defendant's answer, it was not necessary for him to insist on the statute as a bar. The complainant in such case must produce legal evidence of the agreement which cannot be established by parol proof merely"—*Bank v. Root,* 3 Paige Ch., 478, quoted with approval in *Bonham v. Craig, supra.* Likewise, the following terse statement from *Morrison v. Baker, supra,* has been repeated in a number of later cases: "A contract which the law requires to be in writing can be proved only by the writing itself, not as the *best,* but as the *only admissible evidence of its existence.*" The protection of the statute extends not only to the performance of the contract, but to its discovery as well. *Barnes v. Teague, supra.* To show a parol agreement, when a written one is required, is to fall short of the necessary proof. *Kluttz v. Allison,* 214 N. C., 379, 199 S. E., 395.

The plaintiff would have us adopt the English practice which prevails under a statute somewhat different from ours, and which is enforced as a rule of evidence. *Jordan v. Furnace Co., supra.* The first North Carolina decision on the subject, *Lyon v. Crissman* (1839), 22 N. C., 268, indicated a preference for the English practice, but this was soon abandoned in the case of *Allen v. Chambers* (1845), 39 N. C., 125. Since this latter decision, we have followed the rule that when the protection of the statute is invoked, the plaintiff is entitled to recover only by showing compliance with its provisions. *Gulley v. Macy, supra; Valentine v. Gill, supra.* The English statute of frauds goes only to the enforcement of contracts coming within its terms, and not to their validity. Ours affects the substance as well as the remedy. Hence, the difference in procedural insistence. Expressions may be found in some of the cases which seem to overlook this distinction. However, in most of them it will be discovered that the point now under review was not in focus. Every expression to be correctly understood, ought to be considered with a view to the circumstances of its use. *Krites v. Plott,* 222 N. C., 679, *loc. cit.* 683, 24 S. E. (2d), 531; *U. S. v. Burr,* 4 Cranch., 469. The plaintiff's dernier position is not sustained.

The complaint is broad enough, however, to support a recovery on implied *assumpsit* to pay the plaintiff the reasonable worth of her services or *quantum meruit* as expressed in some of the cases, and there is evidence to warrant the submission of the case to the jury on this theory. *Grady v. Faison, supra; Neal v. Trust Co., supra.* Indeed, it may be doubted whether the complaint or the evidence shows more than a cause

of action for the reasonable worth of plaintiff's services. *Stewart v. Wyrick, supra; Coley v. Dalrymple, supra.* "Where the plaintiff alleged a contract to pay for services performed, and, upon the trial, failed to prove a special contract, but did prove the performance of the services and their value: *Held,* that he was entitled to recover upon *quantum meruit* without amending the complaint." Third Syllabus, *Stokes v. Taylor,* 104 N. C., 394, 10 S. E., 566. See *Roberts v. Woodworking Co.,* 111 N. C., 432, 16 S. E., 415, and McIntosh on Procedure, 421.

The verdict and judgment will be set aside and the cause remanded for trial on the theory of implied *assumpsit* or *quantum meruit.*

New trial.

W. B. COPPERSMITH, MRS. ATTIE COPPERSMITH, ELISHA COPPERSMITH AND IRMA C. HOPKINS v. L. J. UPTON.

(Filed 3 March, 1948.)

1. Estates § 16: Partnership § 12—

Under the proviso of the statute abolishing survivorship in personalty generally, a surviving partner is vested with title to the partnership estate for the purpose of settling the affairs of the partnership. G. S., 41-2.

2. Partnership §§ 12, 13—

The fact that the surviving partner instituting action on a partnership asset has not filed bond as required by G. S., 59-74, is not ground for nonsuit, since the requirement of a bond is for the protection of the estate of the deceased partner, and the objection is not available to one who is merely a debtor of the partnership. This conclusion is consonant with G. S., 59-75, which provides that upon failure of the surviving partner to file bond, the Clerk of the Superior Court shall appoint a collector of the partnership upon application of any person interested in the estate of the deceased partner.

3. Equity § 3—

Laches is an equitable defense which is not ordinarily tenable in a court of law and on a legal demand, and in this action to recover the balance due on purchase price of potatoes the plea of laches *is held* unavailing.

PLAINTIFFS' appeal from *Bone, J.,* January Term, 1948, PASQUOTANK Superior Court.

The plaintiff, W. B. Coppersmith, and his brother, Elisha Coppersmith, Sr., during the year 1927 were engaged as partners in the business of farming, raising and selling irish potatoes. During the summer of 1927 a quantity of the potatoes so produced were sold and delivered to the defendant, it is alleged, the total purchase price amounting to $5,500,

upon which the defendant paid $2,000 in 1929, the balance remaining unpaid. During the intervening years before the commencement of this suit it is in evidence that Upton on several occasions promised to pay the balance due for the potatoes but never did so.

Meantime, in the year 1928, Elisha Coppersmith, Sr., died, leaving surviving him a widow, Mrs. Attie Coppersmith, and two children, Elisha Coppersmith and Mrs. Irma Hopkins, all coplaintiffs in this action.

The estate of Elisha Coppersmith, Sr., other than the interest he is alleged to have had in the item sued upon, has been fully administered and settlement made with his heirs and distributees.

Plaintiff joined with him the widow and children of Elisha Coppersmith, Sr., above named, brought this suit against Upton, a resident of Virginia, for the recovery of the balance due upon the purchase price of the potatoes and, in aid of the service and jurisdiction, attached lands of the defendant in Pasquotank County, where the suit was brought. Complaint was filed setting up above pertinent facts.

The defendant answered, admitting the purchase of a quantity of the potatoes from the plaintiff by L. J. Upton & Company, a corporation of which he was president, but denying that he was in business on his own account, or that he had, personally, bought any potatoes from plaintiff; and averring that the corporation had failed and gone out of business shortly after 1928, and that its records have been destroyed.

The defendant denied that plaintiff had made any claim upon him as alleged in his complaint and pleaded that the plaintiff is estopped by reason of his laches from now asserting the claim.

Upon the trial the plaintiffs' having offered evidence in support of their contentions, rested their case. The defendant did not demur to the evidence, but moved for judgment of nonsuit upon the ground that the cause of action of the plaintiffs, if any, was in the surviving partner, W. B. Coppersmith, and he had not qualified as such under the statute and had no right to maintain this suit, he had not given the above mentioned bond. The court, being of that opinion, sustained the motion of defendant upon that ground, over the objection and exception of the plaintiffs. Thereupon the court signed the judgment of nonsuit, to which the plaintiffs objected, and excepted, and appealed, assigning error.

R. Clarence Dozier and John H. Hall for plaintiff, appellants.

W. A. Worth for defendant, appellee.

SEAWELL, J. Succession to property by virtue of survivorship in joint tenancy was abolished by an early statute, now, with some amendment, G. S., 41-2. The statute, however, makes certain modifying provisions

relating to estates used in partnerships. The proviso vests in the surviving partner the estate held in joint tenancy for partnership purpose "in order to enable him to settle and adjust the partnership business, or pay off the debts which may have been contracted in pursuit of the joint business; but as soon as the same is effected, the survivor shall account with, and pay, and deliver to the heirs, executors, administrators and assigns respectively of such deceased partner all such part, share, and sums of money as he may be entitled to by virtue of the original agreement, if any, or according to his share or part in the joint concern, in the same manner as partnership stock is usually settled between joint merchants and the representatives of their deceased partners." See *Stroud v. Stroud,* 61 N. C., 525.

To be read in connection with this section respecting settlement of the partnership affairs by the surviving partner, is G. S., 59-74, found in the chapter on partnership, requiring that the surviving partner shall execute a bond with surety, conditioned upon the faithful performance of his duties in the settling of the partnership affairs.

The first question presented by the appellant is whether the giving of this bond is a condition precedent to the maintenance of an action by the surviving partner to recover debts due the partnership at the time of its dissolution by death of one of them. The affirmative view, we are aware, has been judicially adopted in several jurisdictions where, as here, survivorship, as an incident of joint tenancy, has been preserved with respect to partnership property and power given to the surviving partner to settle the affairs of the partnership, and a bond required of him in connection with that administration. Apparently the question has never been raised here. Typical expression of the view that the filing of the bond is a condition precedent to the maintenance of the action may be found in *Campbell v. Bohan,* 148 Kan., 205, 80 P. (2d), 1110; 121 A. L. R., 586, Anno. 869.

Conceding that the extraterritorial statutes may be comparable to our own, nevertheless a study of our own laws, read *in pari materia,* leads us to a contrary conclusion.

The purpose of the statute, G. S., 59-74, requiring a bond of the surviving partner, is, we think, limited to the protection of those who are interested in the property or estate administered by the surviving partner, who is required to account to them and pay over in case there is a surplus (of that interest) after paying the partnership debts. It is a trust relationship in which only they have a legal interest. Therefore, the objection that the surviving partner has not filed the bond is not available to the defendant, who is merely a debtor of the estate.

Moreover, it seems apparent that the giving of the bond cannot be regarded as a condition precedent to the maintenance of the action, for the reason that Section 59-75 provides an alternative remedy upon fail-

ure of the surviving partner to give bond. In that event "the Clerk of the Superior Court shall upon application of any person interested in the estate of the deceased partner, appoint a collector of the partnership who shall be governed by the same law governing an administrator of a deceased person." Not only have those who are "interested in the estate" taken no action in that direction, but they have expressed their acquiescence by joining the surviving partner in this suit. (It is to be noted that the defendant did not demur to the joinder of parties. It would have had no effect on the principle discussed.)

The second question presented is that of laches in the institution and maintenance of the suit. The doctrine of laches, or want of diligence in the assertion of a claim, is ordinarily regarded as an equitable defense, and it has been held that the plea is not tenable in a court of law and on a legal demand, "the court being governed by the statute of limitations"; 19 Am. Jur., p. 339, Sec. 49; *U. S. v. Mack*, 295 U. S., 480, 79 L. Ed., 1559. Whether that rule has been strictly followed by our own courts we need not inquire. In the present case, since the defendant is a nonresident, he cannot avail himself of any statute of limitations. However this may be, we see nothing in the instant case which would justify the Court in applying the doctrine.

The judgment of nonsuit is reversed and the cause is remanded to the Superior Court of Pasquotank County for action in accordance with this opinion.

Reversed and remanded.

IN THE MATTER OF THE WILL OF W. J. CASSADA, DECEASED.

(Filed 3 March, 1948.)

1. Wills § 17—

While in a strict sense there are no parties to an issue of *devisavit vel non*, the proceeding being *in rem*, propounders and caveators may be put in the category of parties for the purpose of ruling upon the admissibility in evidence of their admissions and declarations.

2. Wills § 23b; Evidence § 42c—

The extra-judicial admissions of one of several caveators, made without authority of the others, is not competent on behalf of propounders to contradict caveators' assertion of testamentary incapacity, since even though it be a declaration against interest and would be competent against the caveator making the admissions if he were the sole caveator, yet such caveator is not in privity with the others and has no joint interest with them in the matter in suit, and therefore the admissions are incompetent as against the other caveators.

3. Wills § 18c—

Caveators have a community of interest in the successful prosecution of the caveat, but they are not in privity and do not have a joint interest in the matter in suit in a legal sense, but, if successful, will hold their respective shares in the realty as tenants in common and their respective shares in the personalty in severalty.

APPEAL by caveators from *Nettles, J.*, and a jury, at the October Term, 1947, of BUNCOMBE.

This is a caveat to the script propounded for probate as the will of W. J. Cassada, deceased, who was twice married. His first wife, Violet Cassada, died intestate 24 June, 1901, leaving the following six minor children born of her union with the decedent: Jeter Cassada, Dewey Cassada, George Cassada, Melissa Cassada, Eula Cassada, and Iva Cassada. Melissa Cassada, Eula Cassada and Iva Cassada were subsequently married respectively to men bearing the surnames of Plemmons, Bailey, and Tillery. Iva Cassada Tillery died intestate, survived by an only daughter, Mrs. R. D. Gunter. After the death of his first wife, W. J. Cassada contracted a second marriage with Lucinda Cassada, and had the following nine children by her: Winston Cassada, Vista Cassada, Luther Cassada, May Cassada, Norma Cassada, Kate Cassada, Willard Cassada, Cecil Cassada, and Lyle Cassada.

On 5 March, 1903, W. J. Cassada bought 182 acres of land known as the Jud Wells farm on Turkey Creek in Buncombe County from J. E. Hampton for a recited consideration of two thousand dollars. Here he made his home until his death on 25 December, 1945. This farm constitutes practically the entire estate of the decedent. According to testimony adduced by the caveators on the trial, the Jud Wells place had a market value of about twenty-five thousand dollars on 29 December, 1936, when W. J. Cassada executed the script now offered for probate as his will.

By this paper writing, the deceased willed all of his property, including the Jud Wells farm, to Lucinda Cassada, his second wife, and to Willard Cassada, Cecil Cassada, and Lyle Cassada, his three youngest sons by his second marriage, subject only to the payment of fifty dollars in cash to each of his other twelve children. The propounders, Lucinda Cassada, Willard Cassada, Cecil Cassada, and Lyle Cassada, caused this paper writing to be admitted to probate in common form before the Superior Court of Buncombe County, and thereupon Jeter Cassada filed a caveat contesting the validity of the script as the will of W. J. Cassada upon the allegations that W. J. Cassada lacked testamentary capacity at the time of its execution and that its execution was procured through undue influence exerted upon W. J. Cassada by the propounders, Lucinda Cassada and Willard Cassada. It is asserted in the brief of the pro-

pounders that Dewey Cassada, George Cassada, Melissa Cassada Plemmons, and Mrs. R. D. Gunter, joined Jeter Cassada in the prosecution of the caveat. This Court assumes this assertion to be true for the purpose of this decision, despite the fact that there is nothing in the record sustaining it except a mere recitation in the judgment. The trial court properly ruled that the evidence adduced on the hearing was insufficient to justify the submission of an issue as to undue influence.

There was sharp conflict in the testimony on the trial relating to the mental state of W. J. Cassada. In support of their claim that their virtual disinheritance was an unnatural act on the part of the decedent, the caveators offered evidence indicating that while such children were small infants and while he was serving as their guardian, W. J. Cassada wrongfully invested in the purchase of the Jud Wells place about six hundred dollars accruing to the six children of his first marriage from the estate of their deceased mother, Violet Cassada, and that he never repaid such moneys so used by him to such children. To repel any inference that there was anything unnatural in the act of W. J. Cassada in willing practically all of his property to them, the propounders undertook to prove that the propounders were the only members of the family residing with and dependent upon the decedent at the time of the execution of the alleged will, and that the decedent had paid over to his children by his first marriage all moneys accruing to them from the estate of their deceased mother. In this connection, the propounders were permitted to introduce in evidence over the exception of the caveators a declaration made by Dewey Cassada, one of the caveators, after the filing of the caveat, to the effect that he had received from his father and guardian, W. J. Cassada, his full share in the estate of his deceased mother, Violet Cassada, and that he disclaimed any interest in the Jud Wells farm or in any other part of the estate of W. J. Cassada. Dewey Cassada did not appear on the trial as a witness, and his declaration was not authorized in any way by any of the other caveators.

Upon issues submitted, the jury found that the paper writing offered for probate had been executed by W. J. Cassada in due form of law, and that W. J. Cassada possessed testamentary capacity at the time he signed the same. The trial court entered judgment on the verdict establishing the script in question as the will of the decedent, and the caveators appealed to this Court upon exceptions duly preserved.

Guy Weaver and James E. Rector for propounders, appellees.
George M. Pritchard for caveators, appellants.

ERVIN, J. The probate of a will is a proceeding *in rem*, and there are in a strict sense no parties to an issue of *devisavit vel non*. *In re*

Lomax, 226 N. C., 498, 39 S. E. (2d), 388. But the courts put propounders and caveators in the category of parties for the purpose of ruling upon the admissibility of their admissions and declarations in will contests. See Page on Wills (Lifetime Ed.), Vol. 2, sections 801, 802, 803.

The exception of the caveators to the introduction of the declaration of Dewey Cassada presents this question for determination: Where several heirs at law and next of kin caveat an alleged will of a decedent on the ground of testamentary incapacity, are extra-judicial admissions of one of the caveators made without the authority of the others competent as substantive evidence in behalf of the propounders to contradict the assertion of testamentary incapacity made by the caveators or to establish the claim of testamentary capacity advanced by the propounders? This question must be answered in the negative.

The propounders insist, however, that this answer is incorrect, because of the familiar rule of evidence that a declaration against interest constitutes legal testimony against the declarant. *McCraine v. Clarke,* 6 N. C., 317; *Enloe v. Sherrill,* 28 N. C., 212. As the statement of Dewey Cassada received in evidence on the trial has a tendency to refute the claim of the caveators that their virtual disinheritance by the decedent was unnatural, it is undoubtedly a declaration against the interest of the declarant, Dewey Cassada, and would clearly be admissible against him as such under the authorities if he were the sole heir at law and next of kin of the decedent. 167 A. L. R., Annotation, 12-109; 28 R. C. L., Wills, section 412; *Pollock v. Pollock,* 328 Ill., 179, 159 N. E., 305; *McMann v. Murphy,* 259 Mass., 397, 156 N. E., 680. See, also, in this connection, the authorities quoted in these North Carolina cases: *In re Fowler,* 156 N. C., 340, 72 S. E., 357; Ann. Cas. 1913A, 85, 38 L. R. A. (N. S.), 745; *Linebarger v. Linebarger,* 143 N. C., 229, 55 S. E., 709, 10 Ann. Cas., 596. This would be true in such case, because the admissions as to the mental capacity of the alleged testator would affect the interest of the declarant only. *Ramseyer v. Dennis,* 187 Ind., 420, 119 N. E., 716.

But Dewey Cassada is not the sole heir at law and next of kin of W. J. Cassada. Five other heirs at law and next of kin of the decedent have joined in the caveat and are here resisting the probate of the script in controversy. The admission of Dewey Cassada received in evidence on the trial was not authorized in any way by any of the other caveators. These facts call for the application of the well settled and just principle that no one should be concluded by the unauthorized statements of another where there is no privity between them and they have no joint interest in the matter in suit. *Linebarger v. Linebarger, supra;* 31 C. J. S., Evidence, section 318. No privity exists between Dewey Cassada and

the other caveators. Each of the caveators claims independently of the others through W. J. Cassada alone under the statutes of descent and distribution. The caveators have a community of interest in the successful prosecution of the caveat, but they do not have a joint interest in the matter in suit in a legal sense. On the contrary, their interests are several. If they meet with success in their effort to defeat probate of the alleged will, they will not be joint owners of either the real or the personal property of the decedent. In such event, they will hold their respective shares in the land in question as tenants in common and their respective shares in the personal estate under consideration in severalty.

This is not a case where a declaration against interest can be admitted as against the party who made it and excluded as against his coparties. This is true, because the paper writing in controversy cannot be admitted to probate as against Dewey Cassada and rejected for probate as against the other caveators. The issue relating to the testamentary capacity of the deceased involves the validity of the alleged will as a whole, and the court is limited in power to the rendition of a judgment either probating the alleged will in its entirety or rejecting it as a whole. The admission of Dewey Cassada should not, therefore, be received in evidence, because it could not possibly have any effect as to himself without affecting the other caveators. Hence, reason demands that the declaration be excluded, and that the propounders be required to maintain their position upon the issue concerning the testamentary capacity of the decedent by testimony competent against all of the caveators.

This conclusion finds full support in well considered decisions of this Court and of appellate courts in other jurisdictions. *McDonald v. McLendon,* 173 N. C., 172, 91 S. E., 1017, Ann. Cas., 1918A, 1063; *In re Fowler, supra; Linebarger v. Linebarger, supra; Estate of Dolbeer,* 153 Cal., 652, 96 P., 266, 15 Ann. Cas., 207; *Roller v. Kling,* 150 Ind., 159, 49 N. E., 948; *Powell v. Bechtel,* 340 Ill., 330, 172 N. E., 765; *James v. Fairall,* 154 Iowa, 253, 134 N. W., 608, 38 L. R. A. (N. S.), 731; *Matter of Myer,* 184 N. Y., 54, 76 N. E., 920, 6 Ann. Cas., 26. A case very much in point is *Matter of Kennedy,* 167 N. Y., 163, 60 N. E., 442. See, also, 31 C. J. S., Evidence, sec. 318; 28 R. C. L., Wills, Sec. 412.

The error committed in receiving the declaration in question in evidence is of sufficient moment to entitle the caveators to a new trial. It is so ordered.

New trial.

LEE BANKS AND WIFE, MAMIE BANKS; TOM HYLEMAN, LONNIE ALLEN, BEN RIDDLE, R. H. HUGHES, W. K. BANKS, JACK PATTON, AND OTHERS INTERESTED IN THE PROSECUTION OF THIS ACTION, v. THE TOWN OF BURNSVILLE.

(Filed 3 March, 1948.)

1. Municipal Corporations § 15b: Injunctions § 4d—

G. S., 130-117, giving a court of equity power to enjoin any person, firm, corporation or municipality from emptying untreated sewage *into* a stream upon suit by any person, applies only when a public drinking-water supply is taken *from the stream*, in which instance proof of any injurious effect upon plaintiffs' water supply is not required.

2. Same—

In a suit by private individuals to restrain a municipality from emptying untreated sewage into a stream, from which a public drinking-water supply is not taken, a complaint which fails to allege that plaintiffs own land along or adjacent to the stream and that the acts complained of constitute a nuisance resulting in continuing, irreparable damages, is demurrable.

APPEAL by defendant from *Sink, J.*, at October Term, 1947, of YANCEY.

Civil action to restrain the Town of Burnsville from emptying sewage into Pine Swamp Branch.

By consent of counsel this cause was heard by his Honor upon affidavits and without the services of a jury.

The defendant demurred *ore tenus* on the ground that the complaint does not state facts sufficient to constitute a cause of action in that (1) the plaintiffs allege no ownership of property abutting upon or contiguous to Pine Swamp Branch; (2) the plaintiffs allege no damages, irreparable or otherwise; and (3) the plaintiffs fail to allege they have no adequate remedy at law.

The trial judge overruled the demurrer, found as a fact that the Town of Burnsville is and has been for a number of years, disposing of raw sewage in Pine Swamp Branch referred to in the complaint, and entered judgment for the plaintiffs, restraining the defendant from emptying untreated sewage in Pine Swamp Branch on and after 1 November, 1950. The judgment provides, however, that unless the defendant shows to the satisfaction of the court by 1 November, 1949, that it has set about "making provision for the necessary repairs, remedies and facilities for such treatment of the sewage," the effective date of the injunction may be accelerated.

Defendant appeals, assigning error.

Charles Hutchins for plaintiffs.

E. L. Briggs and J. Frank Huskins for defendant.

DENNY, J. The plaintiffs allege they are citizens and residents of Burnsville Township, Yancey County, North Carolina. However, they do not allege that they own land abutting upon or contiguous to Pine Swamp Branch. Moreover, they do not allege that by reason of the emptying of untreated sewage into Pine Swamp Branch by the defendant, they are suffering some peculiar or special injury to their personal and property rights not suffered by the public generally. Instead of alleging special damages to their respective properties as a result of the conduct of the Town of Burnsville in emptying untreated sewage in Pine Swamp Branch, they allege "that from a practical viewpoint the health of the citizens of Burnsville is continually endangered on account of the unlawful practice of said defendant, the Town of Burnsville, in dumping such refuse into said slowly running stream."

It seems the plaintiffs instituted and tried this action below upon the theory that the equitable relief sought by them may be obtained by alleging and proving that the defendant, Town of Burnsville, is and has been disposing of untreated sewage in Pine Swamp Branch. The appellees cite *Board of Health v. Commissioners*, 173 N. C., 250, 91 S. E., 1019, in support of their contention that the defendant has not and cannot acquire an easement against the public by prescription. They further take the position in their brief that it is not necessary for them to show any actual damages.

The above case was bottomed upon a statute which prohibited any person, firm, corporation or municipality from discharging untreated sewage into any drain, brook, creek or river from which a public drinking-water supply is taken. A violation of this statute, G. S., 130-117, is sufficient to invoke the equitable powers of the court and an injunction may be issued against a defendant for emptying sewage into such a stream without proof of any injurious effect upon plaintiff's water supply. *Durham v. Eno Cotton Mills*, 144 N. C., 705, 57 S. E., 465; *Shelby v. Power Co.*, 155 N. C., 196, 71 S. E., 218. Likewise, an action to enjoin any person, firm, corporation or municipality from emptying untreated sewage into a stream in violation of the above statute, may be brought by any person. However, in such case it is not mandatory that an injunction be issued. *Brogden, J.*, in speaking for the Court in *Smithfield v. Raleigh*, 207 N. C., 597, 178 S. E., 114, said: "The statute recognizes such practical exigencies of social life, and declares that 'the continued flow and discharge of such sewage may be enjoined upon application of any person.' The words 'may be enjoined' clearly demonstrate

that surrounding facts and circumstances must be considered in entering a peremptory order of the kind sought in this action."

In the instant case it is not contended that a public drinking-water supply is taken from Pine Swamp Branch. Therefore, the above statute nor the cases bottomed thereon are controlling on this appeal.

Ordinarily, private individuals who seek to restrain a municipality from emptying sewage in a stream from which a public drinking-water supply is not taken, must allege, in order to survive a demurrer, that they own land along or adjacent to said stream and that the acts complained of are such as to constitute a nuisance and as a result thereof the plaintiffs have and will continue to suffer irreparable damages unless granted the relief sought. *Vickers v. Durham*, 132 N. C., 880, 44 S. E., 685; *Pedrick v. R. R.*, 143 N. C., 485, 55 S. E., 877; *Cherry v. Williams*, 147 N. C., 452, 61 S. E., 267; *Metz v. Asheville*, 150 N. C., 748, 64 S. E., 881; *McManus v. R. R.*, 150 N. C., 656, 64 S. E., 766; *Little v. Lenoir*, 151 N. C., 415, 66 S. E., 337; 46 C. J., Section 376, p. 768. While the plaintiffs are not seeking damages but equitable relief only, even so, they are not entitled to the relief they seek unless the defendant is maintaining a nuisance by emptying untreated sewage into Pine Swamp Branch and they have suffered special damages as a result thereof. *McManus v. R. R., supra; Anderson v. Waynesville*, 203 N. C., 37, 164 S. E., 583; *Gray v. High Point*, 203 N. C., 756, 166 S. E., 911.

The demurrer *ore tenus* should have been sustained, and the defendant's exception to the failure of the court to so rule will be upheld. Therefore, the judgment of the court below is

Reversed.

STATE v. SHADE ALSTON.

(Filed 3 March, 1948.)

1. Criminal Law § 53c: Homicide § 27a—Charge held not supported by evidence and constituted prejudicial error.

In this homicide prosecution defendant pleaded self-defense. The evidence tended to show that defendant went to a social gathering with a loaded pistol in his pocket, that while there he got in an impromptu dice game with another guest, and that the guest lost and became greatly incensed and later moved to attack defendant with a loaded gun as defendant was sitting in his car waiting for his companions in order to leave, and that in the encounter deceased fired twice and defendant fired once, inflicting fatal injury. It was not clear from the evidence as to which fired first. *Held:* An instruction to the effect that if defendant armed himself and went to the gathering with the intention of using the weapon if he got into a fight with deceased, and provoked a fight in which

both used deadly weapons, defendant would be guilty of murder in the second degree, must be held for prejudicial error, since the instruction, although correct in itself, is not supported by the evidence.

2. Criminal Law § 53k: Homicide §§ 27a, 27f—

The evidence tended to show that defendant went to a social gathering with a loaded pistol, had an altercation with another guest, and, in an encounter in which each shot at the other, fatally wounded such other guest. *Held:* It was error for the court to give the State's contentions on this phase of the evidence without giving defendant's opposing contentions that the fact that defendant had a loaded pistol in his pocket would not deprive him of his legal right of self-defense if he made no unlawful use of the pistol prior to the attack upon him by deceased.

APPEAL by defendant from *Williams, J.*, at January Term, 1948, of WARREN. New trial.

The defendant was indicted for the murder of Charles Young. In accord with the announcement of the Solicitor for the State the trial was for murder in second degree or manslaughter as the evidence should disclose.

There was evidence tending to show that on the evening of 17 December, 1947, the defendant and his two nephews, named Perry, drove in an automobile to the house of Will Young, where Will Young's grandson, Calvin Young, had just arrived with his bride, accompanied also by his uncle Charles (called Cheatham) Young, the deceased. The defendant's automobile was stopped ten or twelve steps from the house. Supper was prepared, rabbit being one of the items on the menu. All were laughing and talking with the newly married couple as they went into the dining room to supper. After eating some of the food, the defendant and deceased, who had been reared in same community and were on friendly terms, went into the adjoining kitchen and played at a dice game, but the only money in evidence was a stake of 25c put up by each. Defendant won the money, and deceased asked him to loan him the money back so he could continue the game. This was refused. Defendant then went back into the dining room and ate a piece of rabbit, and shortly thereafter, accompanied by his nephew, went out to his automobile to leave. Defendant got in the automobile and was sitting under the wheel awaiting the Perry boys. As they were leaving the house the deceased said, "Shade (defendant) will not get away with that quarter," and took down from the rack a double barreled shotgun, loaded it, and stepped off the porch and moved toward the automobile with the gun. The Perry boys remonstrated with him, but he told them to stand back, which they did. The defendant drew a pistol from his pocket and shot the deceased, and the deceased fired both barrels at the defendant in the automobile at close range, one load striking the automobile just over defendant's head and the other going through the window. The evidence was not clear as to

which weapon was fired first but all three reports were very close together. The wound from the pistol ball caused the death of the deceased.

There was verdict of guilty of murder in second degree, and from judgment imposing sentence of twenty to twenty-two years in State's prison, the defendant appealed.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

Banzet & Banzet for defendant, appellant.

DEVIN, J. The defendant admitted the intentional slaying of the deceased with a deadly weapon and relied for his acquittal upon his plea of self-defense. He contended, also, that in any view of the testimony satisfactory evidence of mitigation appeared, and that conviction of a higher offense than manslaughter was not warranted. The defendant in apt time requested the court to instruct the jury that the fact that the defendant had a pistol in his pocket, but had made no unlawful use of it prior to the attack upon him by the deceased, would not deprive the defendant of his legal right of self-defense. *S. v. Hough*, 138 N. C., 663, 50 S. E., 709. The court declined to give the instruction requested, but on this point charged the jury as follows: "I further charge you, gentlemen, that if the prisoner had prepared a deadly weapon with intention of using it if he got into a fight with the deceased, and went into the house and dining room having made this decision, and for a conflict with the deceased, Young, and met him there and got in a gambling game and quarreled over it and thereby he provoked a fight with him in which both used deadly weapons, one a shotgun and the other a pistol, and that as a result thereof he shot the pistol inflicting a wound which killed the deceased, then it would be your duty to return a verdict of guilty of murder in the second degree, provided you so find beyond a reasonable doubt." Defendant assigns error in these rulings of the court.

While the instruction complained of contains a correct statement of law when applicable to and supported by facts in evidence, it must be held for error here, since there was no evidence upon which to base the instruction given, or to justify the charge to the jury, if the facts as thus stated were found, to return verdict of guilty of murder in the second degree.

All the evidence seemed to indicate a friendly gathering at a marriage supper, where the social amenities of the occasion indicated felicitations and good food. As result of an impromptu dice game the defendant won the sum of 25c, and the deceased became greatly incensed and moved to attack the defendant with a loaded gun. The shooting that ensued proved fatal to the deceased. There was no evidence that the defendant had

prepared a weapon and gone to the house where the deceased was for the purpose of using it in a difficulty with him, or had provoked a fight with him.

To the evidence that the defendant had a pistol in his pocket when he went to the House of Will Young to greet the bride and bridegroom, the court inadvertently gave undue point and emphasis, in this instruction, by the suggestion of purposeful preparation of a deadly weapon as constituting ground for returning verdict of murder in the second degree. We think this had a prejudicial effect upon the defendant's pleas that the shooting was done in self-defense, or under circumstances which compelled the conclusion of mitigation to manslaughter. Nor does it appear that the converse or alternative view of this phase of the case was stated to the jury. *S. v. Fairley,* 227 N. C., 134, 41 S. E. (2d), 88.

In *Real Estate Co. v. Moser,* 175 N. C., 255, 95 S. E., 498, it was said: "The instruction embodies a correct and a very wholesome rule of law, but we do not think there is any sufficient evidence to support it." And in *Seagroves v. Winston,* 167 N. C., 206, 83 S. E., 251: "The submission of any question of fact to a jury without sufficient evidence to warrant a finding is error." See also *S. v. Love,* 187 N. C., 32, 121 S. E., 20; *S. v. Wyont,* 218 N. C., 505, 11 S. E. (2d), 473; *Curlee v. Scales,* 223 N. C., 788, 28 S. E. (2d), 576.

As there must be a new trial, the other exceptions noted by defendant and brought forward in his appeal have not been considered.

New trial.

JESSE BAKER v. MARTIN R. PERROTT.

(Filed 3 March, 1948.)

1. Automobiles §§ 18h (2), 18h (3)—Evidence held properly submitted to jury upon issues of negligence and contributory negligence.

The evidence tended to show that after a collision on the highway, a hearse and a car were stopped on the shoulders on the south side of the highway, and a truck, which had been traveling west, was standing with its left wheels extending two feet to its left of the center line of the highway, the lights on all three vehicles burning. Plaintiff's evidence tended to show that a car approaching from the west passed the scene with safety but that, the vehicles remaining in the same position, defendant's car, traveling east at excessive speed approached the lighted vehicles without slackening speed and in attempting to turn to the right to avoid the truck ran off the highway to his right and struck plaintiff who was standing on the shoulder. Defendant contended that his motions to nonsuit should have been sustained on the issue of negligence in that his evidence disclosed that he was traveling in his proper traffic lane at a lawful speed and hit plaintiff while plaintiff was standing on the hard

surface in such lane, and further on the ground of contributory negligence in that the evidence disclosed that plaintiff remained near or on the hard surface in the face of defendant's approaching car. *Held:* Considering the entire evidence, and particularly that of plaintiff, defendant's motion for judgment of nonsuit was properly denied.

2. Automobiles § 12a—

The driver of a vehicle is under duty not to exceed a speed which is reasonable and prudent under the circumstances and to decrease speed when special hazards exist in regard to pedestrians or traffic. G. S., 20-141 (a); G. S., 20-141 (c).

APPEAL by defendant from *Williams, J.*, at November Term, 1947, of EDGECOMBE. No error.

This was an action to recover damages for personal injury alleged to have been caused by the negligence of the defendant in the operation of an automobile.

On 20 November, 1946, about 7 p.m., the plaintiff was driving a hearse in an easterly direction on the highway from Durham to Wake Forest, and was closely followed by an automobile owned by him and being at the time driven by James Hart, who was accompanied by his wife. About 5 miles west of Wake Forest plaintiff's vehicles met the motor truck of James Case traveling in the opposite direction. The wheels of Case's truck were 1½ to 2 feet over and to the left of the unmarked center line of the highway, and the automobile driven by Hart came in contact in a side collision with the truck, but Hart was able to drive on off the paved surface and on to the shoulder where he stopped just behind the hearse which had already parked there. The truck had stopped immediately before or at time of the collision, and afterwards the driver, Case, was unable to move it. The lights on all vehicles continued to burn. The paved surface of the road was 18 feet wide and the shoulders 6 feet on each side. The plaintiff and his companions got out of their vehicles and walked back some 70 yards to a point near the stalled truck and talked to Case. At this juncture an automobile driven by Carlyle Moore approached from the west and passed on safely, and a few minutes later the automobile owned and driven by the defendant Perrott approached from the west, but in attempting to pass the truck the defendant's automobile struck the plaintiff and injured his leg so severely that it had to be amputated. There was conflict as to whether plaintiff when he was struck was standing on the paved surface of the road or on the shoulder, and there was disagreement also as to the speed and movement of defendant's automobile.

The plaintiff alleged in his complaint that the defendant was negligent in that he drove his automobile without keeping proper lookout, at an excessive rate of speed, without observing the plaintiff standing on the

shoulder, and failed to exercise due care and circumspection in attempting to pass the truck at high speed, thus causing his automobile to swerve to the right and strike the plaintiff.

The defendant denied the allegation of negligence, and alleged contributory negligence on the part of plaintiff, in that he remained on the hard surface, in the shadow of the truck lights, in the traffic lane in which he saw the defendant's automobile approaching and when he should have known the defendant's vision was obscured by the lights of the truck. Defendant further alleged that the negligence of Case in leaving his truck with lights on near the center of the road was also one of the proximate causes of the injuries sustained by the plaintiff.

Plaintiff's evidence on the controverted points tended to show that he was standing on the outer edge of the shoulder near the ditch, and that the defendant continued to drive his automobile at full speed in approaching these lighted vehicles parked on or near the highway, and that in attempting to turn to the right to avoid the truck he ran off on the shoulder and struck the plaintiff there, and continued on across the ditch into a cotton field a distance of 60 feet. Plaintiff's evidence also tended to show that while the plaintiff's vehicles and the truck were in the same position the automobile of Moore had passed safely, and that plaintiff had no reason to anticipate that defendant's automobile would run off on the shoulder and strike him.

On the other hand, the defendant's evidence tended to show he was driving about 40 miles per hour, on a straight paved road as he approached the scene; that Case's truck was standing still, extending 2 feet over the center of the road, with lights burning; that the stationary position of the truck was not observable until he had gotten within 30 feet, and that in turning to the right to avoid and pass the truck his wheels did not entirely leave the hard surface in the lane of traffic in which he had to move, and that it was the impact of striking plaintiff that deflected his automobile off the road and into the field. His evidence also tended to show the plaintiff made no effort to move out of harm's way, and that defendant's vision was obscured by the bright lights on Case's truck.

Defendant's motions for judgment of nonsuit were denied. Issues of negligence, contributory negligence and damage were submitted to the jury, and answered in favor of the plaintiff. From judgment on the verdict, defendant appealed.

Cooley & May for plaintiff, appellee.
Philips & Philips for defendant, appellant.

DEVIN, J. The defendant assigns error in the denial by the court below of his motion for judgment of nonsuit. It is urged that the evi-

dence does not show that the defendant in the operation of his automobile on this occasion failed to exercise reasonable care under the circumstances as they then appeared to him. He points out that he was driving on a straight paved road at a speed not in excess of the statutory limit, and had no reason to anticipate that any person would continue to stand in the light of his approaching automobile on the traveled roadway or so near as to be struck by a passing car, and that if it should be held there was negligence on his part, the plaintiff himself should be held guilty of contributory negligence as a legal conclusion.

However, after considering the entire evidence, and particularly that of the plaintiff, material portions of which are hereinbefore set out, we think the plaintiff's evidence sufficient to carry the case to the jury on both issues of negligence and contributory negligence, and that defendant's motion for judgment of nonsuit was properly denied. This view finds support in several recent decisions of this Court in cases involving similar questions of negligence in the operation of motor vehicles. *Webb v. Hutchins, ante,* 1, 44 S. E. (2d), 350; *Garvey v. Greyhound Corp., ante,* 166, 45 S. E. (2d), 58; *Hoke v. Greyhound Corp.*, 227 N. C., 412, 42 S. E. (2d), 593; *Hoke v. Greyhound Corp.*, 226 N. C., 692, 40 S. E. (2d), 345; *Cummins v. Fruit Co.*, 225 N. C., 625, 36 S. E. (2d), 11; *Allen v. Bottling Co.*, 223 N. C., 118, 25 S. E. (2d), 388; *Pike v. Seymour*, 222 N. C., 42, 21 S. E. (2d), 884; *Kolman v. Silbert*, 219 N. C., 134, 12 S. E. (2d), 915; *Cole v. Koonce*, 214 N. C., 188, 198 S. E., 637. A speed greater than is reasonable and prudent under the conditions then existing is prohibited by statute, G. S., 20-141 (a), and the duty is imposed upon the driver to decrease the speed of his automobile when special hazard exists with respect to pedestrians or other traffic. G. S., 20-141 (c).

There was neither allegation nor proof that the negligence of the driver of the truck which was stopped on the highway at this point was the sole proximate cause of plaintiff's injury, or served to insulate or render harmless the negligence of defendant. *Butner v. Spease*, 217 N. C., 82, 6 S. E. (2d), 808; *Gold v. Kiker*, 216 N. C., 511 (517), 5 S. E. (2d), 548; *Smith v. Sink*, 211 N. C., 725 (728), 192 S. E., 108.

We have examined the other exceptions noted by the defendant to the rulings of the trial court with respect to the admission of testimony and instructions to the jury and find them without substantial merit. The conflicting questions of fact seem to have been fairly submitted to the jury in accord with approved procedure, and they have been determined by the triers of the facts in favor of the plaintiff. The result will not be disturbed.

In the trial we find

No error.

DURAND A. HALL AND CAROLINE H. HALE, INDIVIDUALLY, AND AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF WILLIAM C. WHITE, DECEASED, *v.* FRANK W. WARDWELL AND ELIZABETH M. WARDWELL, HIS WIFE, AND TRYON FEDERAL SAVINGS & LOAN ASSOCIATION.

(Filed 3 March, 1948.)

1. Wills § 33f: Trusts § 14b—

Neither a devisee for life nor a trustee under a testamentary trust has authority to convey the fee in the land devised in the absence of authority conferred by the will, but the power to convey need not be expressly conferred but may be implied from the language of the instrument necessarily requiring the exercise of the power to effectuate the testamentary intent.

2. Wills § 33f—

A devise of the residue of testator's property, real and personal, for life, with direction to the life tenant to invest and keep invested the principal and use any portion thereof for any charitable or philanthropic purpose she might select, vests in the life tenant, by necessary implication, power to convey the real estate in fee.

3. Trusts § 14b—

A devise of property in trust subject to an intervening life estate, with direction to the trustees to keep the principal invested and use the proceeds for purposes designated (G. S., 36-21), gives the trustees the power to convey the real estate in fee, since the right to invest and use the proceeds necessarily implies the power to convert into proceeds by sale.

APPEAL by defendants from *Patton, Special Judge,* at January-February Term, 1948, of POLK. Affirmed.

Controversy without action to determine whether plaintiffs are entitled to specific performance of a contract of real property.

William C. White died prior to 1936, seized and possessed of the land in controversy. He left a last will and testament in which he devised the residue of his property, including the *locus,* as follows:

(1) "All the rest and residue of all property, real and personal," to his wife, Alida D. White, "to be held and the income therefrom to be used by her, during her natural life, the principal thereof to be invested and kept invested by her as she shall deem best" without liability for losses.

(2) "All the rest and residue," after the death of his wife, "to Caroline H. Hale and Durand A. Hall . . . in trust" for certain named uses, "to keep such rest and residue of my estate invested as shall seem to them best and to use the proceeds" as designated in the will.

(3) "Notwithstanding the foregoing item 8 of this Will, it is my desire and will that if in her lifetime my wife shall desire, she may use

any portion of said rest and residue of my estate that she shall wish so to use" for certain purposes; "any residue thereafter remaining to be used by my said trustees for the purposes set forth in said item 8; of any such use by my wife she to be the sole judge."

On 12 November, 1938, Alida D. White, individually and as executrix of the estate of William C. White, deceased, executed and delivered to Caroline H. Hale and Durand A. Hall a deed conveying the *locus*. In this deed full reference is made to the provisions in the White will.

In March 1947 plaintiffs contracted to sell the *locus* to defendants, and defendants deposited in the bank $250 earnest money. Thereupon plaintiffs executed and tendered to defendants a deed sufficient in form to convey an indefeasible fee to the *locus*. They likewise tendered similar deed executed by them as trustees under the White will.

Defendants declined to perfect the agreement for that the deeds tendered do not in fact convey a marketable and indefeasible fee to said premises. Thereupon this proceeding was filed to procure an adjudication of the controversy.

When the cause came on for hearing the judge, being of the opinion that said deeds vested in plaintiffs a "marketable and indefeasible title in fee simple to the property therein described" and that the deeds tendered by them conveyed said title to the defendants, entered judgment for plaintiffs. Defendants excepted and appealed.

M. R. McCown for plaintiff appellees.

W. Y. Wilkins, Jr., for defendant appellants.

BARNHILL, J. While the indefiniteness of the trust provisions in the White will are mooted to some extent, the validity of this trust is not at issue. In any event the will vested title in the widow for life with the remainder in fee in the trustees. G. S. 36-21.

The one decisive question is this: Did the will vest in Mrs. White, or in the trustees, or in both, the power to sell and convey the land in fee?

The plaintiffs tender a deed which conveys the title they acquired through the deed from Mrs. White and also a deed executed by them as trustees. Hence, if either they or Mrs. White are, under the terms of the White will, vested with power to convey the *locus*, the title tendered is unassailable and defendants must comply with their contract.

The court below concluded that the tendered deeds conveyed "a marketable and indefeasible title in fee." In this conclusion we concur.

In the absence of authority conferred by the will, a devisee for life or a trustee under a testamentary trust has no authority to convey the fee in the land devised. But the power to convey need not be expressly conferred. It may be implied from the context of the will. 54 A. J.,

349. It is purely a question of testamentary intent. *Tippett v. Tippett*, 7 A. (2d), 612; 3 Bogert, Trusts and Trustees, pt. 2, 558.

The implication may result from language necessarily requiring the exercise of the power, from the statement of purposes, or the conferring of other powers or duties to which the power of sale is essential. 54 A. J., 349. It will be implied where the power to invest and to consume the principal, consisting of real estate, for specific purposes, or to invest and manage real estate, *Robinson v. Robinson*, 105 Me., 68, 32 L. R. A., ns, 675, or "to invest and keep invested" is conferred, with a devise over of the unconsumed principal. *Foil v. Newsome*, 138 N. C., 115; *Powell v. Woodcock*, 149 N. C., 235; *Dillon v. Cotton Mills*, 187 N. C., 812, 123 S. E., 89; *Bank v. Edwards*, 193 N. C., 118, 136 S. E., 342; Anno. 134 A. L. R., 380, 400.

Here the life tenant was authorized to invest and keep invested the principal estate consisting in part of real property "without liability for any losses incurred," and to use any portion thereof she should desire for the maintenance or care of any charitable or philanthropic purpose or individual or cause she might select. This could be accomplished only by a conversion of the land into liquid assets. The conversion into liquid assets required a sale. Hence the power to sell must be inferred.

The widow, in the exercise of this power, conveyed the premises to the plaintiffs. They thereby became the owners of the property in fee and the deed tendered by them conveys a like estate to defendants.

Furthermore, the trustees who were seized of the premises in fee, subject to the life estate of the widow and her power of disposition, were likewise directed to "keep such residue . . . invested . . . and use the proceeds . . ." for designated purposes. The right to invest and use the proceeds necessarily implies the power to convert into proceeds by sale.

It follows that any asserted defect in the title of plaintiffs as individuals is cured, if cure is needed, by the deed they, as trustees, have tendered to the defendants.

Hence the judgment below must be

Affirmed.

LIDA LEA AND JESSIE LEA ROBERTS v. G. H. BRIDGEMAN AND WIFE, LECIE G. BRIDGEMAN, FRANCIS HEATH LEA, AND JOHN R. BURGESS, GUARDIAN AD LITEM FOR FRANCIS HEATH LEA AND ALL UNKNOWN PERSONS HAVING AN INTEREST IN THE LANDS IN SUIT.

(Filed 3 March, 1948.)

1. Trial § 21: Appeal and Error § 40a—

The question of the sufficiency of the evidence must be presented by motion to nonsuit or by prayer for instructions or by objections to the submission of the issues, and an exception to the judgment on the ground that there was no sufficient evidence to sustain the verdict, is too late to raise the question.

2. Appeal and Error § 40a—

An exception to the judgment presents only the question of whether error appears on the face of the record, and if the judgment is supported by the verdict the exception must fail.

3. Estates § 5—

A good title in fee simple is title to the whole property absolutely, and is necessarily marketable and unencumbered.

APPEAL by the defendants, G. H. Bridgeman and wife, Lecie G. Bridgeman, hereinafter called the appellants, from *Patton, Special Judge*, and a jury, at the January-February Term, 1948, of POLK.

The plaintiffs sued the appellants in the court below for specific performance of an admittedly valid contract in writing by which the plaintiffs agreed to convey to the appellants "a marketable and unencumbered title in fee simple" to certain lands in Polk County, and by which the appellants promised to pay the plaintiffs a specified sum for such conveyance of such property. The plaintiffs tendered to the appellants a deed sufficient in form to vest in the appellants a fee simple title to such lands, but the appellants refused to accept such deed and to pay the plaintiffs the stipulated purchase price upon the specific ground that the plaintiffs were unable to convey to the appellants an undivided one-third interest in the property in question, of which Francis Heath Lea, the half-brother of the plaintiffs, had become seized at some past time. It was judicially admitted in the pleadings and on the trial by the plaintiffs and the appellants and John R. Burgess, Guardian *Ad Litem*, that such one-third undivided interest had descended to the plaintiffs, and that the plaintiffs were the owners in fee simple of all interests in the lands embraced by the contract, and that the deed tendered by the plaintiffs would convey a good title in fee simple to the appellants if Francis Heath Lea, in fact, had died intestate and without issue as alleged by the plaintiffs.

The plaintiffs offered testimony on the trial below for the avowed purpose of establishing that Francis Heath Lea had died intestate and without issue. No objection was interposed to the introduction of this evidence, and the appellants did not challenge its sufficiency to support a verdict for the plaintiffs by a motion for nonsuit, or by a prayer for instruction, or by an objection to the submission of the issues.

Issues were submitted to the jury and answered by them as set out below, namely:

1. Is Francis Heath Lea dead? Answer: Yes.

2. If so, did he die intestate and without issue? Answer: Yes.

3. Are the plaintiffs, Lida Lea and Jessie Lea Roberts, the owners in fee simple of the property described in the complaint? Answer: Yes.

The appellants made no motion for a new trial. The trial court entered judgment on the verdict adjudging that the deed of the plaintiffs conveyed a good title in fee simple in the lands in question to the appellants and ordering the appellants to accept such deed and to pay to the plaintiffs the agreed purchase price in accordance with the contract. The appellants thereupon excepted to the judgment upon the ground set out below and appealed to this Court.

S. G. Bernard for plaintiffs, appellees.

M. R. McCown for defendants, G. H. Bridgeman and Lecie G. Bridgeman, appellants.

ERVIN, J. The only exceptions of the appellants are their exceptions to the judgment. They took such exceptions in the court below upon the express ground that the trial court erred in rendering the judgment because there was no evidence adduced on the trial sufficient to sustain the affirmative answers of the jury to the issues submitted.

The appellants failed to challenge the sufficiency of the testimony to support the verdict by a motion for nonsuit, or by a prayer for instruction, or by an objection to the submission of the issues. *Holder v. Lumber Co.*, 161 N. C., 177, 76 S. E., 485; *Burcham v. Wolfe*, 180 N. C., 672, 104 S. E., 651; *Morrisett v. Cotton Mills*, 151 N. C., 31, 65 S. E., 514; *Mincey v. Construction Co.*, 191 N. C., 548, 132 S. E., 462. Their effort to raise the question of the insufficiency of the evidence initially by their exceptions to the judgment comes too late. This is true because it has been held by this Court "with marked uniformity that an objection that there was no evidence or no sufficient evidence to support a verdict cannot be taken for the first time after the verdict has been returned." *Mincey v. Construction Co., supra.* See, also, *Moon v. Milling Co.*, 176 N. C., 407, 97 S. E., 213; *Wilkerson v. Pass*, 176 N. C., 698, 97 S. E., 466.

The exceptions to the judgment present only the question of whether error appears on the face of the record, and the exceptions must fail if the judgment is supported by the record. *Smith v. Smith,* 226 N. C., 506, 39 S. E. (2d), 391; *Rader v. Coach Co.,* 225 N. C., 537, 35 S. E. (2d), 609; *Query v. Ins. Co.,* 218 N. C., 386, 11 S. E. (2d), 139. It is apparent that the judgment conforms to the pleadings. A good title in fee simple is necessarily marketable and unencumbered for it is a title to the whole property absolutely. 31 C. J. S., Estates, section 8. Manifestly, the judgment is supported by the verdict. *In re Escoffery,* 216 N. C., 19, 3 S. E. (2d), 425. It follows that the judgment must be

Affirmed.

STATE v. ANNIE LAURIE GARDNER.

(Filed 17 March, 1948.)

1. Criminal Law § 38d—

Photographs are not competent as substantive evidence but may be used by a witness only for the restricted purpose of explaining or illustrating his testimony when description in words of the scene, object or person represented would be competent.

2. Same—

The accuracy of a photograph as a true representation of the scene, object or person it purports to portray must be shown by extrinsic evidence, but it is not required that this be established by the photographer, it being sufficient if it is established by any witness familiar with the scene, object or person portrayed.

3. Same—

Whether there is sufficient extrinsic evidence to establish the accuracy of a photograph is a preliminary question of fact for the trial judge.

4. Same—

The fact that an authenticated photograph competent for the purpose of illustrating or explaining the witness' testimony is gory or gruesome or may tend to arouse prejudice does not render the photograph incompetent.

5. Same: Homicide § 22—

The State's evidence tended to show that defendant stabbed deceased in the neck with a knife, inflicting mortal injury. Defendant pleaded self-defense. *Held:* It was competent for witnesses to testify as to the bloody condition of the room after the assault and as to the nature of deceased's wound as tending to show that defendant used excessive force and that the attack was vicious, and therefore photographs of the room as it appeared immediately after the attack and photographs of the body of deceased as it had been turned over where deceased fell after the attack, are competent

for the purpose of explaining and illustrating the witnesses' testimony in these respects.

6. Same—

The fact that a photograph showing the wound described by the doctor was taken in the morgue after the body had been cleansed, does not of itself render the photograph incompetent for use in illustrating the testimony of the doctor.

7. Criminal Law §§ 50d, 81b—

The record disclosed that a State's witness testified on cross-examination that he saw defendant "make a run and her hand go that way." The court interposed, "What do you mean by 'make a run'? Give a step like that and hit him?" A. "He got up, she took a step and hit him." *Held:* The record discloses only the words of the court, and does not affirmatively disclose any demonstrative action by the court constituting an expression or intimation of opinion on the evidence forbidden by law, and defendant's exception thereto cannot be sustained.

8. Criminal Law § 81c (3)—

The State's witness testified that after the homicide defendant said, "she would have cut his damned head off if they had let her alone,—that she didn't care," and then, in response to a question by the solicitor as to whether defendant expressed any remorse answered "Not any." *Held:* Conceding that defendant's objection to the question as to whether defendant expressed remorse should have been sustained, the testimony in regard thereto, when considered with the testimony immediately preceding, was not of sufficient prejudicial import to warrant a new trial.

9. Homicide § 22—

Where defendant pleads self-defense, testimony as to the bloody condition of the room immediately after defendant's fatal attack on deceased is competent as bearing upon the character of the wound inflicted.

10. Criminal Law § 81c (3)—

Exception to the admission of evidence cannot be sustained when other evidence of like import is admitted without objection.

APPEAL by defendant from *Phillips, J.*, at November Term, 1947, of BUNCOMBE.

Criminal prosecution upon indictment charging that defendant "late of Buncombe County . . . with force and arms, at and in said county, unlawfully, willfully and feloniously, of her deliberate and premeditated malice aforethought, did kill and murder one Nathaniel Barnard, contrary to the form of the statute," etc.

The solicitor announced in open court, upon the call of the case for trial, that the State elected not to try defendant on the charge of murder in the first degree, but for murder in the second degree or manslaughter as the evidence and the law might justify.

Defendant pleaded not guilty, and defended upon the ground of self-defense.

On the trial in Superior Court the State offered evidence tending to show these facts: That Nathaniel Barnard, called Nate Barnard, who was tall and weighed about 230 pounds, came to his death on the night of 25 October, 1947, as result of stab wound in his neck inflicted by a knife in the hands of defendant, Annie Laurie Gardner, at the home of James Roberts, her brother-in-law, at Dula Springs in Buncombe County, North Carolina; that the Roberts home is a one-room house and in it were a table, a stove, three beds and three chairs; that defendant and her sister and Nate Barnard came to the Roberts home about eight o'clock in the evening; that defendant and Nate, who had been "going together" about two years, were "arguing" when they got there; that Nate sat down on the bed and they "got to arguing and talking and got into a fight there"; that defendant hollered out "He hit me"; that James Roberts then took Nate "out of doors," but he later came back in the house; that defendant didn't say anything to him, but she was "just a-crying" then; that Nate was sitting on the bed, and defendant was behind her sister and "kept sidling around," and Nate said something and got up, and she said, "I am getting tired of your foolishness; you have run over me about long enough," and she made "a run" and hit Nate, and blood spurted from his neck, and he staggered toward the door and went down the hill and fell about seventy-five feet from the house and died there; and that blood was "all in the house."

The State offered other evidence in ampliation of the above narrative of events leading up to and culminating in the homicide. It is unnecessary for purpose of this appeal to give more detailed recital. Such of the evidence as is pertinent to presentation of assignments of error follows:

The record shows that for the purpose of illustrating testimony of certain witnesses, and over objections and exceptions duly made and taken by defendant, the State offered three photographs, to wit: (1) Exhibit S-1, identified by the State's witness James Roberts as fairly representing the house and the condition of it after deceased "had got up and gone out," and also identified by deputy sheriff Burleson, witness for the State, as fairly representing the condition of the house when he arrived there that night,—after the homicide occurred. The witness Roberts introduced by the State had testified without objection of defendant that he saw blood spurting from the neck of Nate, and that "there was blood all in the house." And the deputy sheriff had testified, over objection of defendant, that when he went there, "the house was as bloody a place as you could see. You had to walk in the blood." And later in the course of the trial Dr. P. R. Terry, also witness for the State,

testified without objection by defendant, that when he went into the house that night: "I found the floor of the house covered with blood, blood on the walls and blood on the door coming out of the house, and going down to where the body was lying—tracks of blood all the way down there." There is no evidence as to who took the photograph.

(2) Exhibit S-2, identified by deputy sheriff Burleson, State's witness, as fairly representing the circumstances under which he found the deceased when he reached the scene, except that deceased was lying on his face,—the picture being made after the body had been turned over on its back, and also identified by Dr. Terry as fairly representing the body and its surroundings as he found it when he arrived there. The deputy sheriff had testified that on the night of the homicide he had found deceased lying on his face, that the body was turned over—he believed by the coroner, and that this was about 75 feet from the Roberts house. And Dr. Terry then testified that when he got there he found "a Negro man lying on his back by the side of the path . . . 75 to 100 feet below the house"; that he had a wound in his right neck; and that "he was dead when I arrived there." There is no evidence as to who took the photograph.

(3) Exhibit S-4, identified by Dr. Terry, State's witness, as fairly representing the body of the deceased and the wound he had described. The doctor had testified that in his opinion Nathaniel Barnard died from hemorrhage from the wound in the neck. Quoting him, "I have a picture that shows how large a wound better than I can describe. It was in the right neck . . . a stabbing and cutting wound. What I mean, stab of the knife and she pulled it out and cut the wound and made it larger, just above the right clavicle. . . . This knife wound went in and severed the subclavian vein or artery . . . and it punctured the inner lobe of the lung . . . went in there two or three inches . . . a wound like that with a terrible hemorrhage like that the man couldn't live over 4 or 5 minutes." The State seems to concede that this photograph was taken in a morgue,—showing a wound in the right neck. There is no evidence as to who took it.

When the first of the photographs was offered by the State, the trial judge gave this instruction to the jury: "You will not consider the photograph as substantive evidence,—it is not competent for that purpose. It is only competent, and the court limits the evidence in the way of a photograph to illustrating the testimony of the witness, and it is a question for you as to whether or not it does illustrate his testimony, and you will receive it and consider the photograph in no other way other than as tending to illustrate the testimony of the witness, and not as substantive evidence." Defendant again excepts.

Like instructions were given when each of the other two photographs was offered by the State, and in each instance defendant excepted.

The record also shows that during the cross-examination of James Roberts, witness for the State, he had stated that defendant said, "You have run over me long enough; I have took enough of your foolishness" and that then he "saw her make a run and her hand go that way," the court interposed: "What do you mean by 'make a run'? Give a step like that and hit him?" Defendant excepts. A. "He got up, she took a step and hit him." Motion to strike. Denied. Defendant excepts.

The record further shows that in the course of the direct examination of deputy sheriff Burleson, after he had related a conversation with defendant later in the night of the homicide, he testified: "She said she would have cut his damned head off if they had let her alone,—that she didn't care." Then the solicitor asked the witness this question: "Did she express any remorse for having cut him?", to which the witness answered "Not any."

Defendant's objection to the question, aptly made, was overruled, and her motion to strike the answer was denied. She excepted to each ruling.

And the record shows exception by defendant to the testimony of deputy sheriff Burleson that "the house was just as bloody a place as you could see. You had to walk in the blood."

Defendant, having reserved exception to denial of her motion, made when the State first rested, for judgment as of nonsuit on the charge of murder in the second degree, offered evidence tending to show that she is of good character, and she, as witness in her own behalf, gave her version of events leading up to and culminating in the stabbing of Nate Barnard, and tending to support her plea of self-defense.

The State offered testimony in rebuttal.

At the close of all the evidence defendant renewed her motion for judgment as of nonsuit on the charge of murder in the second degree, and excepted to the denial of it.

Verdict: Guilty of manslaughter.

Judgment: Confinement in the Central State Prison at Raleigh, North Carolina, for a term of not less than seven nor more than twelve years.

Defendant appeals therefrom to Supreme Court and assigns error.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

George Pennell for defendant, appellant.

WINBORNE, J. Defendant in brief filed in this Court, expressly abandons her assignments of error based upon exceptions taken to denial of motion made when the State first rested its case, and renewed at the

close of all the evidence for judgment as of nonsuit on the charge of murder in the second degree. And the record shows no exception, or assignment of error based upon exception to the charge of the court to the jury.

The questions presented by defendant on this appeal are predicated upon exceptions (1) to rulings of the court in respect to each of three photographs offered by the State, (2) to the court interposing question as to how defendant struck deceased, (3) to the admission of evidence as to defendant showing a lack of remorse, and (4) to description of the room in which the fatal blow was inflicted.

However, after careful consideration of each point so raised by defendant, prejudicial error is not made to appear.

(1) Defendant makes practically the same argument, and advances substantially the same reasons in her complaint as to the action of the trial judge in allowing the State to offer each of the three photographs, Exhibits S-1, S-2 and S-4. It is argued and contended that there is no sufficient proof of the authenticity or accuracy of the photographs, that they are not material and relevant, that they were not used to illustrate the witness' testimony, and that they are solely calculated to excite prejudice against defendant,—particularly since women were on the jury.

The decisions of this Court uniformly hold that in the trial of cases, civil or criminal, in this State, photographs may not be admitted as substantive evidence, *Honeycutt v. Brick Co.*, 196 N. C., 556, 146 S. E., 227; *S. v. Perry*, 212 N. C., 533, 193 S. E., 727, but that where there is evidence of the accuracy of a photograph, a witness may use it for the restricted purpose of explaining or illustrating to the jury his testimony relevant and material to some matter in controversy. *S. v. Jones*, 175 N. C., 709, 95 S. E., 576; *Elliott v. Power Co.*, 190 N. C., 62, 128 S. E., 730; *S. v. Holland*, 216 N. C., 610, 6 S. E. (2d), 217; *S. v. Wagstaff*, 219 N. C., 15, 12 S. E. (2d), 657; *S. v. Miller*, 219 N. C., 514, 14 S. E. (2d), 522; *S. v. Shepherd*, 220 N. C., 377, 17 S. E. (2d), 469; *S. v. Mays*, 225 N. C., 486, 35 S. E. (2d), 494; *S. v. Stanley*, 227 N. C., 650, 44 S. E. (2d), 196.

In the *Elliott case, supra*, the Court says: "Plaintiff excepted because certain pictures were submitted to the jury. All of these pictures were used to explain the witnesses' testimony to the jury. It was not error for the court to allow the jury to consider the pictures for this purpose and to give them such weight, if any, as the jury may find they are entitled to in explaining the testimony."

Ordinarily photographs are competent to be used by a witness to explain or to illustrate anything it is competent for him to describe in words.

The accuracy of a photograph must be shown by extrinsic evidence that the photograph is a true representation of the scene, object or person it purports to portray. 20 Am. Jur., Evidence, Sec. 730; *S. v. Mitchem*, 188 N. C., 608, 125 S. E., 190; *Pearson v. Luther*, 212 N. C., 412, 193 S. E., 739. 32 C. J. S., Evidence, Sec. 715. Wigmore on Evidence, 3rd Ed., Vol. 3, Sec. 793.

The correctness of such representation may be established by any witness who is familiar with the scene, object, or person portrayed, or is competent to speak from personal observation. It is not necessary to prove this fact by the photographer who took the photograph. *Bane v. R. R.*, 171 N. C., 328, 88 S. E., 477; *White v. Hines*, 182 N. C., 275, 109 S. E., 31; *S. v. Matthews*, 191 N. C., 378, 131 S. E., 743; *S. v. Stanley, supra.*

Whether there is sufficient evidence of the correctness of a photograph to render it competent to be used by a witness for the purpose of illustrating or explaining his testimony is a preliminary question of fact for the trial judge. *S. v. Matthews, supra.*

Moreover, if the testimony sought to be illustrated or explained be relevant and material to any issue in the case, the fact that an authenticated photograph is gory, or gruesome, and may tend to arouse prejudice will not alone render it incompetent to be so used.

In the light of these principles, applied to the present case, it appears from the record that the evidence as to the accuracy of the photographs to portray the condition of the house after the homicide, the body as found, and the wound on the body, is sufficient to render them competent for use in illustrating the testimony of the witnesses testifying to their accuracy, for which purpose their admission was expressly limited; that they were not admitted as substantive evidence; and that they were relevant to material matters in issue in the case. But the record indicates a paucity of use for the purpose for which they were offered. Nevertheless, it does not appear on this record that this was prejudicial error.

As to the relevancy of the photographs: The testimony of the witnesses as to the bloody condition of the room, and of the nature of the wound has relation to the character of the attack made by defendant upon the deceased, and that has bearing on the question of self-defense upon which defendant relied. It tends to indicate that she used excessive force, and that the attack was vicious. Thus the photographs were competent for use in illustrating this testimony. And the photograph, Exhibit S-2, was competent for use in illustrating the testimony of the witness bearing upon *corpus delicti*. See *S. v. Miller, supra.*

Moreover, the fact that the photograph showing the wound, described by the doctor, was taken in the morgue, after the body had been cleansed,

does not of itself make it incompetent for use in illustrating the testimony of the doctor. See Scott's Photographic Evidence, Sec. 661, at p. 576.

(2) Regarding the assignment of error based upon the court interposing questions as to how defendant struck deceased: The complaint here is that "the trial judge not only put the words in the witness' mouth by saying 'Give a step like that and hit him,' but then asked how by demonstration, saying 'Give a step like that and hit him.'" It is contended that in this way the trial judge expressed or manifested an opinion forbidden by law. However, the regret of inability "to bring a sound movie and establish before the appellate court the movements of the judge as well as his words" in this incident, seems to be a concession by defendant that the record does not show error. It discloses only the words, leaving all else to imagination. Hence error is not made to appear here.

(3) In reference to the admission of evidence as to defendant showing a lack of remorse: It may be conceded that this question is improper, and that objection to it should have been sustained. Yet when it is considered with the testimony immediately preceding, we fail to find in it error of sufficient prejudicial import to warrant a new trial.

(4) The assignment of error directed to the description of the room in which the fatal blow was inflicted may not be sustained. The evidence indicated great flow of blood immediately following the blow, and that had bearing upon the character of the wound inflicted by defendant upon deceased, and was relevant to be considered by the jury on defendant's plea of self-defense. Moreover, other evidence of like purport was admitted without objection.

Finally, after full consideration of every reason advanced for error, assigned on this appeal, we find no cause to justify the disturbing of the verdict rendered. Hence, in the judgment below there is

No error.

MAMIE E. WEBB, ADMINISTRATRIX OF THE ESTATE OF W. J. WEBB, v. G. J. EGGLESTON AND EARL LAWRENCE WILLIAMS.

(Filed 17 March, 1948.)

1. Death § 3—

Right of action for wrongful death is solely statutory, G. S., 28-173, and the action must be asserted in strict conformity with the statute.

2. Death § 4—

The requirement that an action for wrongful death must be instituted within one year after such death is an integral part of the action in the

nature of a condition precedent, and the lapse of the statutory time not only bars the remedy but destroys the liability.

3. Same—

It is incumbent upon plaintiff to show in evidence that his action for wrongful death was instituted within the time allowed.

4. Actions § 8—

An action is begun by the issuance of summons, but there must be a complaint filed in which the cause of action is stated.

5. Actions § 9—

Where an amendment to a complaint, or an amended complaint, introduces a cause of action or new matter not stated in the original complaint, it has the same force and effect as if the amendment were a new and independent cause.

6. Same: Death § 4—

Where demurrer is sustained to the complaint in an action for wrongful death, with leave to plaintiff to amend, and an amended complaint is thereafter filed, the action is instituted for the purpose of applying the provisions of G. S., 28-173, from the date the amended complaint was filed, since the action could not be maintained on the original complaint.

7. Death § 4—

The fact that the amended complaint stating for the first time a cause of action for wrongful death, is filed more than one year after the death of plaintiff's intestate, may be taken advantage of by demurrer.

SEAWELL, J., dissenting.

APPEAL by defendants from *Williams, J.*, September-October Term, 1947, WILSON. Reversed.

Civil action to recover damages for wrongful death.

On 25 July 1945 an oil truck belonging to defendant Eggleston and being operated by defendant Williams, collided with the rear end of a truck belonging to and being operated by plaintiff's intestate. As a result, plaintiff's intestate was killed.

On 9 July 1946 plaintiff instituted this action. Summons and complaint were duly served on defendants 10 July 1946.

At the February Term, 1947, defendants demurred to the complaint for that it fails to state a cause of action. The demurrer was sustained and plaintiff was allowed time "in which to plead over by way of amendment to the complaint." Plaintiff did not appeal. Instead, she, on 22 February 1947, filed an "amendment to complaint," setting forth in detail the alleged acts of negligence on the part of the defendants.

On 26 February 1947 defendants demurred for that (1) the amended complaint fails to allege any fact constituting negligence on the part of

the defendants; (2) the original complaint failed to state a cause of action and the amendment thereto was filed more than one year after the death of plaintiff's intestate, which fact appears of record and on the face of the complaint; and (3) there is no allegation in the original complaint or in the amendment thereto that this action was instituted within one year of the death of plaintiff's intestate.

At the June Term, 1947, Frizzelle, J., overruled the demurrer and defendants excepted.

The cause came on for hearing at the September-October Term. At the conclusion of the evidence for plaintiff, defendants moved to dismiss as in case of nonsuit. The motion was overruled and defendants excepted. The evidence offered by plaintiff tends to establish negligence but fails to show that this action was instituted within one year of the death of her intestate. The issues submitted were answered in favor of plaintiff. From judgment on the verdict defendants appealed.

Connor, Gardner & Connor and Moore & Brinkley for plaintiff appellee.

Lucas & Rand for defendant appellants.

BARNHILL, J. The defendants bring forward on this appeal their exception to the order of the court, entered at the June Term, 1947, overruling their demurrer to the amended complaint. Hence the merit of that exception, as well as the exception to the refusal of the court below to dismiss as in case of nonsuit, is presented for consideration.

The right to maintain an action for damages for wrongful death did not exist at common law. It was created by Chap. 39, Laws 1854-55, now codified as G. S. 28-173. *Hoke v. Greyhound Corp.*, 226 N. C., 332, 38 S. E. (2d), 105; *White v. Charlotte*, 212 N. C., 539, 193 S. E., 738; *McGuire v. Lumber Co.*, 190 N. C., 806, 131 S. E., 274; *Craig v. Lumber Co.*, 189 N. C., 137, 126 S. E., 312.

The right rests entirely upon this Act and must be asserted in conformity therewith. *Broadnax v. Broadnax*, 160 N. C., 432, 76 S. E., 216; *Hall v. R. R.*, 149 N. C., 108; *Hinnant v. Power Co.*, 189 N. C., 120, 126 S. E., 307; *Tieffenbrun v. Flannery*, 198 N. C., 397, 151 S. E., 857; *Brown v. R. R.*, 202 N. C., 256, 162 S. E., 613; *Whitehead & Anderson, Inc., v. Branch*, 220 N. C., 507, 17 S. E. (2d), 637; *Wilson v. Massagee*, 224 N. C., 705, 32 S. E. (2d), 335.

The personal representative of a deceased person whose death was caused by the wrongful or negligent act of another is granted the right to maintain an action for damages "to be brought within one year after such death." This requirement that the action must be instituted within one year is an integral part of the right in the nature of a condition

precedent. The right exists only during the twelve months next after death, at the end of which, if no action has been instituted, it ceases to exist. *Gulledge v. R. R.*, 148 N. C., 567; *Trull v. R. R.*, 151 N. C., 545, 66 S. E., 586; *Neely v. Minus*, 196 N. C., 345, 145 S. E., 771; *Tieffenbrun v. Flannery, supra; McGuire v. Lumber Co., supra,* and cited cases; *Curlee v. Power Co.*, 205 N. C., 644, 172 S. E., 329. The lapse of the statutory time not only bars the remedy but destroys the liability.

Hence the timely institution of the action must be shown in evidence at the hearing. *Gulledge v. R. R., supra; Bennett v. R. R.*, 159 N. C., 345, 74 S. E., 883; *Hatch v. R. R.*, 183 N. C., 617, 112 S. E., 529; *Hanie v. Penland*, 193 N. C., 800, 138 S. E., 165; *Neely v. Minus, supra; Mathis v. Mfg. Co.*, 204 N. C., 434, 168 S. E., 515.

An action is begun by the issuance of summons. But there must be a complaint filed in which a cause of action is stated. And we have consistently held that where an amendment to a complaint or an amended complaint introduces a cause of action or new matter not stated in the original complaint, it will have the same force and effect as if the amendment were a new and independent suit. *Capps v. R. R.*, 183 N. C., 181, 111 S. E., 533, and cited cases.

Of course a complaint filed in apt time under an order extending the time for filing the same as provided by statute relates back to the date of the summons. But such is not the case here. When the cause was called for hearing and after the pleadings had been read, the defendants interposed a demurrer *ore tenus*. The demurrer was sustained and there was no appeal. Thereupon the ruling that the complaint failed to state a cause of action became the law of the case. Thereafter the plaintiff was not entitled to maintain her action on the original complaint. She was compelled to rely on the complaint as amended and the date of its filing, under the rule stated, for the purpose of applying the provisions of G. S. 28-173, was the date the action was instituted.

A failure to amend after judgment sustaining the demurrer would have worked a dismissal. G. S. 1-131.

Applying this principle to a fact situation on all fours with the case at bar, *Devin, J.*, speaking for the Court in *George v. R. R.*, 210 N. C., 58, 185 S. E., 431, says: "It follows, therefore, that an amendment to the complaint, if it be good and available, would relegate the plaintiff to the position of having thereby for the first time stated a cause of action against the demurring defendants; and since it was not filed until August, 1935, nearly three years after the death of the intestate, plaintiff's right of action under the amended complaint cannot be maintained." See also *Capps v. R. R., supra.*

The fact that the amended complaint stating for the first time the cause of action now sought to be maintained was filed more than one

year after the death of plaintiff's intestate may be taken advantage of by demurrer. *Capps v. R. R., supra; Davis v. R. R.*, 200 N. C., 345, 157 S. E., 11; *George v. R. R., supra; Taylor v. Iron Co.*, 94 N. C., 525.

It follows that defendants' demurrer to the complaint as amended should have been sustained. Failing in that, defendants were, in the trial below, entitled to judgment as in case of nonsuit.

The situation here presented is unfortunate for the plaintiff. Even so, for us to undertake to give her relief against the positive facts appearing of record would necessitate a complete shift of position, not only as to the *George* and similar cases, but also as to a long line of decisions holding that the date of the introduction of new matter in a complaint is the date of the institution of the action for the purpose of determining the bar of a pleaded statute of limitations. For surely, if that rule does not apply in a case where time is of the essence of the cause of action and the right to recover, irrespective of a plea, it should not apply to a mere statute of limitations which relates only to the remedy and is not available to the defendant unless specifically pleaded.

The judgment below must be

Reversed.

SEAWELL, J., dissenting: The appeal brings sharply to the front what happened before Judge Frizzelle when the matter was before him upon defendants' first demurrer. Decision of this case definitely rests on a proper interpretation of his judgment, its intent and effect, and his power to allow the amendment which was made to the complaint. That neither the intent nor the effect of his order was to dismiss the action for failure to state a cause of action, is, I think, apparent from his statement of the nature of the objection and his action thereupon as found on page 3 of the record.

The objection to the complaint did not go to a defect in the cause of action, but only to its defective statement. The judgment thereupon did not dismiss the cause of action, but on the contrary, allowed an amendment. The demurrer was not general but was special—directed to a particular objection to the complaint, amendable on the face of the objection, and the judgment, *eodem modo,* authorized an amendment in that particular. *It did not go to the cause of action* but to a defect in its manner of statement.

A reading of the original complaint makes clear the propriety and the discretion in the court in permitting the amendment as clarifying or making more certain a merely defective statement of a good cause of action.

The complaint alleges that plaintiff's intestate was killed through the negligence of the defendant and states that the facts were as follows:

> ". . ., while the plaintiff's intestate was driving his truck from Wilson, N. C., towards Raleigh, N. C., in a prudent and careful manner on the right hand side of the highway approaching the town of Sims and on a straight and unobstructed section of said highway, the defendant's truck was so carelessly and negligently driven that it was run into and upon the rear end of plaintiff's intestate's truck, knocking the said intestate's truck along the highway for a considerable distance, throwing the said intestate out of his truck and upon the highway, killing said intestate and damaging and destroying said truck; and from the impact of the collision causing said plaintiff's intestate's truck to run off the highway some distance in an adjacent field."

The acts attributed to defendant, in their physical implication, spell negligence in any language, lay or legal, implying excessive speed, want of lookout, failure to apply brakes, at least.

Supposing the complaint to be merely defective in its statement of the cause of action,—is it amendable? Not only so, but that is enjoined by the statute, its propriety is urged by the courts, and it is familiar practice. G. S., 1-163, and annotations. The change in the system of pleading from common law to code is supposed to prevent technical defeat of justice by substituting for a baseless strictness a liberality which will promote trial on the merits. *Page v. McDonald,* 159 N. C., 38, 74 S. E., 642; *Bullard v. Johnson,* 65 N. C., 436, 438; *Cheatham v. Crews,* 81 N. C., 343, 345.

The plaintiff before Judge Frizzelle was in the same position as one who has alleged fraud in an action for deceit and has not stated the particulars, or facts constituting the fraud, and the sufficiency of the complaint has been challenged. If he elects to stand by his pleading, the court, in the exercise of its supervisory powers, may dismiss his action; if he desires to amend, that privilege, in the discretion of the court, is uniformly accorded him. The limitation of the power of the court to permit amendments to the complaint is that the court is without power to allow such amendment when the effect is to change the asserted cause of action into another, or add a new cause of action, or change the subject matter of the original action. *Lefler v. Lane,* 170 N. C., 181, 86 S. E., 1022; *Wilmington v. Board of Education,* 210 N. C., 197, 85 S. E., 767; 41 Am. Jur., 508, Sec. 310. From *Lefler v. Lane, supra,* I quote:

> "Under the statutes regulating our present system of procedure, Revisal 1905, sec. 507 (now C. S. 547) *et seq.,* and numerous deci-

sions construing the same, the power of amendment has been very broadly conferred, and may and ordinarily should be exercised in furtherance of justice, unless the effect is to add a new cause of action or change the subject-matter thereof, and our cases on the subject hold that, *where the amendment is germane to the original action, involving substantially the same transaction and presenting no real departure from the demand as originally stated, it shall, when allowed, have reference by relation to the original institution of the suit. Gadsden v. Crafts,* 175 N. C., 358, 361, 95 S. E., 610; *McLaughlin v. R. R.,* 174 N. C., 182, 93 S. E., 748; *R. R. v. Dill,* 171 N. C., 176, 88 S. E., 144. 'It is expressly provided by statute that if a demurrer is filed the plaintiff may be allowed to amend.' C. S., 513." *Goins v. Sargent,* 196 N. C., 478, 481, 482, 146 S. E., 131. See G. S., 1-163.

The emphasis in the above quotation is supplied, but note its significance. It is in accord with 41 Am. Jur., 509, Sec. 315:

"Whenever the claim or defense asserted in the amended pleading arises out of the conduct, transaction, or occurrence set forth in the original pleading, the amendment relates back to the date of the original pleading." *Fleischman Constru. Co. v. United States,* 70 U. S., 349; 70 L. ed. 624 (This bears on a statute similar to ours in respect to the condition that the suit must be brought within a year.)

In the instant case the plaintiff has never pursued any other cause of action or joined issue with another defendant.

What is the effect of such an amendment when made? What relation does it have to the elapse of the period during which the action must be brought? The theory that the one year of grace given by the statute to begin the action automatically dates from the filing of a complaint invulnerable on any ground works a supersession of the statutes cited and recognized liberal rules of civil procedure, and is definitely contrary to authority heretofore followed.

A civil action is begun by the issue of a summons. G. S., 1-88. The Court will take judicial notice of the summons to ascertain when the action was commenced, *Harrell v. Lumber Co.,* 172 N. C., 827, 90 S. E., 148, and it will be presumed to have issued at the time it bears.

The complaint when filed in accordance with the statute relates back to the issue of the summons. This much is conceded in the main opinion to be ordinarily true, but it is held that the case at bar forms an exception because the complaint was not *perfected* within the year following the death.

The conclusion reached by the Court rests on the authority of *George v. R. R.*, 210 N. C., 58, 185 S. E., 431; the same case reported in 207 N. C., 457; and *Ballinger v. Thomas and So. R. R.*, 195 N. C., 517, 142 S. E., 761. These cases form a triad to be studied together and are not in disagreement with the position I have taken. *All of them refer to defective causes of action dismissed upon demurrer and not within the power of the Court to renew by amendment.* The decisions in the two *George cases* rest upon the authority of the *Ballinger case.* In that case the complaint not only did not state a cause of action but it affirmatively negatived such a cause, and the opinion therein, by *Mr. Chief Justice Stacy*, said that the effect of the complaint was the same as to have stated a cause of action against the railroad company and then to have withdrawn it. The action against the railroad company was, therefore, dismissed. In *George v. R. R.*, 207 N. C., 457, where the situation in so far as insulated negligence was concerned, was so stated in the complaint as to exonerate the defendant and form an exact parallel with the situation in the *Ballinger case,* the brief opinion by *Justice Brogden* dismissed the action by a reference to the controlling authority of the *Ballinger case.* When the case came back here on appeal, in *George v. R. R.*, 210 N. C., 58, there had been an attempted amendment, but this Court, in an opinion by *Mr. Justice Devin,* dismissed the action on the ground that the former judgment of *Brogden, J.*, had become the law of the case. It is true that attention was called to the fact that the amendment was not made within one year after the alleged wrongful death; but the continuity of the relation back was broken by the former dismissal of the action for a defect going to the cause of action.

In *Capps v. R. R.*, 183 N. C., 181, 111 S. E., 533, the plaintiff brought his action in the State court under the Federal Employers' Liability Act and after it had been pending for more than a year after the wrongful death sought by amendment to substitute for the action created by this statute a cause of action under the State law. The opinion by *Mr. Chief Justice Stacy* held that the effect of the amendment would be to create a new cause of action and beyond the power of the Court to allow; again calling attention to the fact that the substituted cause of action had been asserted for the first time more than a year after the wrongful death.

All of these cases taken together are too disparate in legal principle, history and in factual conditions to be cited as authority for the position now taken in this decision. In all of them the judgment was final, going to the cause of action, and could not be renewed by an amendment. 41 Am. Jur., Pleading, Sec. 251. In the case at bar the amendment was within the power of the Court and the principle of relation back not

disturbed. 41 Am. Jur., Pleading, Sec. 315; *Gadsden v. Crafts,* 175 N. C., 358, 361, 85 S. E., 610.

The judgment of nonsuit should be reversed and the case sent back for a trial on the merits.

STATE v. GRANT WILLIAM HOLBROOK.

(Filed 17 March, 1948.)

1. Intoxicating Liquor § 9d—

The State's evidence tending to show that officers found in defendant's car, which defendant was driving, four fifth gallon bottles of intoxicating liquor intact and four broken bottles from which some of the contents had leaked out, all of which contained or had contained sloe gin, *is held* sufficient to overrule nonsuit in a prosecution under G. S., 18-2, for transportation and possession of intoxicating liquor in a county which had not elected to come under the Alcoholic Beverage Control Act. G. S., 18-36, *et seq.*

2. Intoxicating Liquor § 9b—

The proviso of G. S., 18-49, permitting the transportation of alcoholic beverages not in excess of one gallon from a county which has elected to come under the Alcoholic Beverage Control Act to another county not coming under the provisions of this Act, is a matter of defense, and it is incumbent upon the defendant to bring his case within the exception either from the State's evidence or from his own.

3. Intoxicating Liquor § 9c—

Testimony that defendant had in his possession sloe gin is evidence of possession of intoxicating liquor. G. S., 18-1.

APPEAL by defendant from *Clement, J.,* at September Term, 1947, of YADKIN. No error.

The defendant was indicted for transportation and possession of intoxicating liquor in violation of G. S., 18-2. There was verdict of guilty as charged, and from judgment imposing sentence the defendant appealed.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

Trivette, Holshouser & Mitchell and F. B. D. Harding for defendant.

DEVIN, J. The sole question presented by the appeal is the sufficiency of the evidence offered by the State to warrant submission of the case to

the jury. The defendant did not testify and offered no evidence. From the State's evidence it appears that the defendant's automobile, which he was at the time driving, was overturned as result of a collision on the highway, and there was found in his automobile a carton or case containing four unbroken bottles (fifths) of sloe gin. In the case with these bottles were three or four broken bottles from which some of the contents had leaked out. The witness described it as "sloe gin, red gin."

Yadkin County is not within the territory affected by the Alcoholic Beverage Control Act of 1937 (G. S., 18-36). Under the provisions of G. S., 18-2, it was unlawful to transport, possess or purchase any intoxicating liquor, "except as authorized in this article." By G. S., 18-49, it was declared not unlawful to transport alcoholic beverages not in excess of one gallon "from a county" which is under the provisions of the Act of 1937 "to or through" another county not under the provisions of this Act, provided the cap or seal of the container has not been opened or broken, and the liquor is not being transported for the purpose of sale.

We think, in keeping with the rule of favorable consideration of the State's evidence on motion to nonsuit, testimony that in the case in the defendant's automobile were found four bottles intact, and in the same case four other broken bottles from which the contents were leaking, afforded ground for the reasonable inference that more than one gallon of intoxicating liquor had been transported by the defendant in violation of the statute.

On another ground we think the motion to nonsuit was properly overruled. The exemption from criminal liability for the transportation of liquor into or through a county not within the provisions of the Act of 1937 applies to liquor being transported from a county which is under the provisions of the Act, G. S., 18-49, or from without the State. G. S., 18-58. Here there was no evidence where the liquor came from, and it was a matter of defense for the defendant to bring his case within the exception, either from the State's evidence or that of the defendant. *S. v. Davis,* 214 N. C., 787, 1 S. E. (2d), 104; *S. v. Epps,* 213 N. C., 709, 197 S. E., 580. See also *S. v. Wilson,* 227 N. C., 43, 40 S. E. (2d), 449; *S. v. Suddreth,* 223 N. C., 610, 27 S. E. (2d), 623, where the pertinent statutes on the subject are analyzed and interpreted. In the *Davis case, supra*, it was said: ". . . when defendant relies upon some independent, distinct, substantive matter of exemption, immunity or defense, beyond the essentials of the legal definition of the offense itself, the onus of proof as to such matter is upon the defendant." Since the statute (G. S., 18-1) declares that the phrase intoxicating liquor shall be construed to include, among other enumerated beverages, gin, the designation by the witness of the liquor in the case as "sloe" gin would seem to indicate the source

of its production rather than to remove it from the category of intoxicating liquor.

The defendant's motion for nonsuit was properly denied, and as no other assignment of error is brought up, we conclude that in the trial there was

No error.

IN RE REVOCATION OF LICENSE TO OPERATE A MOTOR VEHICLE OF WILBUR ANDERSON WRIGHT.

(Filed 17 March, 1948.)

1. Automobiles § 34a—

G. S., 20-16, and G. S., 20-23, are parts of the same statute relating to the same subject matter and must be construed *in pari materia*.

2. Same—

G. S., 20-16 (7), gives the Department of Motor Vehicles discretionary power to suspend the license of an operator who has committed an offense in another state which would be grounds for suspension if committed here, and G. S., 20-23, prescribes that notice of conviction of such person in another state is sufficient evidence for action by the Department of Motor Vehicles, and adds the power of revocation.

3. Automobiles § 34b—

Discretionary suspensions and revocations of licenses by the Department of Motor Vehicles are reviewable under G. S., 20-25; mandatory revocations under G. S., 20-17, are not so reviewable.

4. Constitutional Law § 10a—

Courts have inherent authority to review the discretionary action of any administrative agency whenever such action affects personal or property rights, upon a *prima facie* showing, by petition for *certiorari*, that such agency has acted arbitrarily, capriciously or in disregard of law.

5. Courts § 4e—

The Legislature has full authority to provide for appeals to the Superior Court by licensees whose driving licenses have been suspended or revoked by the discretionary action of the Department of Motor Vehicles. G. S., 20-25; N. C. Constitution, Art. IV, sec. 12.

6. Automobiles § 34b: Constitutional Law § 8c—

The failure of G. S., 20-25, to provide standards for the courts on appeals by licensees whose driving licenses have been suspended or revoked by discretionary action of the Department of Motor Vehicles, does not invalidate the statute or negate the jurisdiction, since established rules of procedure of the courts give assurance against any unbridled exercise of discretionary power.

7. Arrest and Bail § 7—

"Bail" is security for defendant's appearance in court to answer a criminal charge there pending, and is ordinarily evidenced by a bond or recognizance which becomes a record of the court.

8. Arrest and Bail § 8—

Forfeiture of bail or a recognizance must be pursuant to a judgment of forfeiture entered in a pending cause by the judicial officer having jurisdiction thereof for nonappearance of defendant in answer to a call, proven by an entry on the minutes of the court and returned as a part of the proceeding.

9. Same: Automobiles § 34b—

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), which provides that forfeiture of bail shall be equivalent to a conviction. In this case there having been no forfeiture of bail within the meaning of G. S., 20-24 (c), whether the statute applies to forfeiture by the courts of another state is not presented for decision.

10. Automobiles § 34b—

Notice of conviction in another state upon which the Department of Motor Vehicles may act is not limited to notice from a judicial tribunal or other official agency but the Department may act on notice from whatever source obtained.

11. Same—

G. S., 20-23, and G. S., 20-25, must be construed *in pari materia*.

12. Same—

All suspensions, cancellations and revocations of driving licenses made in the discretion of the Department of Motor Vehicles, whether under G. S., 20-16, G. S., 20-23, or any other provision of the statute, are reviewable by trial *de novo*.

13. Same—

A license to operate a motor vehicle is a privilege in the nature of a right of which the licensee cannot be deprived save in the manner and upon the conditions prescribed by statute.

14. Same—

In reviewing the suspension or revocation of a driving license by the Department of Motor Vehicles in the exercise of its discretion, no discretionary power is conferred upon the Superior Court, and the court may determine only if, upon the facts, petitioner is subject to suspension or revocation under the provisions of the statute.

PETITION to rehear.

Attorney-General McMullan and Assistant Attorneys-General Moody and Tucker for respondent appellant.

Powell & Powell for petitioner appellee.

BARNHILL, J. This cause was here at the Fall Term, 1947, and is reported *ante* at page 301, 45 S. E. (2d), 370. The Department of Motor Vehicles petitions for a rehearing for that (1) the former opinion is erroneous in that it interprets and applies G. S. 20-16, whereas the license of Wright was revoked under the terms of G. S. 20-23; and (2) the interpretation placed on G. S. 20-25, as applied to a revocation of license under G. S. 20-16 and G. S. 20-23, is tantamount to a declaration that the statutory provisions relating to the revocation of drivers' licenses are unconstitutional.

In its brief it challenges the right of the court to review the action of the department in revoking the license of a motorist under G. S. 20-23. It contends that G. S. 20-25, as interpreted by the Court, is unconstitutional; that the Court, in reviewing the action of the department as therein authorized, is exercising delegated legislative and administrative authority; that the Act sets up no standards for the guidance of the Court, which is left free to exercise an unbridled discretion; and therefore the statute is unconstitutional in that it delegates legislative authority to the Court without prescribing proper standards for the exercise thereof.

This Court, in the consideration of the merits of the original appeal, did not overlook or fail to consider the provisions of G. S. 20-23. After a careful examination of the original record in the light of the contentions now advanced we are constrained to adhere to the conclusion there reached.

However, the present petitioner is a department of our government, charged with the duty of enforcing the licensing provisions of our automobile law, and it now asserts that, for the reasons stated in its petition, the former opinion "is quite misleading and confusing" and leaves the enforcing officers in a state of uncertainty as to their rights and duties in enforcing the automobile law. For that reason, without conceding the validity of the criticism, we brought the case back for amplification and clarification.

G. S. 20-16 and G. S. 20-23 are parts of the same statute and relate to the same subject matter. Chap. 52, P. L. 1935, G. S. Chap. 20, art. 2. They must be considered *in pari materia*. When so considered the two sections have the same connotation as if they read:

"The department shall have authority to suspend the license of an operator or chauffeur without preliminary hearing upon a showing by its records or other satisfactory evidence that the licensee (7) has com-

mitted an offense in another state which, if committed in this state would be grounds for suspension, and 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 of such operator or chauffeur, shall be deemed and held to be satisfactory evidence, upon the receipt of which the department may either suspend or revoke the license of such operator or chauffeur."

The language of G. S. 20-16 (7) and G. S. 20-23 is almost identical. The first is the real source of authority. The latter prescribes a rule of evidence and adds the power of revocation, when G. S. 20-16 (7) is the basis of action.

No right accrues to a licensee who petitions for a review of the order of the department when it acts under the terms of G. S. 20-17, for then its action is mandatory. The court is granted authority to review only suspensions and revocations by the department in the exercise of its discretionary power. G. S. 20-25.

The jurisdiction vested in the court by this section does not constitute a delegation of legislative and administrative authority. The review is judicial and is governed by the standards and guides which are applicable to other judicial proceedings.

The court has inherent authority to review the discretionary action of any administrative agency, whenever such action affects personal or property rights, upon a *prima facie* showing, by petition for a writ of *certiorari,* that such agency has acted arbitrarily, capriciously, or in disregard of law. *Pue v. Hood,* 222 N. C., 310, 22 S. E. (2d), 896. G. S. 20-25 dispenses with the necessity of an application for writ of *certiorari,* provides for direct approach to the courts and enlarges the scope of the hearing. That the Legislature had full authority to impose this additional jurisdiction upon the courts is beyond question. N. C. Constitution, Art. IV, sec. 12.

Surely the failure of the Act to provide standards for the guidance of the courts, which already have their own rules of procedure, does not invalidate the statute or negate the jurisdiction. Any litigant may rest assured that those standards and rules to which the courts adhere give full assurance against any unbridled exercise of discretionary power.

G. S. 20-24 (c) provides that "conviction" shall mean a final conviction, and "a forfeiture of bail or collateral deposited to secure a defendant's appearance in court, which forfeiture has not been vacated, shall be equivalent to a conviction." It is argued that this provision of the statute applies to notice of conviction in another state and sustains the action of the department. This raises the question of the extraterritorial application of the Act—a question which, on this record, is not presented

for decision for the reason it is not made to appear that there was any forfeiture of the bail of the licensee.

"Bail" as here used means security for a defendant's appearance in court to answer a criminal charge there pending. Ordinarily it is evidenced by a bond or recognizance which becomes a record of the court. The forfeiture thereof is a judicial act. 6 A. J., 68; *S. v. Mills*, 13 N. C., 555; *S. v. Hill*, 25 N. C., 398; Clark, Crim. Proc. 84.

The judgment that the bond or bail has been forfeited must be entered in the court and in the cause in which it was filed. *S. v. Sanders*, 153 N. C., 624, 69 S. E., 272; *S. v. Moody*, 69 N. C., 529; *Bond Co. v. Krider*, 218 N. C., 361, 11 S. E. (2d), 291; *S. v. Bradsher*, 189 N. C., 401, 127 S. E., 349.

In the ordinary case the condition is not broken by nonappearance generally, to be proved by any evidence, but only by nonappearance in answer to a call, to be proved by an entry made on the minutes of the court and returned as a part of the proceeding. 6 A. J., 116. The call can only be made and a judgment of forfeiture entered in a pending cause and by the judicial officer having jurisdiction thereof. Clark, Crim. Proc., 98, 99, 100; Bishop, Crim. Proc., 2d ed. 222; *S. v. Dorr*, 5 L. R. A. 402 (W. Va.). See also S. C. Code of 1942, secs. 940, 943 and 1041.

Here there was no warrant served on the defendant and it does not appear that one was issued. As there was no warrant there was no criminal action pending in court. As there was no criminal action pending there could be no valid judgment of forfeiture. The language used by the Legislature is not sufficient, in any event, to embrace, and it never intended to include in its definition, the mere deposit of security with an arresting officer or magistrate pending the issuance and service of a warrant, which deposit is retained without the semblance of judicial proceeding or legal forfeiture.

G. S. 20-23 does not limit the notice of conviction in another state, upon which the department may act, to notice from a judicial tribunal or other official agency. Under the wording of the statute, from whatever source the notice may come, the department may act. It now contends that it may do so without affording the licensee a hearing and without any right of review. If it desires to maintain that position as to a hearing by it, decision of the question must await another day.

Its contention that the hearing provided by G. S. 20-25 does not relate to or include the permissible review of its action when it proceeds under G. S. 20-23 is without merit. The two sections are component parts of the same statute and must be read together as separate parts of the whole.

G. S. 20-25 gives a licensee whose license has been suspended or revoked the right to petition for a judicial review thereof in all cases "except where such cancellation is mandatory under the provisions of

this article." This includes all suspensions, cancellations, and revocations made in the discretion of the department whether under G. S. 20-16, G. S. 20-23, or any other provision of the statute.

None of the conditions, save one,—G. S. 20-16 (8)—upon which the department may in its discretion cancel, suspend or revoke the license of a motorist rests upon a conviction in a North Carolina court. It is apparent, therefore, that the Legislature was unwilling to vest this power in the department without providing the licensee with the right to a review by a court of this State. Hence the inclusion of the provisions of G. S. 20-25.

A license to operate a motor vehicle is a privilege in the nature of a right of which the licensee may not be deprived save in the manner and upon the conditions prescribed by statute. These, under express provisions of the Act, include full *de novo* review by a Superior Court judge, at the election of the licensee, in all cases except where the suspension or revocation is mandatory. *S. v. McDaniels,* 219 N. C., 763.

It must be noted, however, that the discretion to suspend or revoke, or not to suspend or revoke, is vested in the department, subject to a judicial review of the facts upon which its action is based. No discretionary power is conferred upon the Superior Court. Hence, if the judge, upon the hearing, finds and concludes that the license of the petitioner is in fact subject to suspension or revocation under the provisions of the statute, the order of the department entered in conformity with the facts found must be affirmed.

The record of the original appeal fully sustains the findings and conclusions of the court below. Under those findings the license of Wright is not subject to suspension or revocation. He was entitled to a hearing in the Superior Court, notwithstanding the fact the department acted under G. S. 20-23. It follows that no cause for modification of our former opinion is made to appear.

The primary complaint of the department stems from the fact it filed no answer and offered no evidence at the hearing. This presents a situation against which we can afford no relief.

Petition dismissed.

NORSIE PEEPLES, ADMINISTRATRIX OF RICHARD PEEPLES, DECEASED, v. SEABOARD AIR LINE RAILROAD COMPANY AND SAM CONNELL.

LENA EDWARDS, ADMINISTRATRIX OF CLONNIE EDWARDS, DECEASED, v. SEABOARD AIR LINE RAILROAD COMPANY AND SAM CONNELL.

WILLIE EDWARDS v. SEABOARD AIR LINE RAILROAD COMPANY AND SAM CONNELL.

TOM KEARNEY v. SEABOARD AIR LINE RAILROAD COMPANY AND SAM CONNELL.

(Filed 17 March, 1948.)

1. Trial § 11—

The trial judge has the discretionary power, *ex mero motu*, to consolidate actions for trial even though instituted by different plaintiffs against a common defendant or by the same plaintiff against several defendants, when the causes of action grow out of the same transaction and substantially the same defenses are interposed, provided such consolidation results in no prejudice or harmful complications to either party.

2. Same: Appeal and Error § 38—

It is incumbent upon a party appealing from a discretionary order consolidating actions for trial to show injury or prejudice arising therefrom in order for his exception thereto to be sustained.

3. Trial § 11—

An order consolidating four actions, two instituted by personal representatives to recover for wrongful death and two by the survivors of the accident to recover for personal injuries, all four actions arising out of a grade crossing accident between defendant's train and the truck in which intestates and the survivors of the accident were riding, and in which practically the same defenses were interposed, *held* without error.

4. Same—

An order of consolidation will not be reversed on the ground that it is based on an erroneous finding when the alleged error of fact does not affect the question of consolidation, since appellant is not prejudiced thereby, the pleadings and not the findings being controlling upon the trial.

APPEAL by defendant Seaboard Air Line Railroad Company from *Frizzelle, J.*, at November Term, 1947, of HALIFAX.

Four civil actions,—each of the first two to recover damages for alleged wrongful death of intestate of plaintiff, and each of the third and fourth to recover damages for personal injuries allegedly sustained by plaintiff, resulting from actionable negligence of the defendants, when a truck owned and operated by another, in which the said two intestates in the wrongful death cases and the plaintiffs in the personal injury cases were

riding, and a train of defendant, Seaboard Air Line Railroad Company, on which defendant Sam Connell was fireman, collided at Poplar Street crossing in the town of Weldon, North Carolina.

The allegations of the complaints in the two death cases, except those relating peculiarly to each intestate, are in almost identical language; and the allegations of the complaints in the two personal injury cases, except those relating peculiarly to each plaintiff, are in almost identical language. The allegations of the complaints in the two death cases, and those in the two personal injury cases differ chiefly in language used by different attorneys in stating causes of action arising upon the same state of facts, except in these respects: (1) In the complaints in the death cases this allegation appears: "That at the time herein complained of plaintiff's intestate was not the owner of the truck in which he was riding nor did he have any control over said truck or the driver thereof," but it does not appear in the complaint in the personal injury cases; and (2) in the complaints in the personal injury cases additional negligent acts and omissions are alleged against defendants which are not alleged in the complaint in the death cases.

On the other hand, defendants in their joint answers filed in each case deny in the main the material allegations of the complaint, and plead in bar of recovery three further defenses, in which they aver in detail as against the intestates of plaintiffs in the two death cases, and the two plaintiffs in the personal injury cases (1) contributory negligence; (2) sole negligence of the driver of the truck in which they were riding; and (3) contributory negligence of the driver imputable to them in that they and the driver were engaged in a joint enterprise.

The record shows that:

"When these cases were reached on the trial calendar, his Honor, J. Paul Frizzelle, Judge Presiding, *ex mero motu*, entered the following order: 'November Term 1947. It appearing to the court that the above named cases arise out of the same transaction, to wit: the collision between a railroad train of the defendant and an automobile truck in which the four above named plaintiffs were riding as passengers at the time of said collision, and that the trial of these cases involves the same principles of law and the same facts:

" 'It is therefore in the discretion of the court ordered and adjudged that the four above named cases be consolidated for trial. J. Paul Frizzelle, Judge Presiding.'

"To the foregoing order of consolidation the defendant, Seaboard Air Line Railroad Company, excepted and appealed to Supreme Court," and assigns the same as error.

Murray Allen and D. Mac Johnson for Seaboard Air Line Railroad.
No counsel contra.

WINBORNE, J. "Did the court commit error in, *ex mero motu*, ordering the consolidation of these cases for trial?" Appellant states this as the question involved on this appeal. Decisions of this Court answer "No."

Neither of the plaintiffs, appellees, has filed a brief.

The decisions of this Court uniformly recognize that the trial court possesses the power in proper cases to order the consolidation of actions for trial. See McIntosh on North Carolina Practice and Procedure, pp. 536-539; *Person v. Bank*, 11 N. C., 294; *Buie v. Kelly*, 52 N. C., 266; *Glenn v. Bank*, 70 N. C., 191; *Hartman v. Spiers*, 87 N. C., 28; *Monroe Bros. & Co. v. Lewald*, 107 N. C., 655, 12 S. E., 287; *Lumber Co. v. Sanford*, 112 N. C., 655, 16 S. E., 849; *Wilder v. Greene*, 172 N. C., 94, 89 S. E., 1062; *Ins. Co. v. R. R.*, 179 N. C., 255, 102 S. E., 417; *Ins. Co. v. R. R.*, 179 N. C, 290, 102 S E., 504; *Henderson v. Forest*, 184 N. C., 230, 114 S. E., 391; *Blount v. Sawyer*, 189 N. C., 210, 126 S. E., 424; *Fleming v. Holleman*, 190 N. C., 449, 130 S. E., 171; *Rosenmann v. Belk-Williams Co.*, 191 N. C., 493, 132 S. E., 282; *Durham v. Laird*, 198 N. C., 695, 153 S. E., 261; *Abbitt v. Gregory*, 201 N. C., 577, 160 S. E., 896; *Pridgen v. R. R.*, 203 N. C., 62, 164 S. E., 325; *Trust Co. v. Green*, 204 N. C., 780, 168 S. E., 224; *Power Co. v. Yount*, 208 N. C., 182, 179 S. E., 804; *Hewitt v. Urich*, 210 N. C., 835, 187 S. E., 759; *Kalte v. Lexington*, 213 N. C., 779, 197 S. E., 691; *Robinson v. Transportation Co.*, 214 N. C., 489, 199 S. E., 725; *Park, Inc., v. Brinn*, 223 N. C., 502, 27 S. E. (2d), 548; *In re Will of Atkinson*, 225 N. C., 526, 35 S. E. (2d), 638.

In keeping with these decisions this Court has said that the general rule, in determining the legal aspect of consolidation, is that the judge has the power to consolidate actions involving the same parties and the same subject matter if no prejudice or harmful complications will result therefrom. This salutary power, it is stated, is vested in the judge in order to avoid multiplicity of suits, unnecessary costs and delays, and as a protection against oppression and abuse. *Durham v. Laird, supra*, and cases there cited. See also *Abbitt v. Gregory, supra*. And it has been held by this Court that it is proper to consolidate for trial separate actions by different plaintiffs against common defendants for damages arising out of the same accident, except when such consolidation would be injurious or prejudicial to one or more of the parties. See *Ins. Co. v. R. R.*, 179 N. C., 255, 102 S. E., 417, and *Ins. Co. v. R. R.*, 179 N. C., 290, 102 S. E, 504; *Fleming v Holleman, supra; Pridgen v. R. R., supra; Baker v. R. R.*, 205 N. C., 329, 171 S. E., 342; *Hewitt v. Urich, supra; Robinson v. Transportation Co., supra.*

In each of the two cases of *Ins. Co. v. R. R., supra*, separate fire insurance companies sought in separate actions to recover the several amounts

they had been compelled to pay on fire insurance policies as the result of the same fire allegedly caused by actionable negligence of defendant. In the first of these cases this Court approved the consolidation ordered upon motion. And in the second, this Court held on authority of the first case that the trial judge erred in ruling that he did not have the power to consolidate the several actions brought by the insurance companies.

In *Fleming v. Holleman, supra,* two separate actions in behalf of different plaintiffs against same defendant to recover damages for injuries sustained allegedly through negligence of defendant were consolidated. This Court saw no error.

In *Pridgen v. R. R., supra,* the consolidation of an action by an employee to recover for personal injuries sustained in a collision between the truck he was driving and the defendant's railroad train with an action by the employer for damages to the truck was held not to be error. The Court, in opinion by *Brogden, J.,* stated: "Both cases grew out of the same injury and practically the same defenses were interposed."

In *Hewitt v. Urich, supra,* Mrs. Claudia Hewitt and A. J. Hewitt, wife and husband, brought separate actions against defendant for damages for personal injuries each sustained in an automobile accident while they were riding as guests of defendant in an automobile owned and operated by him. This Court held that there was no error in consolidating the two actions for trial, citing *Fleming v. Holleman, supra,* and the first *Ins. Co. v. R. R., supra.*

In *Baker v. R. R., supra,* an action for damages for wrongful death of Heber C. Baker, an "invited guest or passenger," and an action by Jacob C. Williams for damages for personal injury sustained in collision between automobile operated by Williams and the dividing wall under one of defendant's bridges, were consolidated for trial. This Court disposes of the exception shown in record on appeal by saying, "As the two causes of action arose out of the same collision or same state of facts, for convenience, they were consolidated and tried together," citing *Fleming v. Holleman, supra.*

And in *Robinson v. Transportation Co., supra,* as the record shows, the trial judge ordered that five separate actions, instituted by different plaintiffs, in which each sought damages for personal injuries and one property damage, be consolidated and tried together. This Court, in opinion by *Seawell, J.,* states: "The exception to the consolidation of the cases for the purpose of trial is without merit. In this State the power of the trial court to consolidate cases for convenience of trial is not confined to cases between the same parties, but extends to cases by the same plaintiff against several defendants and cases by different plaintiffs against the same defendant, where the causes of action grow out of the same transaction and the defense is the same. *Abbitt v. Gregory,* 201

N. C., 577, 593, 594. McIntosh, Practice and Procedure, 536, 539. The liability of the defendants, if any, to the several plaintiffs in this action grew out of the same alleged negligent acts and the defense is the same. There is no apparent prejudice to the defendants in the consolidation of these actions which might interfere with the discretion of the court in making the order."

Further, in the cases of *Hewitt v. Urich, supra,* as shown by the record on appeal, and in *Abbitt v. Gregory, supra,* cited in the *Robinson case, supra,* the orders for consolidation were made in each instance by the judge of his own mere motion, that is, *ex mero motu.*

Moreover, where error is assigned on the ground of improper consolidation, injury or prejudice arising therefrom must be shown to sustain the exception. McIntosh on N. C. P. & P., p. 536; *In re Will of Atkinson, supra.*

The decisions of this Court appear to be in harmony with the majority of cases in other jurisdictions. See Annotation 104 A. L. R., 62, on subject "Propriety of Consolidation for trial of actions for personal injuries, death or property damage arising out of the same accident."

In the light of the principles enunciated in these authorities, as applied to the facts alleged on the pleadings here, it is not apparent from the record that appellant is injured or prejudiced by the order of consolidation. As alleged, all four actions grow out of the same accident and practically the same defenses are interposed.

It is contended, however, that since order of consolidation is based upon the finding of the judge that "the four above named plaintiffs were riding as passengers at the time of the collision," which is not supported by the record, the order should be reversed. The finding is of necessity based upon the pleadings, and if in conflict with the pleading, the latter will control. In any event, the pleadings do show that the four were riding in the truck and it is not alleged that either of them was operating the truck at the time of the collision. Hence, for purpose of the question presented as to consolidation of the actions, the finding that they were passengers may be disregarded as immaterial.

As to the contention of appellant that there is such substantial difference in the pleadings as will seriously complicate these cases to its prejudice, a similar point was raised before, and considered by this Court in *Martin v. R. R.,* 148 N. C., 259, 61 S. E., 625, and, under such conditions, the Court was of opinion that there was no error in the order of consolidation. We are of like opinion here.

After careful consideration of all reasons advanced by appellant, in the light of pertinent authorities, we fail to find error in the order of consolidation.

Affirmed.

STATE v. CHARLIE PHILLIPS.

(Filed 17 March, 1948.)

1. Criminal Law § 38f—

Experimental evidence is competent when the experiment is carried out under substantially similar circumstances and tends to shed light on the transaction in question, and while it is required that the experiment be carried out under substantially similar conditions, it is not required that the conditions be precisely similar, the want of exact similarity going to the weight of the evidence with the jury.

2. Same—

Whether the circumstances and conditions under which an experiment is carried out are sufficiently similar to those of the transaction in question as to throw light on that transaction and not tend to confuse or mislead the jury, is a preliminary question for the court in determining its competency, and the court's ruling thereon will be upheld unless too wide of the mark.

3. Same—

Defendant testified that the fatal shot was fired while the pistol was in deceased's right hand and defendant's hand on the barrel. There were no powder burns on the clothing of deceased. The fatal shell was of Hungarian manufacture. The State introduced evidence of experiments made with the pistol, using American manufactured shells, to determine the distance at which powder stains or burns would appear on the target. An officer who made the experiments testified that the amount of powder in a shell and the type of powder would affect discoloration but would not affect powder burns. *Held:* The conditions under which the experiments were carried out were sufficiently similar to render the evidence competent.

4. Criminal Law § 81c (2)—

The instructions of the court to the jury will be considered contextually, and when they are free from prejudicial error when so construed, exceptions thereto will not be sustained.

APPEAL by defendant from *Burney, J.*, at July Special Term, 1947, of HARNETT.

Criminal prosecution on indictment charging the defendant with the murder of one Etta Mae Phillips.

On Sunday afternoon, 18 August, 1946, Charlie Phillips and his wife, Etta Mae Phillips, were alone in their home—a small tenant house in the back yard of Harvey Stephenson—at Angier, Harnett County. Neighbors heard a pistol shot and in a few minutes the defendant emerged through the kitchen door and called to someone at the Stephenson home to get a doctor as his wife had shot herself. In a little while the doctor came and found Mrs. Phillips in the bedroom on the bed. She was dead. Soon the coroner arrived. Examination show that the deceased had been

shot with a pistol; that the bullet had grazed the top of the muscle of her right arm, entered the right chest about five inches from the shoulder-level, and had come out on the left side of the back about the level of the eighth rib, and had lodged in her slip or under dress. Further examination was made by the undertaker after the body had been removed to the funeral home. He stated that "by raising the arm it all matched the hole in the upper part of the chest, and if the arm was down by the side it didn't match, but when it was drawn up it did." There were no powder burns on the body of the deceased or her clothing. She died as a result of the pistol-shot wound.

The defendant told different stories as to how the shooting occurred. At first he said his wife attempted to shoot herself and he "tried to take the gun away from her and it went off." Later he said that his wife threatened to kill him and that he either slapped the gun out of her hand or twisted it out of her hand and in the struggle she was shot.

The solicitor then began an investigation and brought to light the following facts: The defendant had been married about eight years. Two children were born of the union. The defendant and his family had moved from place to place as tenant farmers. The defendant was addicted to the use of alcoholic drink, and on numerous occasions had quarreled with his wife; several times he had threatened to kill her. The story is one of domestic infelicity.

In the Fall of 1945, the defendant entered into a bigamous marriage with a woman in Raleigh, which greatly increased his troubles, domestic and otherwise. In the Spring of 1946, he told Cliff Hamilton that he was "messed up" with a girl in Raleigh, and that "he didn't know what in the hell to do unless he killed somebody to get them out of the way." Similar statements were made to others on different occasions.

About ten days or two weeks before his wife's death, the defendant borrowed the pistol, with which his wife was shot, a Hungarian .37 milometer, from James Wimberly, who got it from a Hungarian colonel while overseas. It had one cartridge in it. The defendant told Cecil Stephenson that he had "had a quarrel with his wife and was going to kill her." He had in his pocket at the time a pistol which resembled the death pistol.

The defendant was arrested and charged with uxoricide. He was convicted at the September Term, 1946, Harnett Superior Court, of murder in the first degree and sentenced to death. The judgment was affirmed on appeal. 227 N. C., 277, 41 S. E. (2d), 766.

Thereafter a paper writing was found by the defendant's sister in the clothing of the deceased, which purported to be in the handwriting of the deceased and revealed a purpose on her part to commit suicide. On the basis of this newly discovered evidence a new trial was ordered.

The defendant, who did not testify on the first trial, but was a witness in his own behalf at the second trial, said that he came to dinner around 2:30 on the day of the homicide and found his wife standing in the back of the house looking out the window; that he stepped into the kitchen to wash his face and hands and upon his return she was sitting at the table; that when he pulled up a chair and sat down she said, "You s.o.b., you have two-timed me the last time," pulled a gun from under the table and pointed it at her face; that "she stuck the gun in her face, did not stick it in my face"; that when he saw the gun he caught the barrel with his right hand and her wrist with his left hand; that she had the gun in her left hand; that "it fired with my hand around the barrel, in her left hand"; that he jerked it back and it went to the floor; that he reached down and got the gun and threw it on the dresser; that his wife fell to the floor, and that he picked her up and put her on the bed.

On cross-examination the defendant said his wife had the pistol in her right hand when it fired; that she was right-handed; that she was sitting in the chair when shot, and that he would not say the pistol was three inches from her arm when it went off, but "would say probably 6 inches."

The prosecution sought to discredit the defendant's testimony by evidence of experiments made by officers who fired the death pistol after the killing in an effort to determine the distance at which, when fired, powder stains or burns would appear upon the target. The targets into which the experimental bullets were fired were placed at distances ranging from 2 to 36 inches from the muzzle of the pistol. They were covered with white cheese cloth of the approximate thickness of the clothing which the deceased had on at the time of her death. In every instance when the pistol was fired from a distance of 2 to 18 inches, powder burns appeared on the target, diminishing in amount as the distance increased. The defendant objected to the introduction of this "manufactured evidence" because of the dissimilar circumstances under which it was produced. Objection overruled; exception.

The death cartridge was of German manufacture with special kind of powder to prevent the flash from being seen when fired at night. The experiments were performed with American ammunition.

Verdict: Guilty of murder in the first degree.

Judgment: Death by asphyxiation.

The defendant appeals, assigning errors.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

Neill McK. Salmon and Charles Ross for defendant.

STACY, C. J., after stating the facts as above: The State contended on the second trial, as well as on the first, that the range of the death

bullet plus the absence of powder burns left the theory of suicide with no substantial basis of fact.

In support of this contention, the prosecution had experiments made to determine whether bullets fired from the death pistol at close range would show powder burns on the targets. They did. On cross-examination, one of the officers who made the experiments stated that "the amount of powder in a shell and the type of powder would have right much to do with discoloration, but it would have nothing to do with what we call powder burns. These are powder burns. That is what I am talking about."

The competency of experimental evidence depends upon its trustworthiness to aid in the proper solution of the problem in hand. *S. v. McLamb,* 203 N. C., 442, 166 S. E., 507; *S. v. Young,* 187 N. C., 698, 122 S. E., 667; *Draper v. R. R.,* 161 N. C., 307, 77 S. E., 231; *Cox v. R. R.,* 126 N. C., 103, 35 S. E., 237; *Arrowood v. R. R.,* 126 N. C., 629, 36 S. E., 151; Anno. 8 A. L. R., 18, S. 85 A. L. R., 479; 20 Am. Jur., 627; 32 C. J. S., 440. When the experiment is carried out under substantially similar circumstances to those which surrounded the original transaction, and in such a manner as to shed light on that transaction, the results may be received in evidence, although such experiment may not have been performed under precisely similar conditions as attended the original occurrence. The want of exact similarity would not perforce exclude the evidence, but would go to its weight with the jury. 1 Michie on Homicide, 832. Whether the circumstances and conditions are sufficiently similar to render the results of the experiment competent is of course a preliminary question for the court, and unless too wide of the mark, the ruling thereon will be upheld on appeal. *S. v. Holland,* 216 N. C., 610, 6 S. E. (2d), 217; *S. v. Plyler,* 153 N. C., 630, 69 S. E., 269; *Henderson v. R. R.,* 132 Va., 297, 111 S. E., 277; *Ruestis v. Aetna Life Ins. Co.,* 131 Minn., 461, 155 N. W., 643; 20 Am. Jur., 628.

"The general rule as to the admissibility of the result of experiments is, if the evidence would tend to enlighten the jury and to enable them to more intelligently consider the issues presented and arrive at the truth, it is admissible. The experiment should be under circumstances similar to those prevailing at the time of the occurrence involved in the controversy. They need not be identical, but a reasonable or substantial similarity is sufficient"—*Edwards, J.,* in *Shepherd v. State,* 51 Okla. Crim., 209, 300 P., 421.

True it is, unless the requirement of substantial similarity exist, or be duly observed, the experimental evidence should be rejected. *Caldwell v. R. R.,* 218 N. C., 63, 10 S. E. (2d), 680; *Blue v. R. R.,* 117 N. C., 644, 23 S. E., 275; *Neice v. N. & W. Ry. Co.,* 155 Va., 211, 154 S. E., 563; *McLendon v. State,* 90 Fla., 272, 105 So., 406; *Spires v. State,* 50 Fla.,

121, 39 So., 181, 7 Ann. Cas., 214; *People v. Solani,* 6 Cal., 103, 91 P., 654; *Com. v. Tucker,* 189 Mass., 457, 76 N. E., 127, 7 L. R. A. (N.S.), 1056. *Cf. Simpson v. Oil Co.,* 219 N. C., 595, 14 S. E (2d), 638. This is largely a matter to be decided in the light of all the attendant facts and circumstances. The measure of permissible variation in the conditions of the experiment from those of the occurrence is usually determined by whether such variation would tend to confuse or to mislead the jury. The object of every trial is to find the truth of the matter in controversy. If the experimental evidence contribute to this end, it is admissible; otherwise it should be excluded. *S. v. Plyler, supra.*

While the experimental conditions here were not identical with those attending the matter under review, still they were sufficiently similar for the experimental results to throw light upon the controversy and to assist the jury in making true deliverance in the case, 20 Am. Jur., 628. Hence, the ruling of the court in admitting the evidence will be sustained. *S. v. Young, supra.*

The fact that the smokeless powder in the experimental cartridges was not the same as the flashless powder in the death cartridge would not perforce amount to such a difference in particulars as to render the experimental evidence inadmissible. As stated by one of the officers, it was *not the powder discoloration* they were interested in determining, but the powder burns, which result from firing a pistol such as the death pistol at close range, regardless of the kind of powder used. 22 C. J., 759.

Other exceptions pertaining to the admission of evidence have been pressed with vigor and confidence, but a careful perusal of the transcript leaves us with the impression that they, too, should be overruled.

A number of exceptions have been taken to the charge. Some of them are not altogether free from difficulty. The instructions to the jury are quite lengthy. They cover 124 pages of the record, and contain several inexact expressions, which the defendant has pointed out in exceptive assignments of error. However, considering the instructions as a whole, or in their entirety, and contextually, we are constrained to resolve the exceptions in favor of the validity of the trial. It is not apparent that the alleged errors affected the result. We are disposed to think they did not, especially in the light of the defendant's own testimony.

The verdict and judgment will be upheld.

No error.

JOHN BEAMAN, ADMINISTRATOR OF LUCY BEAMAN, v. BESSIE R. DUNCAN AND CAROLINA CHINAWARE COMPANY,

and

T. L. HARDING, ADMINISTRATOR OF ALVA DENVER REYNOLDS, v. BESSIE R. DUNCAN, TRADING AS CAROLINA CHINA MARKET.

(Filed 17 March, 1948.)

1. Automobiles § 7—

Even though the violation of a traffic statute may be negligence *per se*, such negligence is not actionable unless there is a causal relation between the violation of the statute and the injury; and ordinarily whether such negligence is the proximate cause or one of the proximate causes of an injury is for the determination of the jury.

2. Automobiles § 9—

The evidence disclosed that the driver of the car in which intestates were riding slowed down to about ten miles per hour to make a right turn from the highway into a private driveway, and was hit by defendant's truck, which was following the car, as the car was making the turn. *Held:* The evidence fails to show any causal connection between alleged defective brakes on the car and the accident in suit.

3. Automobiles § 8k—

The evidence disclosed that the driver of the car in which intestates were riding was eighteen years of age and had no driver's license. The accident in suit occurred as the driver of the car, after slowing to ten miles an hour, was attempting to make a right turn off the highway into a private driveway. *Held:* The evidence fails to show any causal connection between the driver's failure to have a driver's license and the accident in suit.

4. Automobiles § 18h (4)—Issue of intervening negligence held for jury upon conflicting evidence.

Plaintiffs' evidence tended to show that the driver of the car in which intestates were riding gave the signal for a right turn, slowed to ten miles an hour, pulled the car to the left to make the turn but did not cross the center line of the highway, and that as he was making the turn, defendant's truck driver, following the car on the highway, first gave notice of its immediate proximity by sounding the horn, and struck the car as its front wheels left the hard surface and entered on the dirt driveway to its right. Defendant's evidence was to the effect that the truck driver blew his horn before overtaking the car, that the car turned to its left, and that the truck driver, anticipating that the car would stop on its left of the highway, turned to the right, and that the left side of the truck's bumper struck the right front wheel of the car when the car turned back across the highway in front of the truck. *Held:* The conflicting evidence raised an issue for the jury, and defendant's motion to nonsuit on the ground that the evidence disclosed negligence on the part of the driver of the car constituting the sole proximate cause of the accident, was properly overruled.

APPEAL in both cases by defendant from *Clement, J.*, at November Term, 1947, of YADKIN.

Civil actions to recover for the wrongful deaths of Lucy Beaman and Alva Denver Reynolds. The cases were consolidated for trial by consent.

It is admitted that Bessie R. Duncan, trading as Carolina China Market, owned the truck involved in the collision which caused the deaths of Lucy Beaman and Alva Denver Reynolds, and that it was being operated at the time of the collision by J. B. Wallace, an employee of the defendant, in furtherance of her business.

On 5 January, 1946, about 2:30 p.m., Lucy Beaman and Alva Denver Reynolds were riding in a 1930 A-Model Ford coupe, on Highway No. 601, leading from Yadkinville to Mocksville, which car was being driven by Henry Beaman, a brother of Lucy Beaman. They were en route from Yadkinville to the Beaman home, which is on the west side of the highway between Yadkinville and Mocksville.

Henry Beaman was only 18 years of age at the time of the collision and did not have a driver's license, but had been driving a car about six months. There is also evidence to the effect that the brakes on the Ford coupe were not very good and that Henry Beaman and his sister, Lucy Beaman, knew of the condition of the brakes.

It is further disclosed by the evidence that the defendant's Chevrolet truck, loaded with three and a half tons of chinaware, was overtaking the Ford coupe. Behind this truck was a Plymouth car driven by Ricer Badgett, which car was followed by another truck belonging to the defendant, which was also loaded with chinaware.

All the above vehicles were being driven down hill on a grade of five to seven per cent. The evidence is conflicting as to the speed of the defendant's truck which collided with the Ford coupe. The defendant's truck driver testified he must have been making 30 to 35 miles per hour. Mr. Badgett, who was following him, and was a witness for defendant, testified the truck driven by Wallace passed him 300 or 400 yards before it reached the point of collision and in his opinion was traveling about 35 miles per hour at the time of the impact. There was other evidence tending to show the truck was being operated from 40 to 50 miles per hour at the time of the collision.

The plaintiffs offered evidence to the effect that Henry Beaman was driving on his right side of the road, traveling about 30 to 35 miles per hour, until he came within 100 yards of the side road that leads to the Beaman home. He then gave a signal that he was going to turn and slowed down to about ten miles per hour. Henry Beaman testified: "I never did get across the center line of the highway. I started turning to the right into the road that leads to my home. The turn I made is a kind of sharp turn because the road is straight there. By a kind of sharp

turn, I mean that I went in at a kind of curve. . . . As I was making my turn, the right front wheel of my car got off the pavement onto the dirt driveway going into my home. That is the last thing I remember about what happened. . . . I never did get over the center line of the hard surface highway. As I was going along there, the left part of the highway was open for traffic at all times."

Corporal McKinney of the Highway Patrol testified: "A little North of the driveway into the Beaman home there was . . . a scooped out place in the hard surface. It was about 5 feet and 11 inches from the West side of the pavement. That was on the right, going South. The Beaman home is on the West side of the road. That road is a 20-foot highway in front of the Beaman house. . . . I did not find any marks North of the scooped out place. . . . From the scooped out place to where I found the truck was 175 feet. . . . The truck was lying on its left side. . . . The Ford coupe was . . . 90 feet from the scooped out place. . . . the Ford coupe was practically demolished, and it showed signs of impact on the right side of the car." According to the evidence, both the right front and rear wheels of the Ford coupe were crushed.

The driver of defendant's truck testified: "I was going on down the hill behind the Ford and just before the accident I blowed on him and he pulled to the left. Well, I saw a mail box and old roadbed where I thought they stopped to get the mail and I thought he started there and I pulled back to the right and when I pulled back to the right just at the road for him to turn in, which I did not see until he was turning, I was so near then, even with his front, that our left front bumper hit his right front wheel and that is what made the little hole in the pavement. . . . When the Ford pulled over to the left hand side of the highway, it got beyond the center mark. After the Ford got completely over on the left hand side of the highway, it traveled near around 50 feet. . . . I did not see him give any signal that indicated he was going to turn. . . . When I first blew my horn, I was fifty or seventy-five feet to the rear of the Ford coupe. . . . When I blew my horn and he pulled over to the left, I pulled to the right. When the Ford coupe got up to make his turn I was even with him. I had started around on the right hand side of the Ford. After I had hit the Ford I did not put on my brakes for 50 feet, but I stepped on the gas. I had not put my foot on the brakes because he cut too quick. By the time I had put my foot on the pedal, we had hit. I stepped on the gas after I hit. The black marks in the road were made by my truck leaning sideways. I stepped on the gas after I hit the Ford in order to straighten up if I could. The truck got away from me from the time I hit."

From judgments on verdicts in favor of both plaintiffs, the defendant appeals, assigning error.

Allen & Henderson and F. D. B. Harding for plaintiffs.

Hall & Zachary and Womble, Carlyle, Martin & Sandridge for defendant.

DENNY, J. The defendant assigns as error the refusal of his Honor to allow her motion for judgment as of nonsuit on the ground that the evidence shows conclusively that the negligence of Henry Beaman was the sole proximate cause of the collision.

The defendant seriously contends that her motion for judgment of nonsuit dismissing the two actions should have been sustained under the authority of *Spease v. Butner,* 217 N. C., 82, 6 S. E. (2d), 808. In that case Spease and Butner were traveling at night in opposite directions. The collision occurred when Spease turned his truck left and cut in front of the approaching car driven by Butner. A guest passenger, Mrs. Myrtie Spease, who was riding in the Spease car and was injured, brought an action against L. T. Butner. Mrs. Bertha Butner, a guest passenger in the Butner car, was injured and brought an action against E. A. Spease. The cases were consolidated for trial. The intervening negligence of E. A. Spease in the case against Butner, was established by his evidence. He testified that he saw the Butner car approaching from the opposite direction, but that he misjudged its speed and turned to the left into the pathway of the approaching car. His negligence was very properly held to be the sole proximate cause of the collision.

The defendant contends in the instant case, that the condition of the brakes on the Beaman car, the failure of Henry Beaman to give a proper signal before turning into the side road, his conduct in pulling a slow moving car to the left side of the road before turning to his right, together with the fact that he did not have a driver's license, established negligence *per se* on his part and that such negligence was the sole proximate cause of the collision; and that the negligent acts of defendant's driver, if any, were insulated thereby, and would not have resulted in any injury to the intestates of the plaintiffs except for the intervening negligence of Henry Beaman, citing *Murray v. R. R.,* 218 N. C., 392, 11 S. E. (2d), 326; *Van Dyke v. Atlantic Greyhound Corp.,* 218 N. C., 283, 10 S. E. (2d), 727; *Jeffries v. Powell,* 221 N. C., 415, 20 S. E. (2d), 561; *Dillon v. Winston-Salem,* 221 N. C., 512, 20 S. E. (2d), 845; *Beaver v. China Grove,* 222 N. C., 234, 22 S. E. (2d), 434; *Brady v. R. R.,* 222 N. C., 367, 23 S. E. (2d), 334; *Rattley v. Powell,* 223 N. C., 134, 25 S. E. (2d), 448.

Even though the violation of a traffic statute may be negligence *per se,* such negligence is not actionable unless there is a causal relation between the violation of the statute and the injury; and ordinarily whether such negligence is the proximate cause or one of the proximate causes which

resulted in an injury, is for the determination of the jury. *Grimes v. Carolina Coach Co.*, 203 N. C., 605, 166 S. E., 599; *Stovall v. Ragland*, 211 N. C., 536, 190 S. E., 899; *White v. R. R.*, 216 N. C., 79, 3 S. E. (2d), 310; *Smith v. Whitley*, 223 N. C., 534, 27 S. E. (2d), 442; *Morgan v. Coach Co.*, 225 N. C., 668, 36 S. E. (2d), 263. The evidence offered in behalf of the plaintiffs, does not establish such intervening negligence on the part of Henry Beaman as may be held, as a matter of law, to be the sole proximate cause of the collision. The case of *Spease v. Butner, supra*, and similar cases, are not controlling on this record. The evidence fails to show any causal relation between the condition of the brakes on the Ford coupe or the failure of Henry Beaman to have a driver's license and the injury inflicted.

The relative duties automobile drivers owe one another when they are traveling along a highway in the same direction, are governed ordinarily by the circumstances in each particular case. In *Dreher v. Divine*, 192 N. C., 325, 135 S. E., 29, *Stacy, C. J.*, in speaking for the Court said: "The driver of a forward vehicle cannot be required to yield the road unless and until the conditions are such as to render a passage reasonably safe. And if the forward driver be not allowed sufficient time to turn to the right before the rear vehicle runs upon him, or is forced off the road in order to avoid striking him, he cannot be held liable for negligence, contributory negligence or otherwise. One who operates an automobile should have it under control and if the driver of a front car has no knowledge of an approaching vehicle from the rear, and apparently does not hear its approach, the driver of the rear trailing vehicle should reduce his speed and stop, if necessary, to avoid a collision or an injury. He cannot proceed regardless of the fact that the driver of the front vehicle does not turn to the right of the road, unless there be ample room to pass in safety without it."

In the instant case the driver of the truck testified that he blew his horn as an indication he intended to pass the Ford coupe when he was about 50 to 75 feet behind the Ford. The driver of the Ford car testified that when he got in front of his father's house he pulled a little towards the center of the road, in order to make a right hand turn. "At this time I started turning right to go into a driveway on the right side of the road. I had given a signal for a right hand turn just prior to making my turn. As I started turning right I heard the horn of the truck, . . . which had been following me, but which I had not seen since I left the top of the hill about one-tenth of a mile away. This truck hit my car just after the front wheels had gone off the pavement into the driveway."

The conflicting evidence on the issue of negligence was for the jury; it has passed upon it and has answered the issue favorable to both plain-

tiffs. The ruling on the motion for judgment as of nonsuit will be upheld.

The defendant has assigned as error certain exceptions to the admission of evidence and has preserved her exceptions to certain portions of his Honor's charge. However, after a careful examination and consideration of these exceptions, we do not think any prejudicial error is shown.

In the trial below, we find

No error.

DELMA WOOD, BY HIS NEXT FRIEND, MRS. EDITH PUTNAM, v. CAROLINA TELEPHONE & TELEGRAPH COMPANY.

(Filed 17 March, 1948.)

1. Automobiles § 11a—

All portions of a public way, from side to side and end to end, are for public use in the appropriate and proper method.

2. Municipal Corporations § 25b: Evidence § 5—

Municipal public ways are commonly divided into sidewalks and streets with an intervening space, used as a matter of common knowledge for the location and maintenance of telephone and telegraph poles, traffic signs, fire hydrants, water meters and similar structures, and the maintenance of such objects or structures is not negligence unless they render the way unsafe for the respective purposes to which each portion is devoted.

3. Negligence § 5—

Negligence is not actionable unless the proximate cause of injury, and foreseeability is an essential of proximate cause.

4. Negligence § 9—

The law does not require omniscience but only that a person foresee the natural and probable consequences of his acts.

5. Automobiles § 11c—Injury to motorist from contact with telephone pole maintained six inches from hard surface held not foreseeable.

Plaintiff alleged that, in the emergency caused by a blow-out, he inadvertently placed his foot on the accelerator instead of the brake, causing the car to increase in speed and skid further across the road to its left, throwing the plaintiff to the left and his left arm out of the open window, so that his arm hit a telephone pole maintained by defendant six inches off the hard surface, although the car did not cross the curb or leave the traveled portion of the highway. *Held:* Defendant could not have foreseen that a motorist traveling on the hard surface would voluntarily or involuntarily place his arm out of the window of a vehicle to such an extent that it would come in contact with the pole, and defendant's demurrer to the complaint was properly sustained.

APPEAL by plaintiff from *Morris, J.*, at November Term, 1947, of JOHNSTON. Affirmed.

Civil action to recover damages for personal injuries, heard on demurrer.

Plaintiff in his complaint alleges facts in substance as follows, to wit:

Defendant as a part of its communications system maintains a telephone pole located about six inches outside the traveled portion of Ellis Avenue in the town of Dunn; that is, it is located on the east side between the sidewalk for pedestrians and the vehicular lane of travel, in the grass plot portion of the sidewalk, six inches from the street curb. Ellis Avenue is a segment of State Highway 301.

About 9:30 p.m., August 31, 1946, plaintiff was operating a large Buick sedan, going south on Ellis Avenue. The automobile was in good condition and he was traveling at a reasonable rate of speed. As he approached the intersection of Ellis Avenue and Johnson Street his left rear tire blew out causing the car to skid to its left and "in said emergency the plaintiff inadvertently placed his right foot on the accelerator instead of the brake, thereby causing the said car to increase in speed and skid farther across the road to the left, and that the motion of the said car threw the plaintiff to the left and his left arm out of the open window . . . at the moment when the said car came into close proximity to the said telephone pole . . .; that as the car went by said telephone pole, plaintiff's left arm was caught between said pole and the frame of the left front car window" as a result of which it was so injured it had to be amputated. Plaintiff's car never crossed the curb or left the traveled portion of the street.

In addition thereto plaintiff alleges that the manner of maintenance of said pole constituted a hazard and menace to persons traveling on the street and was in violation of a pleaded town ordinance and constitutes negligence which proximately caused his injury.

The defendant in apt time demurred to the complaint for that it fails to state a cause of action. The demurrer was sustained and plaintiff appealed.

Parker & Parker for plaintiff appellant.

Leggett & Fountain for defendant appellee.

BARNHILL, J. The plaintiff insists that (1) the public highways from side to side and end to end belong to the public, and members of the public are entitled to free passage along any part thereof, and hence defendant's pole constituted a hazard or menace to persons using the highway for ordinary travel, and (2) the maintenance of said pole just outside the street was in violation of an ordinance of the town of Dunn,

and its maintenance as so located constitutes negligence as a matter of law. He further contends that such negligence on the part of the defendant was the proximate cause of his injury. It is upon these contentions he rests his case.

Surely all portions of a public way, from side to side and end to end, are for public use *in the appropriate and proper method. Oliver v. Raleigh,* 212 N. C., 465, 193 S. E., 853. But this does not mean that a motorist is at liberty to drive his vehicle over and across the sidewalk or the grass plot between the sidewalk and street or to complain that objects there maintained obstruct his free use of the vehicular lane of travel.

Municipal public ways are, as here, commonly divided into sidewalks or passageways for pedestrians and streets or passageways for vehicles. An object or structure which might render one unsafe for the purpose to which it is devoted ordinarily would have little or no relation to the other. The maintenance of an object in the public way in no event constitutes an act of negligence unless it renders the way unsafe for the purposes to which such portion of the street is devoted. *Oliver v. Raleigh, supra; Gettys v. Marion,* 218 N. C., 266, 10 S. E. (2d), 799.

In almost every hamlet, town and city in the State the space between the sidewalk proper and the street is used for the location and maintenance of telephone and telegraph poles, traffic signs, fire hydrants, water meters, and similar structures. It is a matter of common knowledge that this space is so used. *Gettys v. Marion, supra.* In no sense do such structures constitute a hazard to or in any wise impede the free use of the vehicular lane of travel.

Likewise, it is debatable whether the maintenance of defendant's telephone pole at the point alleged is in violation of the pleaded town ordinance. It is not alleged that no license has issued as required by the ordinance. Furthermore, it may be that the ordinance has been superseded and rendered void by subsequent legislative acts. G. S. 105-120 (5); G. S. 136-18 (j); *Hildebrand v. Telephone Co.,* 219 N. C., 402, 14 S. E. (2d), 252.

This we need not now decide, for, even if we concede negligence on the part of the defendant as alleged by plaintiff, there is no allegation in the complaint which reasonably imports injury to plaintiff as a proximate result thereof.

Negligence does not create liability unless it is the proximate cause of injury, and foreseeability is an essential of proximate cause. *Lee v. Upholstery Co.,* 227 N. C., 88, 40 S. E. (2d), 688; *Boyette v. R. R.,* 227 N. C., 406, 42 S. E. (2d), 462.

"Foreseeable injury is a requisite of proximate cause, and proximate cause is a requisite for actionable negligence, and actionable negligence

is a requisite for recovery in an action for personal injury negligently inflicted." *Osborne v. Coal Co.*, 207 N. C., 545, 177 S. E., 796; *Watkins v. Furnishing Co.*, 224 N. C., 674, 31 S. E. (2d), 917; *Butner v. Spease*, 217 N. C., 82, 6 S. E. (2d), 808.

The law does not require omniscience. *Gant v. Gant*, 197 N. C., 164, 149 S. E., 555; *Lee v. Upholstery Co., supra*. A person is bound to foresee only those consequences that may naturally and proximately flow from his negligence. *Rattley v. Powell*, 223 N. C., 134, 25 S. E. (2d), 448. When the injury complained of was not reasonably foreseeable in the exercise of due care, the party whose conduct is under investigation is not answerable therefor. *Osborne v. Coal Co., supra; Brady v. R. R.*, 222 N. C., 367, 23 S. E. (2d), 334.

The existence of defendant's pole beyond the curb line of the street did not obstruct the free use of the vehicular lane of traffic or constitute a hazard to motorists using the highway in proper manner. Hence we are unable to perceive that defendant, in the exercise of due care and foresight, could have foreseen or anticipated that a motorist traveling along the street would, voluntarily or involuntarily, place his arm out of the window of his vehicle to such an extent that it would come in violent contact therewith. It was under the duty to foresee the natural and probable consequences of its acts—*not* the unusual, extraordinary, or exceptional. The occurrence detailed by plaintiff in his complaint was beyond the realm of probability. *Ellis v. Refining Co.*, 214 N. C., 388, 199 S. E., 403.

It is unnecessary to undertake to label plaintiff's own conduct. Whether his acceleration of the speed of the car at the time and under the attendant circumstances was a mere inadvertence, a mishap, or an act of negligence, the fact remains that such conduct on his part was the intervening proximate cause of his injury. *Ballinger v. Thomas*, 195 N. C., 517, 142 S. E., 761; *Rattley v. Powell, supra; Lee v. Upholstery Co., supra*. This injury is a casualty of automobile travel which is not properly chargeable to the defendant.

The judgment below is

Affirmed.

HARVEY WOOD v. CAROLINA TELEPHONE & TELEGRAPH COMPANY.

(Filed 17 March, 1948.)

APPEAL by plaintiff from *Morris, J.*, November Term, 1947, JOHNSTON. Affirmed.

Parker & Parker for plaintiff appellant.
Leggett & Fountain for defendant appellee.

BARNHILL, J. This is an action instituted by the plaintiff to recover for loss of services and for expenses incurred for the medical care of his infant son who is plaintiff in *Wood v. Telephone Co., ante,* p. 605. The determinative facts are the same as in that case. Hence, what is there said controls decision here.

The judgment below is

Affirmed.

THOMAS L. BRAKE v. LOUISE G. BRAKE.

(Filed 17 March, 1948.)

1. Divorce § 19—

In awarding custody of minor children as between the parents in a divorce action, the welfare of the child is the paramount consideration which must guide the court in exercising its discretionary power. G. S., 50-13.

2. Courts § 4b—

An appeal from the Recorder's Court of Nash County to the Superior Court in a cause within the original jurisdiction of the Recorder's Court takes the cause to the Superior Court for trial *de novo.* Public Laws 1909, chap. 633, as amended.

3. Same: Divorce § 17—On appeal from Recorder's Court from order in divorce action awarding custody of minor child, hearing is de novo.

After decree for absolute divorce entered by the Recorder's Court of Nash County, the court entered an order awarding the custody of the child of the marriage. G. S., 50-13. Defendant appealed to the Superior Court. *Held:* If the Recorder's Court had jurisdiction to enter the order, the hearing in the Superior Court on appeal was *de novo,* while if the jurisdiction of the Recorder's Court did not include jurisdiction to award the custody of the child (Session Laws 1943, chap. 768), the petition may be considered an application to the judge of the Superior Court and the Superior Court had jurisdiction to enter a different order awarding the custody of the child, since in no event was its jurisdiction derivative.

4. Courts § 3a—

The Superior Court has original jurisdiction of all civil actions where exclusive jurisdiction is not given to some other court. G. S., 7-63.

APPEAL by plaintiff from *Edmundson, J.,* at Chambers in Goldsboro. From NASH.

Civil action begun 7 February, 1947, in the recorder's court of Nash County for absolute divorce upon ground of two years separation. The complaint therein alleged "that there was one child born of the marriage between plaintiff and defendant, named Harriett Elizabeth, age 6 years." Judgment for divorce as prayed was rendered on 8 April, 1947, but no action was taken then in respect of the child. Thereafter on 10 July, 1947, plaintiff by motion in the cause petitioned for the custody of the child of the marriage.

The recorder of the recorder's court, after hearing on the petition and affidavits filed by the plaintiff and by defendant, found as fact, among other things, that "it is for the best interest of the said child, and that her welfare would be greatly promoted by awarding her custody, tuition and maintenance to her father, the plaintiff," and thereupon, and in accordance therewith entered judgment, "with the right of the mother . . . to see and visit the child at such times as may be reasonable."

Defendant excepted to the judgment and appealed to the Superior Court of Nash County.

Thereafter the appeal of defendant came on for hearing before Edmundson, J., presiding at the September Term, 1947, of Superior Court, who, "after due inquiry, finds as a fact that each of the above parties is a fit and suitable person to have the custody and control of the said minor child . . . and that the interest and welfare of said child will be best promoted by awarding her custody in the manner as is hereinafter set forth," and thereupon entered judgment awarding the custody, maintenance and tuition of the child to plaintiff a part of the time and to defendant a part of the time, as set out in detail,—ordering and directing both plaintiff and defendant to recognize and respect the rights of the other to the care and custody of said child,—"it being the intention of the court to give said child as nearly a normal relationship between herself and both her mother and father as may be possible under the circumstances . . . etc.," and retaining the cause "for such additional orders as may be necessary in the future to take care of changing conditions."

Plaintiff excepts to the judgment and appeals to the Supreme Court, and assigns error.

T. A. Burgess and L. L. Davenport for plaintiff, petitioner.

J. D. Odom and F. S. Spruill for defendant, appellee.

WINBORNE, J. The only exception presented in the assignment of error shown in the record on this appeal is to the signing of the judgment from which appeal is taken. The pivotal question revolves around ap-

pellant's challenge of the authority of the judge of Superior Court to hear this matter anew.

In this connection appellant invokes the statute, G. S., 50-13, which provides that: "After the filing of a complaint in any action for divorce, whether from the bonds of matrimony or from bed and board, both before and after final judgment therein, it is lawful for the judge of the court in which such application is or was pending to make such orders respecting the care, custody, tuition and maintenance of the minor children of the marriage as may be proper, and from time to time to modify or vacate such orders, and may commit their custody and tuition to the father or mother, as may be thought best . . ."

In applying this statute, the decisions of this Court hold that the question of granting the custody and tuition of the child to the father or mother is discretionary with the court. The welfare of the child is the paramount consideration, or, as stated in *In re Lewis,*, 88 N. C., 31, "the polar star by which the discretion of the court is to be guided."

And appellant says that in this case the "judge of the court" referred to in this statute is the judge of the recorder's court, and this judge, having exercised his discretion in the matter, the appeal from his ruling to Superior Court takes the case up for review,—that is, that the jurisdiction of Superior Court in such case is derivative only, and that, hence, the judge of Superior Court is without jurisdiction to hear the matter anew.

This contention necessitates inquiry as to what is the extent of the jurisdiction of the recorder's court of Nash County in such matters, and as to what is the procedure on appeals from this recorder's court to the Superior Court.

The creation of the recorder's court of Nash County was authorized by Chapter 633 of Public Laws of the General Assembly of 1909. Its jurisdiction, both criminal and civil, was originally prescribed therein. However, this act was amended by Chapter 176 of Public-Local Laws of 1911, in which the provisions as to jurisdiction were rewritten. And again in Chapter 499 of Public-Local Laws 1925, the provisions as to jurisdiction were rewritten. And in the 1943 Session Laws of North Carolina, Chapter 768, the General Assembly extended the civil jurisdiction of said recorder's court, and gave to it "concurrent, original and final jurisdiction with the Superior Court of all actions for divorce." Whether this provision includes jurisdiction in controversies involving custody of children is challenged by appellee. But be that as it may, if it be conceded that the provision above quoted is susceptible of being construed so as to include jurisdiction in controversies involving custody of children of the marriage between husband and wife in divorce action, the original acts, Public Laws 1909, Chapter 633, Sec. 11, and Public-

Local Laws 1911, Chapter 176, Sec. 12, provide for an appeal in these words: "Any person desiring to appeal to the Superior Court in a criminal or civil case from a judgment of the recorder's court shall be allowed to do so in the same manner as now provided for appeals from the courts of justices of the peace."

And when an appeal is taken from the judgment of a justice of the peace to a Superior Court, it shall be reheard, G. S., 1-299, formerly C. S., 660, that is, heard *de novo*. See *Bagging Co. v. R. R.*, 184 N. C., 73, 113 S. E., 595; *Pridgen v. Lynch*, 215 N. C., 672, 2 S. E. (2d), 849. In the light of the statutes and decisions of this Court, the appeal brought the proceeding up to Superior Court for hearing *de novo*.

On the other hand, if it be conceded that the act extending the jurisdiction of the recorder's court of Nash County to actions for divorce is not susceptible of being construed so as to include jurisdiction in controversies involving custody of children of the marriage between husband and wife in divorce action, the petition of plaintiff may be considered an application to the judge of Superior Court. The Superior Court has original jurisdiction of all civil actions where exclusive original jurisdiction is not given to some other court. G. S., 7-63. When in this case the matter of the custody of the child came before the judge of Superior Court, he had jurisdiction to make provision for the custody of the child. And, upon the facts found, the best interest of the child expressly appears as the "polar star" by which the discretion of the court was guided. Hence the judgment is

Affirmed.

STATE v. SETH MASSENGILL, ALTON BAREFOOT AND ALTON JOHNSON.

(Filed 17 March, 1948.)

1. **Larceny § 7—Circumstantial evidence of defendants' guilt of larceny held sufficient for jury.**

Evidence establishing the larceny of a quantity of cotton and evidence that tracks found at the scene corresponded to those of defendants, that there was a trail of loose cotton from the scene to the home of one of them, that the three defendants appeared the next morning "before good light" at a gin more distant than the one usually patronized by them, with a like quantity of cotton, where they immediately sold the cotton, together with evidence of conflicting statements made by them and evidence tending to show defendants did not own such quantity of cotton, *is held* sufficient to overrule defendants' motion for nonsuit in this prosecution for larceny.

2. Criminal Law § 52a—

When circumstantial evidence raises a reasonable inference of defendants' guilt, it is for the jury to decide whether the facts taken singly or in combination produce in their minds the moral conviction of guilt beyond a reasonable doubt.

3. Larceny § 8—

An instruction in a larceny prosecution which inadvertently fails to charge that the taking must be felonious, must be held for reversible error.

4. Criminal Law § 53d—

Where the evidence as against each of the several defendants charged is not identical, the trial court should submit the question of the guilt or innocence of each separately, and an instruction which requires the jury either to convict all defendants or to acquit all, is reversible error.

APPEAL by defendants from *Grady, Emergency Judge,* at December Term, 1947, of JOHNSTON. New trial.

The defendants were indicted for larceny of 800 pounds of cotton, the property of N. L. Massengill.

There was evidence for the State that on the night of 6 November, 1947, seed cotton, in quantity between 800 and 1,000 pounds, was stolen from the premises of the prosecuting witness. This cotton had been put in 8 brown sheets, and placed under an open barn shelter, ten feet from the road. The loss was discovered next morning about 8:30. The evidence indicated that the cotton had been carried from the shelter and loaded on a truck a short distance down the road. The tracks of four men were visible on the ground between the shelter and the road, and there were bits of cotton along the road, which led to the home of defendant Barefoot. N. L. Massengill testified: "I found cotton strewn from my house to Barefoot's house along the road." He also saw a lock of cotton near the edge of the road at Barefoot's driveway. Examination of the tracks by this witness and the officers showed one shoe had left the impression in the sand of 13 to 19 tacks, and on defendant Johnson's shoe were found the same number of tacks, and these fitted and corresponded with the impressions on the ground exactly. Another track corresponded with the shoes of defendant Massengill and his shoes were found to fit these tracks. Cotton had also been stolen on the same night from another resident of the community. The three defendants lived within a few hundred yards of each other and about two miles from the prosecuting witness. Barefoot owned a truck. Defendants Massengill and Johnson were tenants of Carson Lee and Barefoot lived on his wife's land.

The evidence further showed that early on the morning of 7 November, about 6 a.m., "before good light," defendant Barefoot drove his truck

loaded with two bales of seed cotton in sheets to the gin at Benson, nine miles from his home, accompanied by defendants Massengill and Johnson. This cotton was ginned and immediately sold in the name of Barefoot. When questioned about this by the officers, Barefoot first said it was his wife's cotton, and later admitted he had carried one bale for defendants Massengill and Johnson. The gin at Four Oaks, usually patronized, was only four miles away. The landlord of defendants Massengill and Johnson testified that they had at that time picked but a small quantity of cotton, less than a bale, and Johnson's wife told the officers in his presence that all the cotton he had picked was in the house, and showed them in a room some 200 pounds. No notice had been given or permission obtained from the landlord to remove any cotton. A few days afterward defendant Johnson was asked by a witness, "What did you boys steal that cotton for?" and he replied, "I don't know."

The defendants offered evidence in defense, denied taking the cotton, and claimed the cotton hauled on 7 November was their own. Each defendant, on cross-examination, admitted having been heretofore convicted of violation of law. Another person was originally indicted with these three defendants, but the evidence as to him was held insufficient.

The jury returned verdict of guilty as charged, and from judgment imposing sentence, the defendants named appealed.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

Wellons & Canaday for defendants.

DEVIN, J. The defendants' motion for judgment as of nonsuit was properly denied. There was proof that the cotton described in the bill of indictment had been feloniously taken on the night of 6 November, 1947, and that it had been removed from the place where stored and carried away by truck. This, with the evidence of the identification of the tracks of those who removed it as having been made at the time by two of the defendants, a trail of loose cotton leading along the road to the home of the other defendant who owned a truck, the appearance of the three the next morning "before good light," at a gin, nine miles away, with the truck laden with two bales of seed cotton in sheets, together with evidence of conflicting statements, would seem to afford some evidence, when considered in the light most favorable for the State, to implicate the defendants as the guilty parties. There was also evidence to negative the suggestion that the cotton asported belonged to the defendants. *S. v. McLeod,* 198 N. C., 649, 152 S. E., 895; *S. v. King,* 222 N. C., 239, 22 S. E. (2d), 445; *S. v. Warren, ante,* 22, 44 S. E. (2d), 207. "When reasonable inferences may be drawn from them (the circumstances in

evidence) pointing to defendant's guilt, it is a matter for the jury to decide whether the facts taken singly or in combination produce in their minds the requisite moral conviction beyond a reasonable doubt." *S. v. Ewing*, 227 N. C., 535, 42 S. E. (2d), 676; *S. v. Lawrence*, 196 N. C., 562, 146 S. E., 395.

However, we think there was error in the instruction given by the court to the jury which entitles the defendants to a new trial. According to the record before us the only instruction given by the court in the application of the law to the evidence was that if the jury found beyond a reasonable doubt "that these defendants took N. L. Massengill's cotton away on the night of the 6th of November, and sold it and converted the proceeds thereof to their own use, it would be your duty to return verdict of guilty; if you are not so satisfied it would be your duty to return verdict of not guilty." The learned judge inadvertently omitted to charge that the taking must be felonious (*S. v. Cameron*, 223 N. C., 449, 27 S. E. (2d), 81), and his charge would also seem to require the jury to convict or acquit all three defendants indiscriminately, without distinction between them. The evidence against the three defendants was not identical as to each, and the jury should have been instructed they had the right, if they so found the facts to be, to convict or acquit one or more of them. The defendants were entitled to have the question of the guilt or innocence of each, on the evidence presented, submitted to the jury.

New trial.

STATE v. H. R. (BLONDIE) CULBERSON.

(Filed 17 March, 1948.)

1. Criminal Law § 81a—

The discretionary denial of motions for continuance and for change of venue or for jury from another county is not reviewable in the absence of abuse of discretion.

2. Criminal Law § 50d—

The remark of the court, in excluding evidence of the violent character of deceased when under the influence of an intoxicant, that "there was no evidence of self-defense" cannot be held for error as an inhibited expression of opinion by the court when the statement is true at the time, particularly when the testimony is subsequently admitted.

3. Homicide § 25—

Expert testimony that deceased died "as a result of a bullet wound, injuring the spinal cord, causing paralysis, general decline and malnutrition until his death" is sufficient evidence that the bullet wound caused death notwithstanding the elapse of some five months between the injury and death.

4. Criminal Law § 81c (2)—

Where the charge of the court considered in its entirety substantially declares and explains the law arising upon the evidence exceptions thereto will not be sustained.

APPEAL by defendant from *Clement, J.*, at August Term, 1947, of DAVIE.

Criminal prosecution on indictment charging the defendant with the murder of one Calvin M. Spillman.

The record discloses that around midnight of 25 October, 1946, the defendant shot Calvin M. Spillman, known as Bo Spillman, with a rifle in his place of business, the Dixie Tavern, at Cooleemee, Davie County, which resulted in "injuring the spinal cord, causing paralysis, general decline and malnutrition" and finally death on 9 April, 1947.

The State's evidence tends to show that the defendant came from his home, diagonally across the street, with rifle in hand, and when he got to the front door of his place of business he raised his rifle and said, "Ain't I told you boys to stay out of here, . . . I will quiet this G— d— fussing," or "I'll learn you s.o.b.'s to quit fussing in here . . . or making a racket in my place," shot Bo Spillman who was standing near the counter, without any immediate provocation, and then struck Bob Hall over the head with his gun and knocked him down. Someone in the tavern had thrown a beer bottle through the front window, breaking the glass, shortly before the defendant appeared on the scene.

C. W. Jacobs testified that when the defendant came into the tavern, "We were in there pretty drunk, . . . Rob and Bo staggered about . . . both so drunk they couldn't hardly walk."

The defendant pleaded self-defense. He says that when he entered the front door of his place of business he asked what was going on in there, and "Bo Spillman advanced at me with his right hand in his pocket and I shot at his arm . . . Bo first observed me when I said, 'What the hell's going on here?' When Bo was advancing towards me he said, 'There's the s.o.b. we are looking for,' and put his hand in his pocket, then he made about two steps towards me and I shot him. He appeared to be drunk and angry." The defendant denied using the language attributed to him by the witnesses for the prosecution.

Verdict: Guilty of murder in the second degree.

Judgment: Imprisonment in the Central Prison at Raleigh for a term of not less than 20 nor more than 25 years.

The defendant appeals, assigning errors.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

T. R. Bryan, Jones, Bowers & Pritchard, and Woodson & Woodson for defendant.

STACY, C. J. We are here confronted with questions of venue, evidence, expression of opinion, and instructions to the jury.

When the case was called for trial the solicitor announced that he would not prosecute on the capital charge, but would seek a verdict of murder in the second degree or manslaughter as the evidence might disclose.

Before pleading to the indictment, the defendant moved for a continuance, and then for a change of venue or for a jury from another county to try the case. Exception was duly entered to the denial of each motion. As these motions were addressed to the sound discretion of the trial court, and no abuse of discretion is suggested—indeed expressly disavowed—the rulings thereon must be upheld. This will be done *pro forma*. *S. v. Lea,* 203 N. C., 13, 164 S. E., 737; *S. v. Godwin,* 216 N. C., 49, 3 S. E. (2d), 347.

The exceptions to the admission and exclusion of evidence are too attenuate to warrant discussion. They present no new question of law or one not heretofore settled by the decisions. There was no inhibited expression of opinion by the court in ruling on excluded testimony. Even if evidence of the violent character of Bo Spillman, when under the influence of an intoxicant, was inadvertently excluded, because, up to that time, as stated by the court in announcing his ruling, "there was no evidence of self-defense," it is not perceived that any harmful effect resulted from the remark. In the first place, it was true at the time; and, secondly, the witness was later allowed to answer the question. *S. v. Cash,* 219 N. C., 818, 15 S. E. (2d), 277.

The defendant relies principally upon his challenge to the sufficiency of the evidence to sustain a conviction. Dr. Kavanaugh, who attended the deceased from shortly after the shooting until his death, gave it as his opinion "that he died as a result of a bullet wound, injuring the spinal cord, causing paralysis, general decline and malnutrition until his death." The inference seems permissible, therefore, that the deceased died as a result of a bullet from the defendant's rifle intentionally fired by him. This made it a matter for the twelve. *S. v. Childress, ante,* 208; *S. v. Hambright,* 111 N. C., 707, 16 S. E., 411; *S. v. Everett,* 194 N. C., 442, 140 S. E., 22. The jury rejected the defendant's plea of self-defense, which was mildly supported by the defendant and strongly contradicted by the prosecution. *S. v. Grass,* 223 N. C., 31, 25 S. E. (2d), 193.

Numerous exceptions are taken to the charge, but a careful perusal of it in its entirety leaves us with the impression that it substantially declares and explains the law arising upon the evidence and that no reversible error has been pointed out. It would only be "threshing over

old straw" to consider the exceptions *seriatim*. However, none has been overlooked; they have all been considered.

The verdict and judgment will be upheld.

No error.

J. H. LEWIS AND WIFE, EARLA MAE LEWIS, v. NORTH CAROLINA STATE HIGHWAY & PUBLIC WORKS COMMISSION.

(Filed 17 March, 1948.)

1. Limitation of Actions § 1—

The requirement of G. S., 136-19, that actions for damages for the taking of a right of way for highway purposes where the owner and the Commission cannot agree upon the amount, must be commenced within six months from the completion of the project, is a statute of limitation rather than a condition precedent to the right of action.

2. Eminent Domain § 2—

The right to compensation for property taken under the power of eminent domain does not rest upon statute but has always obtained in this jurisdiction.

3. Limitation of Actions § 14—

The fact that representatives of the Highway and Public Works Commission assured the owners of the servient tenement that the Commission would provide them a safe approach to the new highway, does not estop the Commission from pleading the six months statute of limitations as a defense to their action for damages for the taking of a right of way for highway purposes, there being no evidence that the Commission requested plaintiffs to delay the pursuit of their rights or that it made any agreement, express or implied, that it would not plead the statute.

APPEAL by petitioners from *Patton, Special Judge,* at November Term, 1947, of BUNCOMBE.

Special proceeding instituted on 4 June, 1941, before the Clerk of the Superior Court of Buncombe County, wherein petitioners seek to recover compensation for the taking of a right of way across a portion of their lands.

The Clerk appointed Commissioners to assess damages and benefits. Damages were assessed at $750.00 and benefits at $250.00. The report of the Commissioners was confirmed by the Clerk and judgment rendered in favor of the petitioners for the sum of $500.00. Respondent appealed to the Superior Court.

It is disclosed by the evidence introduced in the trial below that the road constructed on the right of way involved herein, was completed

more than six months prior to the institution of this proceeding. Whereupon, at the close of petitioners' evidence, the respondent demurred to the evidence and moved for judgment as of nonsuit. The motion was allowed. The petitioners appealed to the Supreme Court, assigning error.

Paul J. Smith for petitioners.

R. Brookes Peters, Jr., and Ernest A. Gardner for respondent.

DENNY, J. In the event the State Highway and Public Works Commission and the owner or owners of lands, cannot agree upon the amount of damages to be paid for a right of way for highway purposes, over such lands, the Commission or the owner or owners of the property may proceed to have the damages and benefits assessed as provided in G. S., 136-19, and G. S., 40-12, *et seq.* It is provided, however, in G. S., 136-19: "That all actions for damages for rights of way or other causes shall be commenced within six months from the completion of each particular project."

The petitioners offered evidence tending to show that the driveway to their residence from the new highway, was lowered to such an extent and the banks on the sides thereof were left in such condition as to make the approach to the highway dangerous. J. H. Lewis, one of the petitioners, signed a right of way agreement before the highway was constructed, but petitioners contend the road was constructed closer to their residence than they were informed it would be when the right of way agreement was executed. The evidence also tends to show that representatives of the respondent assured the petitioners after the road was completed, that the Commission would improve petitioners' driveway and provide for them a safe approach to the highway. Therefore, the petitioners allege and contend that the conduct of the representatives of the Commission was such as to constitute an estoppel; and that the Commission should not be permitted to plead the six months' statute of limitations as a defense to this proceeding, citing *Gaddis v. Road Commission,* 195 N. C., 107, 141 S. E., 358.

In the above case the statute involved provided for the aggrieved party to make application for relief within sixty days after the completion of a road. The application for relief was made within the time fixed by statute, and the court very properly held the plaintiff's right of action was not barred.

The appellee contends that the six months' statute, pleaded in bar of this proceeding, is a condition precedent affecting the cause of action itself, and is not a statute of limitations. It is contended this statute is similar to our statute which authorizes an action for wrongful death. We do not so hold. An action for wrongful death did not exist at com-

mon law, but the remedy and the right were created by the same statute, G. S., 28-173; and when the action is not brought within the prescribed time the liability created by the statute ceases. *Gulledge v. R. R.*, 148 N. C., 567, 62 S. E., 732; *Webb v. Eggleston, ante,* 574; *Curlee v. Duke Power Co.*, 205 N. C., 644, 172 S. E., 329; *Hanie v. Penland,* 193 N. C., 800, 138 S. E., 165; *Bennett v. R. R.*, 159 N. C., 345, 74 S. E., 883; *Trull v. R. R.*, 151 N. C., 545, 66 S. E., 586. On the other hand, it has never been held in this jurisdiction, that the State or its agencies can take private property for public use without just compensation. *Yancey v. Highway Com.*, 222 N. C., 106, 22 S. E. (2d), 256; *Ivester v. Winston-Salem,* 215 N. C., 1, 1 S. E. (2d), 88; *Reed v. Highway Com.*, 209 N. C., 648, 184 S. E., 513; *S. v. Lumber Co.*, 199 N. C., 199, 154 S. E., 72; *Parks v. Com.*, 186 N. C., 490, 120 S. E., 46; *Johnston v. Rankin,* 70 N. C., 550. Hence, we hold the statute under consideration to be one of limitation rather than a condition precedent.

Even so, there is nothing in this record to indicate that the petitioners, prior to the institution of this proceeding, ever demanded or requested the payment of damages by the Commission, or that the Commission agreed to perform the work on the petitioners' driveway in lieu of the payment of damages. In fact, J. H. Lewis, one of the petitioners, testified the road was finished and traffic began to move over it in September, 1940, but, "after the traffic was going on the highway and all the equipment left they did not finish what they promised to finish of mine. That is the reason I did not file suit in six months."

The facts disclosed on this record are not sufficient to bring the case within the principle of equitable estoppel. The respondent did not request the petitioners to delay the pursuit of their legal rights. Furthermore, there was no agreement, express or implied, that the respondent would not plead the statute. *Wilson v. Clement Co.*, 207 N. C., 541, 177 S. E., 632.

The ruling of the court below in granting the motion for judgment as of nonsuit is

Affirmed.

STATE v. GRANT WILLIAM HOLBROOK,
and
STATE v. GRANT WILLIAM HOLBROOK.

(Filed 17 March, 1948.)

1. Automobiles § 30d—

Testimony to the effect that defendant was under the influence of intoxicating liquor immediately after the accident, with testimony by defendant himself that he had drunk intoxicating liquor and was "feeling it a little,"

is ample evidence of intoxication to be submitted to the jury on the charge of operating a motor vehicle while under the influence of intoxicating liquor.

2. Automobiles § 29b—

Evidence tending to show that on a clear day, defendant, in overtaking another automobile proceeding in the same direction on its right side of the highway at a speed of 45 to 50 miles per hour, crashed into the rear of the other automobile with such force as to cause extensive damage, and that there were no other cars in sight on the highway at the time, *is held* sufficient to be submitted to the jury in a prosecution for reckless driving. G. S., 20-140; G. S., 20-149; G. S., 20-152.

3. Criminal Law § 81 (c) 2—

Where the charge of the court is without prejudicial error when construed contextually, exceptions thereto will not be sustained.

APPEAL by defendant from *Clement, J.*, at September Term, 1947, of YADKIN. No error.

The defendant was indicted for operating a motor vehicle while under the influence of intoxicating liquor, and in another bill he was charged with reckless driving in violation of the statute. The two cases were consolidated for trial.

There was verdict of guilty in both cases and from judgment imposing consecutive sentences, the defendant appealed.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

Trivette, Holshouser & Mitchell and F. B. D. Harding for defendants, appellants.

DEVIN, J. The defendant demurred to the evidence in both cases and assigns error in the refusal of the court below to sustain his motion for judgment as of nonsuit.

The evidence offered at the trial tended to show that on the occasion alleged the automobile which defendant was driving on Highway 67 between Booneville and East Bend struck the rear of another automobile proceeding in same direction. Considerable injury was done to the front of defendant's car and to the rear of the other. The radiator of defendant's car was torn up and pushed back against the fan. The car in front was traveling on the right side of the highway at rate of 45 to 50 miles per hour. There were no other cars in sight. It was Sunday afternoon and not raining. The highway patrolman testified the defendant was under the influence of intoxicating liquor. "He was very talkative; his eyes were glassy, and he was unsteady on his feet—wobbled when he walked . . . had alcohol very strong on his breath." Another

witness testified similarly. The defendant himself testified: "I was not too heavy under the influence of intoxicating liquor. I had taken some. I was feeling it a little." The defendant denied he was driving the automobile on this occasion and testified it was being driven by another. While another State's witness testified, "I smelled something on his breath, I couldn't tell what it was. I think he was sober. He was probably drinking something." It is obvious that there was sufficient evidence to carry the case to the jury on the charge of operating a motor vehicle on the highway while under the influence of intoxicating liquor, under the rule laid down in *S. v. Carroll,* 226 N. C., 237, 37 S. E. (2d), 688. The evidence here was more definite and conclusive than that considered in *S. v. Flinchem, ante,* 149, 44 S. E. (2d), 724.

Was there evidence to support the charge of reckless driving? The statute defines the offense as follows: "Any person who drives any vehicle upon a highway carelessly and heedlessly in willful or wanton disregard of the rights or safety of others, or 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." G. S., 20-140. Other statutes enacted in the interest of the safety of persons and property on the highway require that the driver of a motor vehicle in overtaking another vehicle proceeding in the same direction shall pass at least two feet to the left thereof (G. S., 20-149), and the driver of a motor vehicle is prohibited from following another vehicle more closely than is reasonable and prudent, with regard for the safety of others, the speed of such vehicles and the traffic on the highway. G. S., 20-152.

The comprehensive language of the statute making the reckless driving of a motor vehicle on the highway a criminal offense, considered in connection with other safety regulations prescribed by law, would seem to bring the conduct of the defendant on this occasion within the statutory definition of reckless driving. *S. v. Wilson,* 218 N. C., 769, 12 S. E. (2d), 654; *S. v. Cody,* 224 N. C., 470, 31 S. E. (2d), 445. The State's evidence tended to show that on a clear day, on a State highway, in overtaking another automobile proceeding in the same direction, traveling on its right side of the highway at a speed of 45 to 50 miles per hour, the defendant drove his automobile, without turning to the left, at such a speed and in such a manner as to collide with the rear of the other automobile and with such force as to cause substantial injury to both automobiles. We think this evidence sufficient to carry the case to the jury on the charge of reckless driving, and that the motion to nonsuit was properly denied. It may be noted that on cross-examination the defendant admitted he had been heretofore convicted of numerous violations of law including four previous convictions for reckless driving.

The defendant assigns error in the court's charge to the jury and brings up for review excerpts from certain portions of the instructions given, but upon an examination of the charge as a whole we think the exceptions noted are without merit. Considering the entire charge contextually, we find no just cause for complaint on the part of the defendant.

In the trial of both cases there is

No error.

W. H. BETHUNE v. A. E. BRIDGES.

(Filed 17 March, 1948.)

1. Negligence § 9—

The law requires only reasonable foresight and prevision.

2. Animals § 2—

Upon evidence disclosing that upon his return home about sundown, defendant found that two of his horses had broken out of his stable or lot for the first time, that defendant and members of his family searched for them a half hour in the rain and then returned home and went to bed, and that thereafter during the night one of the horses ran into the side of plaintiff's automobile on the highway, causing damage, *is held* insufficient to be submitted to the jury on the issue of negligence, since defendant had no reason to believe that injury was likely to result to anyone from the animals being at large during the night.

3. Same—

The liability of the owner of domestic animals for damages caused by them is predicated upon the law of negligence rather than that of suretyship.

APPEAL by defendant from *Burgwyn, Special Judge,* at December Term, 1947, of LEE.

Civil action to recover damages to plaintiff's automobile alleged to have been caused by the neglect, wrongful act or default of the defendant.

Plaintiff says that on the night of 8 or 9 September, 1944, between 9:00 and 9:30 p.m., he was traveling in his automobile on Highway No. 1, approaching Sanford from the north, when two of defendant's horses came out of the side road going towards the defendant's dairy barn, "and one ran right into the side of my car. Its head caught just in front of the windshield and its knees went into the side of my car about even with the hinge of the front door." It cost the plaintiff $77.00 to have his car repaired.

Plaintiff called the defendant, who said he had been away, and upon his return home about sundown, found that two of his horses were out;

that he hunted them for half an hour but was unable to find them. Whereupon he came home and went to bed. The defendant's wife and daughters and others joined in the search, but gave it up when plaintiff did. The weather was inclement, with a light drizzling rain.

The court instructed the jury there was no evidence of negligence on the part of the defendant in allowing the horses to escape. "The only question for you to determine is whether you are satisfied from the evidence and by its greater weight that there was any negligence proximately causing injury to plaintiff's car on his part in giving up the search and going to bed and going to sleep without continuing the search by or through himself or one or more of his employees." Exception.

From verdict and judgment for plaintiff, the jury assessing the damages at $50.00, the defendant appeals, relying chiefly upon the court's refusal to dismiss the action as in case of nonsuit.

S. Ray Byerly for plaintiff, appellee.

W. W. Seymour for defendant, appellant.

STACY, C. J. The question for decision is whether the evidence suffices to carry the case to the jury in the face of a demurrer. The trial court answered in the affirmative. We are inclined to a different view.

It is conceded there was no negligence on the part of the defendant in failing to keep the horses in restraint, *i.e.*, the horses escaped from the barn or lot through no foreseeable neglect on the part of the defendant. *Gardner v. Black,* 217 N. C., 573, 9 S. E. (2d), 10.

The case then comes to whether the defendant acted as a reasonably prudent person in abandoning the night search for the horses after he and members of his family and others had hunted them for half an hour in the rain. The law requires only reasonable foresight and prevision. This, the defendant seems to have exercised in the circumstances disclosed by the record. The horses had never before broken out of their stable or lot, and the defendant had no reason to believe they might attack travelers or vehicles on the highway, or that injury was likely to result to any one from their being at large for the night. 2 Am. Jur., 737. Indeed, the defendant still thinks the plaintiff was at fault in running into one of the horses.

The case was tried on the theory that the defendant was in duty bound to search for the horses which had gone astray, and to continue the search "until they were found or until it became light," or else answer in damages for any injury they might cause upon the public highway to travelers or others lawfully thereon. The defendant's liability is to be measured by the law of negligence rather than that of suretyship. *Lloyd v. Bowen,* 170 N. C., 216, 86 S. E., 797.

The defendant's demurrer to the evidence was well interposed. It will be allowed here. G. S., 1-183.

Reversed.

ROVY L. BENTON v. FAREST JOHNSON.

(Filed 17 March, 1948.)

1. Negligence §§ 9, 19e—Evidence held to disclose that injury was not foreseeable, and nonsuit was proper.

The evidence tended to show that plaintiff placed a stick of wood under the rear wheel of defendant's backing truck in order to scotch the truck in compliance with request of the driver, that the wheel passed over the wood, and that as plaintiff placed his hand under the wood to retrieve it and replace it to the rear of the wheel, the wheel spun forward and engaged the wood which crushed plaintiff's hand. *Held:* Defendant's motion to nonsuit was properly allowed on the ground that the resulting injury, or any injury of similar nature, could not have been reasonably foreseen, since the driver could not have anticipated plaintiff would undertake the difficult and dangerous operation of retrieving the wood.

2. Negligence §§ 10, 19e—Doctrine of last clear chance does not apply unless peril could have been discovered in time to avoid injury.

The evidence tended to show that defendant's truck driver was backing the truck down a slight incline, that the driver was looking to the rear of the truck and that plaintiff, standing on the driver's side of the truck, placed a stick of wood under the rear wheel to scotch the truck, that the wheel passed over the wood, and as plaintiff placed his hand under the wood to retrieve it and replace it to the rear of the wheel, the wheel spun forward and engaged the wood which crushed plaintiff's hand. *Held:* Even conceding that the driver could or should have seen plaintiff's peril the evidence fails to show that he could or should have done so in time to have avoided the injury.

3. Negligence §§ 11, 19c—Evidence held to disclose contributory negligence in voluntarily selecting dangerous method of performing service.

Defendant's driver, accompanied by a helper, was delivering a load of coal to plaintiff, and had to back the truck down a slight incline to unload the coal at the place designated by plaintiff. The evidence tended to show that the driver gave the order to scotch the truck, that his helper began putting stones to the rear of the wheel, that plaintiff then placed a stick of wood under the rear of the wheel on the other side, and that after the wheel had passed over the wood, plaintiff sought to retrieve it and replace it to the rear of the wheel when the wheel spun forward and engaged the wood which crushed plaintiff's hand. *Held:* Even conceding plaintiff was not a mere volunteer, he was not under duty to undertake the service or to pursue it in such dangerous manner, and plaintiff's own contributory negligence was at least a proximate cause of his injury.

BENTON *v.* JOHNSON.

PLAINTIFF'S appeal from *Clement, J.*, November Term, 1947, YADKIN Superior Court.

Avalon E. Hall for plaintiff, appellant.
Allen & Henderson for defendant, appellee.

SEAWELL, J. The plaintiff sued to recover for a personal injury, the loss of a finger with incident pain and suffering, and surgical and medical bills, and in support of his claim introduced evidence substantially as follows:

The truck in charge of the defendant's employee and driver was in the act of delivering a load of coal to the plaintiff at the latter's tobacco barn and plaintiff directed the driver where to put the coal—in a pen which plaintiff had made for that purpose out of firewood. The driver was at the time accompanied by a helper, one Junior Wilkins. It was necessary to back the truck down a slight incline to get the rear end in position to unload the coal.

At this time the driver was on the left side of the truck, looking toward the rear; the plaintiff was on that side near the rear of the truck. While the truck was being backed down grade the driver "hollered," "Scotch the truck!" Immediately the helper began to gather some small rocks for that purpose. But the plaintiff, thinking that the rocks were too small, got a piece of firewood and threw it behind the rear wheels. Instead of stopping the truck the rear wheels rolled over the stick of wood. Plaintiff then sought to retrieve the stick of wood from in front of the wheels so as to replace it behind them. The wheels "spun" in a forward motion, engaging the stick of wood under which plaintiff had put his hand, and crushing one finger so that amputation was necessary.

The evidence is somewhat conflicting as to whether the wheels were "spinning" in a forward motion when plaintiff reached for the stick of wood or whether they began the forward motion at about the same time, or an instant later. The evidence does not exactly disclose whether the driver was looking at plaintiff just then; but the latter testifies that he was on the driver's side of the car and could have been seen; and that the driver had been looking in that direction. There is no evidence as to whom the request of "scotch the truck" was made.

There was further evidence on the question of damages.

At the conclusion of plaintiff's evidence the defendant demurred and moved for judgment as of nonsuit. The motion was allowed. The plaintiff excepted, and from the ensuing judgment he appealed.

The propriety of the judgment of nonsuit is the only question presented on this appeal. We are unable to find anything in the evidence justifying a reversal.

The defendant points out that a very similar factual situation was presented in *Gant v. Gant,* 197 N. C., 164, 148 S. E., 34, an action brought by the wife against her husband. The defendant in that case was trying to move his automobile in the snow, and the wheels began to spin. The defendant asked his wife to get some long planks to put under the wheels. The car ran over the planks, the wheels spun, kicking a plank back against the plaintiff, injuring her. In sustaining the judgment of nonsuit in that case the Court, in an incisive opinion by *Justice Brogden,* observed:

> "Under the circumstances to require the defendant to foresee that the plank would be kicked backward and injure his wife would practically stretch foresight into omniscience. The law does not require omniscience."

We think that upon the whole evidence of the case the driver of the truck could scarcely be held to have foreseen the particular injury, or any injury of a similar nature, as a probable consequence of his act in attempting to move the truck forward.

It would be true that if the driver had actually seen the plaintiff in a dangerous situation and could have avoided the injury by the exercise of reasonable prudence, liability would have ensued regardless of the fact that there is no evidence or inference that the plaintiff had been called upon to do this service, but was a mere volunteer. *Morris v. Transportation Co.,* 208 N. C., 807, 182 S. E., 487; *Haynes v. R. R.,* 182 N. C., 679, 110 S. E., 56; *Murphy v. R. R.,* 211 N. C., 741, 191 S. E., 329; *Redmon v. R. R.,* 195 N. C., 764, 143 S. E., 829; Anno., 119 A. L. R., 1041, 1055. The evidence, however, fails at this point: It does not show that the driver actually saw the plaintiff in his attempt to retrieve the stick of wood in his further attempt to scotch the truck, and the circumstances are not such as to put upon the driver of the truck the duty of anticipating that the plaintiff would undertake that difficult and dangerous operation, and of keeping a lookout for such an occurrence. And the evidence indicates that the events occurred in such rapid succession that the defendant had no opportunity to avoid the injury if he had seen it.

The forward motion of the wheel in the attempt to prevent the truck from rolling down the declivity occurred, for all practical purposes, just at the time the plaintiff undertook to remove the timber from in front of the wheels.

> "Discovery of the danger, or a duty to discover it, when offered as a predicate for a charge of negligence on the part of the defendant after the peril arose, involves something more than a mere dis-

covery or the duty to discover the injured person; it includes a duty in the circumstances to appreciate the danger in time to take the steps necessary to avert the accident." 38 Am. Jur., Negligence, Sec. 219; *Kruger v. Omaha & C. B. Street R. Co.*, 80 Neb., 490.

At any rate, we think there is a clear inference that the plaintiff's contributory negligence was in part, at least, the proximate cause of producing his injury; *Austin v. Overton*, 222 N. C., 89, 21 S. E. (2d), 887; *Godwin v. Atlantic Coast Line R. R.*, 220 N. C., 281, 17 S. E. (2d), 137; and cases cited.

As we have observed, there is no evidence that the request to "scotch the truck" was made to plaintiff, but, supposing that it was, his relation to the driver, or his superior, did not constrain him to undertake the service, or to pursue it in a dangerous manner.

The judgment of the court below is

Affirmed.

STATE v. JOHN DAVID WOOTEN AND WEBB WARD.

(Filed 24 March, 1948.)

1. Negligence § 23—

Culpable negligence imports more than actionable negligence in the law of torts, and is such recklessness or carelessness, proximately resulting in injury or death, as is incompatible with a proper regard for the safety or rights of others.

2. Automobiles § 28a—

The violation of a safety statute regulating the use of highways does not constitute culpable negligence unless such violation is intentional, willful or wanton, or unless the violation, though unintentional, is accompanied by recklessness or is under circumstances from which probable death or injury to others might have been reasonably anticipated.

3. Automobiles § 28c—Evidence of culpable negligence held sufficient for jury in prosecution for manslaughter.

The evidence tended to show that two cars, traveling in opposite directions, collided head-on in the middle of the highway, disclosing a violation by each driver of the statutory requirement that each driver, under such circumstances, should yield to the other at least one-half of the main traveled portion of the highway as nearly as possible. G. S., 20-148. The collision resulted in the death of several passengers. There was evidence that even if the violation of the statute were unintentional, each defendant was driving his automobile carelessly and heedlessly, without due caution and circumspection under circumstances from which probable death or injury to others should have been anticipated with reasonable

prevision. *Held:* The evidence was sufficient to support the verdict of guilty of manslaughter as to each defendant.

4. Criminal Law § 81b—

Where the charge of the court is not in the record it will be assumed that it is free from error.

APPEAL by defendant from *Williams, J.*, at September Term, 1947, of MARTIN.

Criminal prosecution upon two separate bills of indictment—one charging that John David Wooten "feloniously and willfully did kill and slay one Henry Ward," etc., and the other charging that Webb Ward "feloniously and willfully did slay one Mary Brown and Mae Riddick," etc., by consent, consolidated for the purpose of trial.

These indictments, it appears to be uncontroverted, grew out of a collision on 15 December, 1946, between an automobile owned and operated by defendant John David Wooten, traveling south on State Highway 903, from Robersonville, N. C., in which four others, Steve Little, Mary Brown, Gladys (Mae) Riddick and Jesse Spain were riding, and an automobile owned and operated by defendant Webb Ward, traveling north on same highway toward Robersonville, in which his uncle Henry Ward was a passenger. The collision occurred about a mile south of Robersonville on a right-hand curve,—looking south.

At the trial, in addition to evidence tending to show the above facts, the State offered, as its only witness, W. T. Simpson, the chief of police of the town of Williamston, who testified in pertinent part: "On December 15, 1946, I was a member of the State Highway Patrol—stationed in Martin County. I went to the scene of the collision . . . arriving there about 6:15. I saw Webb Ward and John David Wooten at that time . . . I talked with both of them later . . . When I arrived both vehicles were sitting with the front ends about middle way the highway, and their rear ends on the edge of the shoulder,—the right-hand shoulder going from Robersonville . . . The front ends were joined up, and the back ends were about two feet from each other. There was no center line in the highway, but the front end of both cars was about the center of the highway in the curve . . . no one was in either car when I got there. Henry Ward was lying out in the field, dead; . . . Mary Brown and Mae Riddick—one was lying out in the field, dead, and the other was hurt pretty bad; she died . . . that night. They were riding in John David Wooten's car—he told me later. I did not talk to Webb Ward and John David Wooten together. I talked to Wooten in the hospital and Ward at his home." Then in response to question, "What did Wooten tell you?", this testimony was admitted as against defendant Wooten: "Wooten told me he was on his side of the road and saw this

other vehicle coming and did not know who was driving it, and that he was on his side when he went into this curve; he said he pulled over to pass on the left side of him, and about the time he pulled over to miss that vehicle, that that vehicle pulled over and they both met in the middle of the highway. He said he was going about 40 or 45 miles per hour . . ."

Then in response to question, "What did Webb Ward tell you?", this testimony was admitted as against defendant Ward: "Ward told me he was going down the road and he saw a car in front of him on his side of the road, and that it cut further over and to keep it from hitting his car he cut over to his left and the other car cut in front of him." Then the witness continued: "Both gave the same explanation, and both said the collision occurred in the middle of the highway . . . I could not tell that night that either had had anything to drink. Wooten told me later that he had had a beer, and Ward said later that he had not had anything . . . The collision happened on a curve. There is a bank there, but you can see a car at any point on that curve 350 or 400 yards. Both the defendants told me that it was after dark when the collision occurred, and that each had his headlights turned on . . . Ward said he was driving around 35 or 40 miles per hour . . . a brand new car . . . Everyone in the cars was hurt . . . seven in them, two killed, one died later on, and four put in the hospital . . . John David Wooten was on the inside of the curve."

The State here rested its case.

Defendants, reserving exceptions to denial of motion for judgment as of nonsuit, offered evidence as follows:

DEFENDANT WEBB WARD'S EVIDENCE

Webb Ward, as witness for himself, testified: "I live one mile from Pactolus, in Pitt County . . . On Sunday night, December 15, 1946, I and my uncle, Henry Ward, were driving my 1946 Studebaker heading to Robersonville. And going around that curve there . . . in fact I passed Robert Lee Richardson . . . and passed him in that curve I was meeting this Wooten fellow. I was on my right side of the road, going around the curve, and I could not tell what side he was on, but he was supposed to be on the left side. I was on the right side of the road, going around the curve, and my uncle said, 'Watch out, Jack, he is going to hit you,' and he had done hit me. I don't remember anything after the cars hit . . . I reckon I was traveling about 35. My lights were on. I might have told Mr. Simpson that I turned to the other side to keep from hitting the other car. I was real sick when he came to see me. I was on the outside of the curve. The car was right at me on the curve when I saw it. I did not even attempt to turn to the left to miss him or

to turn on the shoulder. I did not have time to turn to the right or left . . . nor did I put on brakes. I could not tell whether he was on my side or his side. He hit me by the time my uncle said 'Look out, Jack.' There was no use turning out. I might have told Mr. Simpson I turned to the left, but I don't know for sure." Defendant Webb Ward rested his case.

DEFENDANT JOHN DAVID WOOTEN'S EVIDENCE

John David Wooten, as witness for himself, testified in pertinent part: "I live at Fleming's Cross-Roads . . . When the wreck happened I was going towards Stokes. I seed the car coming fast, and I tried to miss the car, and I goes to the other side of the road to miss the car, and it was coming to my side of the road, and we had a collision about the middle of the highway. We hit about the middle of the road about the middle of the curve. I tried to miss the car, and left my side and took his side, and he went back to his side of the road, and that made me take my side of the road back, and I could not miss him, and I hit him. Both of us turned just like the chief said . . . I 'come to' on Monday, and talked with Mr. Simpson on Tuesday, I think. I told him what he testified I said, except that I told him I was driving 35 or 40 miles per hour. I had the inside of the curve. There is a hill in the curve. The other car was about the distance of three times the length of this courtroom from me when I realized it was on my side of the road. I did the first thing that come to my mind to miss him. I don't know why I did not pull to the right. I had drunk one bottle of beer that morning, and it was dead and had left me by the time of the accident . . . I have heard since that Gladys Riddick was 13 or 14 years old. I was not dating her . . . I started to the other man's side of the road, but I did not get there . . . when I started to his side, he started back and we had a collision about the middle of the highway . . . I talked with Mr. Atkinson about this wreck."

Stephen Little, as witness for defendant Wooten, testified: "I got up John Wooten . . . he was driving between 30 and 35 miles an hour, and when he got to the hill he was still on his right side . . . I was sitting in the back . . . right behind the driver. I did not know either one of the girls. Jesse Spain and one of the girls was in the back seat with me . . . Nobody said anything just before the wreck to indicate that a collision was about to happen."

Defendant John David Wooten rested his case.

Thereupon defendant Webb Ward offered in rebuttal these witnesses:

First—Anthony Atkinson, who testified, in pertinent part, "I know Wooten. I went to him after this collision. It was my granddaughter that got killed, and I talked to him and he told me he was driving on the left-hand side of the road and he saw he was going to hit and he started

across on the right-hand side, but they hit him . . . he told me that he was on the left-hand side, and when he saw the car coming he tried to get on the right-hand side."

Second—James Ward, who testified: "I heard John David Wooten talking to my son, George Henry Ward, the next Saturday after the wreck on the corner of Home Grocery Store in Greenville, and he said he was going along on the left-hand side of the road, and the other car was coming so fast he could not get back. I am Ward Webb's uncle."

Third—James Daniel, who testified: ". . . I asked John David Wooten how the wreck happened. He told me that he was going down the road driving pretty speedy, and he said Steve was telling him this thing won't run, and that he drove faster until by and by he was right up on the other car, before he knew it, and there was a girl sitting on his lap and he could not half drive . . . I am no kin to John."

Thereupon, John David Wooten, recalled to the witness stand, denied the statement attributed to him by the three witnesses last above.

Defendants, at the close of all the evidence, renewed their motion for judgment as of nonsuit, and to denial thereof they excepted.

Verdict: Defendants, John David Wooten and Webb Ward—Guilty.

Judgment: Confinement in the State's Prison (1) as to defendant John David Wooten for not less than 7 nor more than 10 years, and (2) as to defendant, Webb Ward, for not less than 3 nor more than 5 years.

Defendants appeal to Supreme Court and assign error.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

William J. Bundy for John David Wooten.

Hugh G. Horton for Webb Ward.

WINBORNE, J. When all the evidence offered on the trial of this case in the court below is taken in the light most favorable to the State, did the trial court err in denying defendants' motion for judgment as of nonsuit aptly made at the close of all the evidence, pursuant to provisions of G. S., 15-173? In other words, is the evidence, so taken, sufficient to support a verdict of guilty of the charge under which defendants are indicted. This is the determinative question involved on this appeal.

A careful consideration of the evidence in the light of pertinent principles of law leads to the conclusion that the evidence is sufficient to support the verdict, and that there is no error.

Applicable principles of law are found in the case of *S. v. Cope,* 204 N. C., 28, 167 S. E., 456, where in opinion by *Stacy, C. J.,* the line which separates the principle of actionable negligence in the law of torts, and that of culpable negligence in the law of crimes is delineated, and

in accordance therewith previous decisions of this Court are aligned. As there summarized, these are pertinent principles: "Culpable negligence in the law of crimes is something more than actionable negligence in the law of torts. . . . Culpable negligence is such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others. . . . And an intentional, willful or wanton violation of a statute or ordinance, designed for the protection of human life or limb, which proximately results in injury or death, is culpable negligence. . . . But an unintentional violation of a prohibitory statute or ordinance, unaccompanied by recklessness or probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, is not such negligence as imports criminal responsibility. . . . However, if the inadvertent violation of a prohibitory statute or ordinance be accompanied by recklessness or probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, amounting altogether to a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others, then such negligence, if injury or death proximately ensue, would be culpable and the actor guilty of an assault or manslaughter, and under some circumstances of murder."

Moreover, the statutes relating to operation of motor vehicles upon the public highways of this State declare: (1) That "any person who drives any vehicle upon a highway carelessly and heedlessly in willful or wanton disregard of the rights or safety of others, or 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, and upon conviction shall be punished . . ." G. S., 20-140; (2) that "drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other at least one-half of the main traveled portion of the roadway as nearly as possible," G. S., 20-148; and (3) that "it shall be unlawful and constitute a misdemeanor for any person to violate any of the provisions of this article unless such violation is by this article or other law of this state declared to be a felony," G. S., 20-176 (a),—and the punishment for violation of various sections, including G. S., 20-148, follows in G. S., 20-176 (b).

Testing the evidence in the present case by these principles, it tends to show, and is sufficient to justify the jury in finding that as the vehicles were meeting each other, traveling in opposite directions, the drivers were violating the provisions of the statute, G. S., 20-148, requiring each to give to the other at least one-half of the main traveled portion of the roadway as nearly as possible. The evidence is that the two vehicles collided in the middle of the road. And the evidence tends to show, and is sufficient to justify the jury in finding that at the time of the collision,

even though the violation of the statute, G. S., 20-148, be unintentional, each of the defendants was driving his automobile carelessly and heedlessly, without due caution and circumspection and in a manner so as to endanger or be likely to endanger persons on the highway when tested by the rule of reasonable prevision. Injury and death did ensue. In all it was a question for the jury.

And in the absence of the charge, it will be assumed that the court properly charged the law applicable to the evidence in the case.

Hence, in the judgment from which appeal is taken, we find

No error.

STATE v. GORDON HAL STEELMAN.

(Filed 24 March, 1948.)

Automobiles § 29b—Evidence held sufficient for jury in this prosecution for reckless driving.

The evidence tended to show that defendant's car was following two trucks traveling east, approaching an intersection in a municipality, that the trucks intended to make a left turn at the intersection and stopped momentarily for a westbound vehicle, that then the second truck had moved forward two truck lengths at a rate of 10 to 15 miles per hour, traveling on its right side of the highway, when it was struck from the rear by defendant's car with such force that the steel frame bed of the truck was driven into the cab, mashing it in three or four inches, and the truck knocked forward some two or three truck lengths. There was evidence that defendant had slid one wheel of his car 20 feet before the impact. The statutory speed limit in force at the scene was 25 miles per hour. *Held:* The evidence was sufficient to overrule nonsuit in a prosecution for reckless driving. G. S., 20-140; G. S., 20-152.

APPEAL by defendant from *Clement, J.*, at November Special Term, 1947, of WILKES. No error.

The defendant was charged with reckless driving of a motor vehicle in violation of G. S., 20-140. From judgment on verdict of guilty as charged, the defendant appealed.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

W. H. McElwee for defendant, appellant.

DEVIN, J. The defendant assigns error in the denial by the court below of his motion for judgment of nonsuit. The material facts as disclosed by the State's evidence were these: On 11 April, 1947, three

motor vehicles were being driven east along B Street in North Wilkesboro, approaching an intersection. The front vehicle was a trailer-truck, the second a pick-up truck driven by Kenneth Greene, and the third a Ford automobile driven by the defendant Steelman. The driver of the trailer-truck intended to turn left at the intersection, as did Greene, but owing to the approach of a west bound bus to the intersection, he had to stop momentarily. Greene's truck also stopped and then moved on traveling on its right side of the highway toward the intersection at the rate of 10 to 15 miles per hour and had gone forward two lengths of the truck when it was struck from behind by defendant's automobile with such force that the steel frame bed of the truck was driven into the cab and the cab mashed in three or four inches. On defendant's automobile, the radiator was burst, the front fenders torn, and the hood driven up into the windshield. There was a tire mark made by one of defendant's rear wheels extending back from point of impact 20 feet, indicating "the Ford had slid one wheel" for that distance. The Greene truck was propelled by the force of the blow 125 feet according to one witness, or two or three truck lengths according to another before being stopped. Greene's truck had two lights on the rear, a stop light and a clearance light, which came on when the brake was applied. These were working at the time. No hand signal was given. The collision occurred at 2:15 in the afternoon.

The statute defines reckless driving as follows: "Any person who drives any vehicle upon a highway carelessly and heedlessly in willful or wanton disregard of the rights or safety of others, or 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." G. S., 20-140. Another statute prohibits the driver of a motor vehicle from following another vehicle more closely than is reasonable and prudent, with due regard for the safety of others, and the speed of such vehicles, in relation to the traffic on the highway. G. S., 20-152. The speed limit for vehicles at this place, as fixed by statute then in force, was 25 miles per hour.

In view of the language of the statute by which reckless driving of a motor vehicle on the highway is made a criminal offense, considered in connection with other safety regulations prescribed by law, and giving to the State's evidence the benefit of all reasonable inferences properly deducible therefrom, we think there is afforded sufficient basis for the finding that in the conduct of the defendant on this occasion there was a lack of that caution and circumspection enjoined by the statute, and that the defendant drove his automobile at such speed and in such manner as to endanger and be likely to endanger persons and property on the highway. The extent of the resultant injury to both vehicles is

indicative of excessive speed and the absence of proper regard for the rights and safety of others.

The evidence was sufficient to withstand a demurrer, and to carry the case to the jury. This is in accord with the decisions of this Court on similar facts in *S. v. Wilson,* 218 N. C., 769, 12 S. E. (2d), 654; *S. v. Cody,* 224 N. C., 470, 31 S. E. (2d), 445; *S. v. Flinchem, ante,* 149 (151), 44 S. E. (2d), 724; *S. v. Holbrook, ante,* 620.

In *S. v. Lowery,* 223 N. C., 598, 27 S. E. (2d), 638, the prosecution was for manslaughter and the question there presented involved the causal relation between breach of statutes regulating the operation of motor vehicles on the highway and the death of the deceased. Here we are chiefly concerned with the conduct of the defendant, rather than with the result of his acts. It is sometimes difficult to draw the line between unintentional or inadvertent violation of statutory regulations and those instances where the act is done intentionally, heedlessly, and in a manner likely to endanger persons or property. We think there is evidence here to bring defendant's case within the latter category. *S. v. Cope,* 204 N. C., 28, 167 S. E., 456; *S. v. Stansell,* 203 N. C.,.69, 169 S. E., 580.

The defendant's exceptions to the court's charge to the jury are without substantial merit. The objection to the form of the judgment was waived in the event the other rulings of the court should be upheld.

We conclude that in the trial there was

No error.

LESTER CARROLL v. ARLIE W. BROWN AND W. G. BROWN.

(Filed 24 March, 1948.)

1. Pleadings § 28: Bills and Notes § 36—

Where, in an action on a note, defendants deny plaintiff's allegations that the note was to draw interest from maturity at the rate of 6% per annum, the note not having been set out in the complaint, judgment on the pleadings in plaintiff's favor is erroneous, since there is a denial of a fact necessary to be established as a basis for the relief prayed.

2. Bills and Notes § 26b—

As between the parties, it is competent for the maker to show that it was agreed at the time of the execution of the note that it was to be paid out of the profits of a partnership in which the maker and payee were then engaged, even though the agreement rests in parol.

3. Partnership § 4—

Plaintiff instituted this action on a note. Defendant alleged that at the time of the execution of the note it was agreed that it was to be paid solely

out of the profits of a partnership in which plaintiff and defendant were then engaged, and set up a cross-action for an accounting upon allegations that plaintiff had theretofore wrongfully taken over all partnership assets, which were sufficient to pay the note. *Held:* The right to set up the cross-action for an accounting comes within the numerous exceptions to the general rule that one partner cannot sue another at law until there had been a complete settlement of the partnership affairs.

4. Pleadings § 28—

Judgment on the pleadings against defendant is not permissible when defendant seeks affirmative relief and plaintiff denies the allegations upon which defendant's prayer for such relief is based.

5. Same: Bills and Notes § 36—

Judgment on the pleadings in an action on a note is error when defendant interposes a valid defense.

APPEAL by defendants from *Alley, J.*, at September Term, 1947, of WATAUGA.

Civil action to recover on a promissory note, executed 30 April, 1946, for $600.00 alleged to be due and payable one day after date with interest at the rate of six per cent per annum until paid.

The defendants filed answer, alleging that at the time the note was executed it was agreed by the parties that the note was not to draw interest and that the principal sum was to be paid out of the profits of a partnership business in which the plaintiff and the defendant, Arlie W. Brown, were then engaged. The defendants further allege in their answer that the plaintiff has heretofore wrongfully taken over all the partnership assets which were sufficient to pay the said note. The defendants also set up a counterclaim and ask for an accounting of the assets of the partnership.

The plaintiff filed a reply in which he denies there were any profits derived from the partnership and alleges that he has heretofore closed out the partnership business.

When this cause came on for hearing in the Court below, counsel for plaintiff moved for judgment on the pleadings. The motion was allowed and judgment was entered for the principal sum, together with interest thereon at six per cent per annum, from 30 April, 1946, until paid. The defendants appeal, assigning error.

T. C. Bowie, Jr., for plaintiff.

Trivette, Holshouser & Mitchell for defendants.

DENNY, J. The only question involved on this appeal is: Was the plaintiff entitled to judgment on the pleadings?

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. *Bessire & Co. v. Ward,* 206 N. C., 858, 175 S. E., 208; *Wilson v. Allsbrook,* 203 N. C., 498, 166 S. E., 313.

Moreover, the defendants allege it was understood at the time this note was executed that it was to be paid out of partnership profits, from a partnership in which the plaintiff and one of the defendants, Arlie W. Brown, were then engaged. In the case of *Ripple v. Stevenson,* 223 N. C., 284, 25 S. E. (2d), 836, this Court said: "It is permissible for the parties to agree that a note shall be paid only in a certain manner, *e.g.,* out of a particular fund, by the foreclosure of collateral, or from rents collected from a certain building, etc. *Jones v. Casstevens,* 222 N. C., 411. And this part of the agreement may be shown, though it rest in parol."

The appellee contends that the general rule that one partner cannot sue another partner at law until there has been a complete settlement of the partnership affairs and a balance struck applies in this case, citing *Pugh v. Newbern,* 193 N. C., 258, 136 S. E., 707. Therefore, he contends the cross-action for an accounting to ascertain whether or not the partnership has sufficient profits out of which the note may be paid cannot be maintained. The position is untenable. There are numerous exceptions to the general rule laid down in *Pugh v. Newbern, supra,* among them being where the partnership property has been wrongfully converted, and "where the partnership has been terminated, all debts paid and the partnership affairs otherwise adjusted with nothing remaining to be done but pay over the amount due by one to the other, such amount involving no complicated reckoning."

Furthermore, it is not permissible to enter judgment on the pleadings against a party seeking affirmative relief when the allegations upon which the prayer for relief is based are denied. "Every fact necessary to be established as a basis for the judgment asked must be admitted either by failure to deny the specific allegations or by specific admission of the facts." *Oldham v. Ross,* 214 N. C., 696, 200 S. E., 393; *Poole v. Scott, ante,* 464, 46 S. E. (2d), 145. Here the defendants deny certain material allegations, interpose a defense, and seek affirmative relief.

The plaintiff's motion for judgment on the pleadings should have been denied. Hence, the judgment below is

Reversed.

IN THE MATTER OF: BRUCE WILSON BUMGARNER, HERBERT CARL BUMGARNER, AND CARL BING BUMGARNER, MINOR CHILDREN OF MRS. GRACE BUMGARNER.

(Filed 24 March, 1948.)

Clerks of Court § 7—Where mother voluntarily appears and gives juvenile court custody of children, it acquires jurisdiction.

Where the mother of minor children, for the purpose of having their custody given to their paternal grandmother, the father being dead, voluntarily comes before Juvenile Court and signs a paper turning over the custody of her children to the Juvenile Court, the Juvenile Court obtains jurisdiction during such time as the custody and control of the children is necessary, notwithstanding the absence of the statutory requirements in cases where the Juvenile Court proceeds directly, and the mother may not thereafter attack on the ground of want of jurisdiction a subsequent order of the Juvenile Court taking the custody away from the grandmother for change of condition and placing the children in the custody of an institution. G. S., 110-21.

APPEAL by Mrs. Grace Bumgarner from *Warlick, J.*, at October Term, 1947, of AVERY.

Civil proceeding originating in the Juvenile Court of Avery County, was heard in Superior Court by Warlick, J., presiding, on appeal thereto from an order of judge of the Juvenile Court.

The record discloses that on 28 September, 1945, Mrs. Grace Bumgarner signed a paper reading as follows:

"North Carolina
Avery County — IN THE JUVENILE COURT

"Bruce Bumgarner
Herbert Bumgarner
Larry Bumgarner — NEGLECT

"Mrs. Grace Bumgarner comes into Juvenile Court and of her own will turns the custody of her three above named sons over to the custody of the Juvenile Court.

"The Judge hereby turns the custody over to Mrs. Margaret Bumgarner, the grandmother of the said children, for trial placement, care and training.

"Mrs. Grace Bumgarner also agrees to place the children's part of the Government allotment in Mrs. Margaret Bumgarner's hands for their care and support and the Judge orders that a financial accounting be rendered every six months.

"Signed by agreement:

September 28, 1945. MRS. GRACE BUMGARNER."

Thereafter, on 7 July, 1947, the judge of Juvenile Court of Avery County signed an order directing the sheriff of Avery County to take the three minors named to Crossnore, N. C., and deliver them to the South Mountain Institute at Nebo, N. C., until further orders of the court.

Thereafter, on 17 July, 1947, Mrs. Grace Bumgarner, mother of the said minors, entered a motion in the Juvenile Court of Avery County, before the judge thereof, "that the said order, together with any other order which may have been entered in the cause, be vacated, recalled and withdrawn, and that the said children be returned to her care and custody immediately, and for such other and further relief as she may be entitled to." Upon the hearing on this motion on 8 August, 1947, Mrs. Grace Bumgarner, being present in person, and represented by attorney, and the State being represented by attorneys, and after argument by the attorneys, the Juvenile judge denied the motion and in accordance therewith signed an order. To the signing of the order the movent, Mrs. Grace Bumgarner, objected and excepted, and appealed to the judge of Superior Court "in open court,—further notice waived."

When the appeal came on for hearing before the presiding judge at the October Term, 1947, "in open court, for the purpose of the record, and emanating from the hearing," the judge found facts substantially as above, and, in connection therewith, found, among others, these pertinent facts:

That during the year 193.... Miss Grace Wilson intermarried with Carl Bumgarner and to that marriage there were born the above named three children; that he entered the armed forces of the United States in the late war and was killed in line of duty, leaving him surviving his wife and the three named children,—all residents of Avery County, North Carolina; that the three children remained in the custody of their mother, who lived at the time near Crossnore, in said county, until 28 September, 1945, when she "voluntarily made her appearance before the Clerk of the Superior Court of Avery County . . . who under the statute, is the duly designated judge of the Juvenile Court for said county, and . . . without any overtures from the said Clerk, made the following signed statement which appears to bear her proper signature"; (here follows the writing of 28 September, 1945, as above quoted); that the voluntary appearance of the mother came through visits made by the Welfare Superintendent, and conversations with her, in view of reports made to the Superintendent which he found to exist; that pursuant to the signed statement the children were legally placed in the possession and under the control of their paternal grandmother, Mrs. Margaret Bumgarner; that this continued for about six months; that the children remained under the supervision of Superintendent of Public Welfare in

the county; and that due to change of conditions, the judge of Juvenile court issued the order of 7 July, 1947, to the sheriff of Avery County, as aforesaid. (Other facts found are not necessary to determination of question raised on this appeal.)

And the judge further finds that "on such facts the parties frankly confess that the sole question for determination on the appeal is whether or not the Juvenile Court of Avery County acquired jurisdiction." The court being of opinion, and holding that the voluntary appearance of the mother before the Clerk, as appears from his record, all in line with the previous discussions with the Welfare Department, constituted on her part legally a surrender of the children, to the upkeep and tuition of the Welfare Department, acting through the Juvenile Court, and that such in law made unnecessary the statutory requirements in cases where the Juvenile Court was proceeding directly, and that the Juvenile Court acquired jurisdiction during such time as the custody and control of the children is necessary,—entered judgment in accordance therewith.

The movent, Mrs. Grace Bumgarner, excepted to the judgment and appeals to Supreme Court and assigns error.

Charles Hughes for appellant.

No counsel contra.

WINBORNE, J. This appeal challenges the ruling of the court below that upon the facts of this case the Juvenile Court of Avery County acquired jurisdiction of the children to whom this proceeding pertains.

Under the pertinent statute, G. S., 110-21, and decision of this Court in *In re Prevatt*, 223 N. C., 833, 28 S. E. (2d), 564, the challenge is not well founded.

The facts in the *Prevatt case* are so similar to those here that the decision there is pertinent and controlling here. Hence, on authority of that case, the judgment below is

Affirmed.

STATE v. RUSSELL BRYANT.

(Filed 24 March, 1948.)

1. Rape § 18—

Evidence *held* sufficient to support verdict of guilty in this prosecution for carnal knowledge of girl between 14 and 16 years of age. G. S., 14-26.

2. Rape § 19: Criminal Law § 53d—Correction of inadvertence by court held not prejudicial.

In this prosecution for carnal knowledge of a girl between 14 and 16 years of age, the period of gestation was relevant solely as bearing upon the accuracy of prosecutrix' testimony as to the time of the intercourse, which she testified resulted in pregnancy. In response to a juror's question, the court charged that there was no law on the period of gestation and no medical evidence had been introduced in regard thereto, but later recalled the jury and instructed them that as a matter of common knowledge the period of gestation is ten lunar months or 280 days. *Held:* The court merely corrected an inadvertence and the jury was neither confused nor misled.

3. Rape § 17—

In this prosecution for carnal knowledge of a girl between 14 and 16 years of age, prosecutrix testified that the intercourse resulted in pregnancy. The child had not been born at the time of the trial. *Held:* Defendant's request that prosecutrix be examined to ascertain the status of the expected child was addressed to the discretion of the trial court, the issue being whether defendant committed the offense and the time of its commission being relevant solely as bearing upon the accuracy of prosecutrix' testimony as to the time of the intercourse.

4. Criminal Law § 53k—

Defendant's exceptions to the court's statement of his contentions *held* without merit.

APPEAL by defendant from *Burney, J.*, at January Term, 1948, of PITT. No error.

The defendant was charged with carnal knowledge of a girl under sixteen years of age in violation of G. S., 14-26. On the trial the State's witness testified the act of intercourse took place 22 April, 1947, and that at that time she was fourteen years of age and had never before had sexual intercourse with any person. She further testified that as result of intercourse with defendant on that date she became pregnant, and at the time of the trial during the one-week term beginning 19 January, 1948, the child was still unborn. The defendant denied ever having had intercourse with the State's witness.

The jury returned verdict of guilty as charged, and from judgment thereon the defendant appealed.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

Albion Dunn and R. T. Martin for defendant.

DEVIN, J. The State's evidence, which seems to have been accepted by the jury, was sufficient to support the verdict and judgment. *S. v. Houpe*, 207 N. C., 377, 177 S. E., 20; *S. v. Swindell*, 189 N. C., 151,

126 S. E., 417. The defendant, however, assigns error in the instruction given by the trial judge to the jury in response to an inquiry from one of the jurors. The juror asked what the law considered "the time limit of gestation," and the court replied that there was no law about it, so far as the court knew, and that there had been no medical or other evidence as to the period of gestation. But shortly afterwards the court recalled the jury and instructed them as follows: "In answer to your question asked me just now as to whether there is any law about the time of pregnancy, the court instructs you that our Supreme Court in *S. v. Forte*, 222 N. C., 537 (539), 23 S. E. (2d), 842, said: 'And it is a matter of common knowledge that the term of pregnancy is ten lunar months, or 280 days.'" We think in this instance the court was correcting an inadvertence and that the jury was neither confused nor misled. No prejudicial error is made to appear.

The defendant's request after the close of the testimony that the State's witness be examined by a physician to ascertain the status of the expected child was addressed to the discretion of the trial judge, and his ruling thereon under the circumstances of the case will not be held for error. *Moyle v. Hopkins*, 222 N. C., 33, 21 S. E. (2d), 826.

The issue before the court and jury was whether the defendant committed the act as charged in the bill. Time was not of the essence. The date was not capitally important. *S. v. Williams*, 219 N. C., 365, 135 S. E. (2d), 617; *S. v. Trippe*, 222 N. C., 600, 24 S. E. (2d), 340; *S. v. Baxley*, 223 N. C., 210, 25 S. E. (2d), 621. The question as to the period of gestation was directed merely to the accuracy of the testimony of the State's witness as to the date of the commission of the offense charged, rather than as determinative of the fact.

The defendant's exception to the judge's charge to the jury in respect to his statement of the contentions of the defendant is without merit. *S. v. Jessup*, 219 N. C., 620, 14 S. E. (2d), 668.

In the trial we find

No error.

STATE v. E. E. GENTRY.

(Filed 24 March, 1948.)

1. Criminal Law § 52a—

Motion to nonsuit in a criminal prosecution is properly denied if there is any competent evidence to support the allegations of the bill of indictment, considering the evidence in the light most favorable to the State, and giving it the benefit of every reasonable inference fairly deducible therefrom.

2. Embezzlement §§ 1, 7—Evidence held to show defendant was "agent" in receiving funds within meaning of embezzlement statute.

The evidence tended to show that prosecuting witness requested defendant to refinance a chattel mortgage on the witness' automobile, that defendant agreed to do so for a fee, that defendant obtained cash from a finance company on a second chattel mortgage and notes executed by the witness or purported to have been executed by him, and advised the witness that he had sent the money to pay off the prior mortgage, that the prior mortgage was not paid, and that defendant refused to reimburse the witness. *Held:* The evidence is sufficient to be submitted to the jury on the charge of embezzlement by defendant of funds received by him as agent of the prosecuting witness. G. S., 14-90.

3. Embezzlement § 2—

Fraudulent intent within the meaning of G. S., 14-90, is the intent of an agent to embezzle or otherwise willfully and corruptly use or misapply the property of the principal or employer for purposes other than those for which the property is held.

4. Criminal Law § 42d—

Where, in a prosecution for embezzlement, testimony in regard to papers upon which defendant obtained money from a finance company as agent for the prosecuting witness is competent, the introduction in evidence of the papers is competent for the purpose of corroboration.

5. Criminal Law § 48c—

Exception to the general admission of evidence competent for a restricted purpose will not be sustained in the absence of a request by appellant, at the time the evidence is admitted, that its admission be restricted.

6. Criminal Law § 81c (3)—

Defendant was charged with embezzlement of funds obtained by him as agent of the prosecuting witness to pay off a chattel mortgage on the witness' car. *Held:* The mortgagee being the only foreign corporation referred to by witnesses and that it repossessed the car because of default being a reasonable inference from the evidence, testimony of prosecuting witness to this effect is harmless, even though he did not give the name of the company and had no personal knowledge of the reason for repossession.

7. Criminal Law § 34e—

Defendant was charged with embezzlement of funds obtained by him as agent of prosecuting witness to pay off a chattel mortgage on the witness' car. Witness testified that defendant stated he had sent the money to the mortgagee, that witness thereupon emphatically challenged the veracity of the statement and accused defendant of not having sent the money. *Held:* Failure of defendant to deny witness' accusation is competent as an implied admission that defendant had not sent the money.

8. Criminal Law § 78c (2)—

Ordinarily, misstatements in recapitulating the evidence or in stating defendant's contentions must be brought to the attention of the trial court in time to afford opportunity for correction.

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

APPEAL by defendant from *Alley, J.*, at August Term, 1947, of CALDWELL.

Criminal prosecution upon a bill of indictment charging defendant with embezzlement of $565 allegedly received and had by him for and on the account of Woodrow Price. G. S., 14-90.

Upon the trial in Superior Court the State offered the testimony of Woodrow Price, and written papers identified by him, and the oral testimony of Luther Bolick, the manager of the National Trading Company of Hickory, North Carolina.

The testimony of Woodrow Price tended to show the following narrative of facts: In 1941 he, Woodrow Price, purchased a Chevrolet car in Baltimore, Maryland,—trading in an old car in part payment, and financing the balance of the purchase price through National Investment Company of Baltimore, that is, he borrowed some money from that company, and gave to it "a title paper" as security therefor. In 1945 he came back to North Carolina and brought the car with him. He had a 1945 State of Maryland registration card for the car, Exhibit C, which contained detailed description of car and engine. At that time he still owed over $600 on the car, and, after returning, he made two or three payments, reducing the amount to $437. He then went to see defendant E. E. Gentry at his place of business in Lenoir, North Carolina, and told him that he, Price, needed the money to pay off what was owing in Baltimore so that he could have title transferred, so he could get a North Carolina tag. Gentry said he would refinance it for $25. Price said all right, and at the suggestion of Gentry, Price signed three papers, partly printed and partly written,—the writing in which was filled out there in Gentry's place of business by a boy who was working for Gentry—Gentry being present. These papers identified by Price are: (1) A paper captioned "Borrower's Statement." (This is Exhibit A.) (2) A paper reading in pertinent parts: "National Trading Company, Hickory, North Carolina. In account with Woodrow Price, R. F. D. #9, Lenoir, North Carolina. Date: Feb. 11, 1946. Loan: $500. Finance and Insurance $96.76. Total Note—$596.76. Payable—Payments of $49.73. First Installment due March 11, 1946. Copy of this Transaction Received: Details of which are correct. Signed—Woodrow Price." (This is Exhibit B.) (3) A paper purporting to be a note for $596.76, dated 11 February, 1946, payable to the order of National

Trading Company at Hickory, North Carolina, in twelve equal monthly installments of $49.73 due on the 11th of each month, starting 11 March, 1946, until the full amount of the principal shall have been paid with interest on deferred payments after maturity, etc. This note is appended and attached to what purports to be a chattel mortgage from and signed by Woodrow Price to National Trading Company of Hickory, North Carolina, acknowledging an indebtedness to it in the sum of $596.76, "payable in accordance with the terms of a certain note of even date herewith, executed by the undersigned and hereto attached," and conveying as security for the indebtedness a 1941 Chevrolet situated at Route #9, Lenoir, N. C., and of same description as that contained on the 1945 State of Maryland registration card—Exhibit C—to which reference is above made. Price testified that his purported signature to the purported chattel mortgage is not in his handwriting. (The note and purported chattel mortgage are Exhibit D.)

After these papers were filled out and signed, as above stated, defendant kept them. Price told Gentry how much money he wanted to borrow to pay off what he owed in Baltimore. Gentry said he would send it to Baltimore and have the title transferred and come back to him,—and Price gave to Gentry the receipt book he had obtained from the National Investment Company of Baltimore, showing every payment he had made. Gentry did not then tell Price where he intended to finance the car,—but did sometime later. Price made two payments of $40 on 16 February, 1946, and $25 on 1 March, 1946, to Gentry, and the boy that worked for Gentry gave him receipts bearing these dates. (These are Exhibits E and F.)

Sometime in March, the Baltimore company took the automobile from Price.

In this connection Price, while on the witness stand, was asked this question: "Why did the Baltimore company take your car?", to which he replied, "They had never received any money for it." As to this the solicitor for the State and counsel for defendant stipulate that: "The defendant did not object or except to the foregoing question. After the question had been propounded to the witness by counsel for the State, and after the witness had answered the question, as set forth above, and after the jury had heard the answer of the witness, the defendant for the first time objected to the answer, but did not move to strike out the same. The objection of the defendant to the answer was overruled, and the defendant excepted. This is Assignment of Error Number 11."

The narrative of Price's testimony continues: In a later conversation Gentry told Price that he had sent a company check to Baltimore to pay what was owing there and that the title should be back. Gentry said he got the money, $500, from the National Trading Company and sent it to

Baltimore. Price, who was then working at a furniture factory, stopped by every evening to ask about it, and Gentry said there was no need to worry about it . . . But Price never did get a title from Gentry or anyone else, and he lost his car. In a later conversation Gentry said he got the money and sent his personal check to the finance company in Baltimore. This was after the car had been taken from Price. Price further testified: "After that I had a conversation with Mr. Gentry. I went to his place of business and asked him if he wanted to pay me my money back or part of the money back that I had lost on my car, and he said No, that he had paid the National Trading Company and that he was not going to lose any more money on it . . . He said that he had sent the money to Baltimore . . . that he had sent his personal check . . . He never did give me any money back. When he told me he had sent his personal check to the finance company, I told him he was a — — liar, that he had never sent them anything. He didn't say anything for a little bit and he didn't remember what he sent but he didn't deny it when I said he had not sent them anything. He didn't say whether he had or not. I lost my automobile and my money. At the time I talked to him he told me that he had taken those papers to the National Trading Company and got $500 from them."

Then on cross-examination Price testified: "I didn't give him anything except the money for the two receipts totaling $65, and that was on a debt."

The witness Luther Bolick testified: "I live in Hickory and am manager of National Trading Company and have custody of the checks and securities of said company. There is no record of any check being issued to any finance company in Baltimore on this car. When the loan was made cash was issued rather than a check. The paper writing marked . . . Exhibit D on an automobile is held by the National Trading Company. It is the property of said company. There have been three payments made on that paper, $49.73, a total of $149.19. Its credits are to Woodrow Price. The first payment was on 14 March, 1946; the second 12 June, 1946, and the third 14 June, 1946. There was paid to Mr. Gentry on this account $500 in cash." Q. "When did you first receive notice that there was any other written claim on this automobile?" Objection—overruled—exception No. 11A. A. "I am not sure about the exact date, but it was about July or August 1946." Then on cross-examination the witness testified: "We simply made Mr. Gentry a loan of $500 and accepted those papers as collateral on that loan." And on re-direct examination the witness concluded his testimony by saying, "We advanced $500 on that paper. I didn't know what he got it for or anything about any trade between he and Mr. Price."

The State rested, and defendant made motion for judgment as of nonsuit. The motion was denied and he excepted. Then defendant rested, and renewed his motion for judgment as of nonsuit. Motion was denied and defendant excepted.

Then counsel for State was permitted to recall Woodrow Price, who testified: "After my car was taken I had a conversation with Gentry and asked him whether or not he had received his personal check back. I asked him if he had a check or anything to show he sent the check up there, and he said No, he didn't have anything to show that he had sent the money up there, just my word."

Again the State rested, and defendant, reserving exception to denial of his motion for judgment as of nonsuit, again rested, and renewed his motion for judgment as of nonsuit, to the denial of which he again excepted.

Verdict: Guilty as charged in the bill of indictment.

Judgment: Imprisonment in the common jail of Caldwell County for the term of three years and assigned to do labor under the supervision of the State Highway and Public Works Commission.

Defendant appeals therefrom to the Supreme Court and assigns error.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

W. H. Strickland for defendant, appellant.

WINBORNE, J. The statute, G. S., 14-90, under which defendant is indicted and convicted, provides in pertinent part that "If . . . any agent, . . . except persons under the age of sixteen years, of any person, shall embezzle or fraudulently or knowingly and willfully misapply or convert to his own use, or shall take, make away with or secrete, with intent to embezzle or fraudulently or knowingly and willfully misapply or convert to his own use any money, goods or other chattels . . . or any other valuable security whatsoever belonging to any person . . . which shall have come into his possession or under his care, he shall be guilty of a felony, and shall be punished as in cases of larceny."

In the light of the provisions of this statute, defendant stresses for error the denial of his motions for judgment as of nonsuit. It is the well settled law in this State that in considering a motion for judgment as of nonsuit in a criminal prosecution, the evidence must be taken in the light most favorable to the State, and if when so taken there is any competent evidence to support the allegations of the bill of indictment, the case is one for the jury. And, on such motion the State is entitled to the benefit of every reasonable inference which may be fairly deduced from the evidence. See *S. v. Davenport,* 227 N. C., 475, 42 S. E. (2d), 686, and cases there cited.

Applying this rule to the present case, there is evidence tending to show, or from which reasonable inferences may be drawn as tending to show every essential element which enters into the crime of embezzlement, as required by the provisions of the statute. G. S., 14-90. There is evidence tending to show that in the transaction in question based upon valuable consideration defendant became the agent of Woodrow Price (1) to obtain money from National Trading Company of Hickory, N. C., on Price's account evidenced by his note, and (2) to pay the money to the National Investment Company of Baltimore for the purpose of having title to Price's automobile released. The evidence also tends to show that defendant obtained the money in cash from National Trading Company of Hickory, N. C., on papers executed or purporting to be executed by Price, and had the money in his possession. The evidence further tends to show that defendant misapplied the money, or converted it to his own use. Also there is sufficient evidence from which it may be inferred that the misapplication of the money by defendant, or the conversion of it to his own use was knowingly and willfully done with fraudulent intent.

Fraudulent intent which constitutes a necessary element of the crime of embezzlement, within the meaning of the statute, G. S., 14-90, is the intent of the agent to embezzle or otherwise willfully and corruptly use or misapply the property of the principal or employer for purposes other than those for which the property is held. *S. v. Howard,* 222 N. C., 291, 22 S. E. (2d), 917. See also *S. v. McDonald,* 133 N. C., 680, 45 S. E., 582; *S. v. Lancaster,* 202 N. C., 204, 162 S. E., 367; *S. v. McLean,* 209 N. C., 38, 182 S. E., 700.

Hence, the motions for judgment as of nonsuit were properly denied.

Defendant also bases other assignments of error upon general exceptions taken to the admission of the Exhibits A to F. The principal argument is that these exhibits are hearsay evidence. It appears, however, that the existence of such papers tended to corroborate the witness Woodrow Price, and were competent for that purpose. It will not be ground of exception that evidence competent for some purposes, but not for all, is admitted generally, unless the appellant asks, at the time of admission, that its purpose shall be restricted. Rule 21 of Rules of Practice in the Supreme Court, 221 N. C., 544. Here the record on the present appeal does not show that any such request was made by appellant. Hence, in the admission of the exhibits in evidence, no error is made to appear.

Regarding Exception No. 11. The argument here advanced is that the question and answer are incompetent for the reason that the witness could not know why his car had been repossessed and that he did not say what Baltimore company had repossessed the same. In the light of

the stipulation of record, p. 25, it would seem that the court below must have deemed the objection to the answer insufficient, and perhaps too late. *Hodges v. Wilson,* 165 N. C., 323, 81 S. E., 340. But, be that as it may, we fail to see harmful error. The witness had testified without objection that "The Baltimore company took the car." The National Investment Company of Baltimore is the only Baltimore company to which reference had been made. It was the only Baltimore company, so far as the evidence discloses, that had any claim against the car. The reasonable inference is that it was that company that repossessed the car and that it did so because there was default in the payment of the indebtedness to it. Moreover, the evidence that when Price emphatically challenged the veracity of defendant in stating that he had sent his personal check to the Baltimore company,—that he had never sent them anything, defendant did not say anything for a bit, did not remember what he sent, but did not deny it. These are circumstances tending to show an admission that he had not sent the money to pay the debt to National Investment Company. Compare *S. v. Hawkins,* 214 N. C., 326, 199 S. E., 284, and cases cited.

The assignments of error directed against the charge are not well taken. They relate to portions of the charge in which the court was recapitulating the evidence, and stating contentions, and the record does not show that the court's attention was called to any misstatement. Ordinarily, an error in stating the contentions of a party or in recapitulating the evidence should be called to the attention of the court in time to afford an opportunity of correction,—otherwise it may be regarded as waived or as a harmless inadvertence. See *S. v. McNair,* 226 N. C., 462, 38 S. E. (2d), 514, and cases cited.

All other assignments of error, after due consideration, have been found to be without merit.

Hence, in the judgment below, we find

No error.

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

CARMEL STEELMAN v. CHARLES BENFIELD AND H. D. McLEAN,

and

JAMES PARSONS v. CHARLES BENFIELD AND H. D. McLEAN.

(Filed 24 March, 1948.)

1. Appeal and Error § 23—

While the form of the assignments of error must depend largely upon the circumstances of each case, they should clearly present the error relied upon without the necessity of going beyond the assignment itself to learn what the question is.

2. Appeal and Error § 28—

The brief should succinctly state the questions of law arising upon the exceptions which appellant desires to have discussed and decided so as to enable the court, as well as counsel, to obtain an immediate grasp of the nature of the controversy.

3. Automobiles § 18h (2)—

Two cars, traveling in opposite directions, collided on the highway. There was conflicting evidence for plaintiffs and for defendants tending to show, respectively, that the other car was being operated on its left side of the highway. *Held:* The conflicting evidence raises questions of fact for the determination of the jury.

4. Trial § 15—

Motion to strike must be made immediately after the testimony objected to in order to preserve an exception to the admission of the evidence.

5. Trial § 14—

Objection to the admission of a photograph in evidence, interposed for the first time when a witness undertakes to use the photograph to explain his testimony, is too late.

6. Evidence § 30a—

Where a photograph is used solely to explain testimony as to the damage to a car and not to depict the scene of the accident, the fact that the car had been moved from the scene at the time the photograph was taken does not render it incompetent.

7. Trial § 31b—

The trial court, in reviewing the evidence, is not required to give a verbatim recital of the testimony, but only a summation sufficiently comprehensive to present every substantial and essential feature of the case.

8. Appeal and Error § 6c (6)—

In the court's summation of the evidence, inaccurate statements of facts in evidence, as distinguished from a statement of facts not shown in the evidence, must be brought to the court's attention in apt time in order for an exception thereto to be considered.

9. Automobiles § 12a—

Evidence of speed greater than is reasonable and prudent under the conditions then existing and, in any event, in excess of 45 miles per hour, is evidence of negligence under the provision of G. S., 20-141, prior to the amendment of Ch. 1067, sec. 17, Session Laws 1947.

10. Appeal and Error § 39f—

Where the charge of the court is without error when considered contextually, exceptions to excerpts therefrom cannot be sustained.

APPEAL by defendants from *Alley, J.*, January Term, 1948, WILKES. No error.

Two civil actions to recover compensation for personal injuries and property damages resulting from a taxi-automobile collision. In the Parsons case the defendants pleaded a counterclaim. The two cases were tried together by consent.

On 25 July 1946, Steelman was operating an automobile on the Wilkesboro-Lenoir highway, going in a westerly direction towards Lenoir. Parsons was his guest passenger. At the same time Benfield was operating a taxi belonging to defendant McLean on the same highway, going easterly towards Wilkesboro. He was at the time an employee of McLean, engaged in the discharge of his duties as such. The two vehicles met and collided in a curve just west of the village of Boomer. Evidence as to the circumstances of the collision is in sharp conflict.

The testimony for plaintiffs tends to show that Steelman was operating his vehicle on his right side of the road and on the outside of the curve, at about 30 miles per hour; that Benfield approached from the opposite direction at a high rate of speed—60 or 65 miles per hour; his taxi "was bouncing up and down" and was veering to its left across the center of the road. "When the taxi began to come into the curve he (Benfield) was coming too fast when he started to make the curve he couldn't make it, the car kept veering over toward us." Steelman cut his car to the right, partly off the hard surface, when the taxi collided with his right front wheel, "bounced up on top" of the automobile and "bounced back off the side of our car and was sitting about midways of the road." Parsons was thrown against the windshield and then out of the car on the bank of the road, suffering certain personal injuries. Steelman remained under the steering wheel and suffered a fractured pelvis and other serious injuries. His car was badly damaged.

On the other hand, the evidence for the defendants tends to show that just as the taxi, going about 40 miles per hour, reached or was entering the curve, Benfield saw Steelman's automobile approaching on the wrong side of the road and that he cut to his right, partly off the hard surface, to avoid the collision, but was hit by plaintiff's automobile and the taxi

was knocked backward 10 or 15 feet. Benfield suffered certain personal injuries and "the whole front end" of his taxi was mashed in.

At the hearing in the court below appropriate issues in each action were submitted to the jury. In the Parsons case these included issues raised by defendants' pleaded counterclaim. The issues in each case were answered in favor of the plaintiff. From judgments on the verdicts defendants appealed.

W. H. McElwee and Hayes & Hayes for plaintiff appellees.

W. H. Strickland and Larry S. Moore for defendant appellants.

BARNHILL, J. The defendants' assignments of error consist of a *seriatim* listing of the exceptions entered during the trial. Two and one-half pages of their brief are consumed in stating the "questions involved." The "questions" as stated are the exceptions in abbreviated form, of which the following is typical: "Was there error in the question and answer set forth in Assignment of Error No. 1 (R. p. 21)?" They make no effort to state the questions of law raised by their exceptions which they desire to have discussed and decided.

"Just what will constitute a sufficiently specific assignment must depend very largely upon the special circumstances of the particular case; but always the very error relied upon should be definitely and clearly presented, and the Court not compelled to go beyond the assignment itself to learn what the question is." *Thompson v. R. R.*, 147 N. C., 412; *Porter v. Lumber Co.*, 164 N. C., 396, 80 S. E., 443.

". . . the points determinative of the appeal, shall be stated clearly and intelligibly by the assignment of errors . . .," *McDowell v. Kent*, 153 N. C., 555, 69 S. E., 626; *Jones v. R. R.*, 153 N. C., 419, 69 S. E., 427; *Cecil v. Lumber Co.*, 197 N. C., 81, 147 S. E., 735; *Rawls v. Lupton*, 193 N. C., 428, 137 S. E., 175; *Jenkins v. Castelloe*, 208 N. C., 406, 181 S. E., 266; *Harrell v. White*, 208 N. C., 409, 181 S. E., 268; and "the first page of appellant's brief . . . shall be used . . . for a succinct statement of the question or questions involved on the appeal. Such statement should not ordinarily exceed fifteen lines, and should never exceed one page . . .

"The statement of the questions involved or presented by the appeal, is designed to enable the Court, as well as counsel, to obtain an immediate view and grasp of the nature of the controversy; and failure to comply with this rule may result in dismissal of the appeal." Rule 27½, 221 N. C., 562; *Caldwell v. R. R.*, 218 N. C., 63, 10 S. E. (2d), 680; *Lumber Co. v. Latham*, 199 N. C., 820, 155 S. E., 925; *Pruitt v. Wood*, 199 N. C., 788, 156 S. E., 126.

It would seem that the motion of plaintiffs to dismiss is not without substantial merit.

Clearly there was sufficient evidence to repel the motion for judgment as in case of nonsuit and to require the submission of appropriate issues to the jury. It was for them to decide the credibility of witnesses and sift the truth from the conflicting testimony.

Exceptions relating to the admission of testimony are without merit. While it is contended that one of the answers of plaintiff Steelman was not responsive and based on opinion and not on fact, there was no motion to strike. *Hodges v. Wilson,* 165 N. C., 323, 81 S. E., 782; *Luttrell v. Hardin,* 193 N. C., 266, 136 S. E., 726, and cited cases. A motion "to strike all testimony of plaintiff" entered at the conclusion of his testimony in chief is not sufficient to raise the question sought to be presented.

Likewise, there was no exception to the introduction of the photograph used to illustrate the testimony of the witness concerning the damage done to the Steelman car. Exception was interposed for the first time when the witness undertook to use the photograph to explain what he had said. *S. v. Gardner, ante,* p. 567, and cases cited.

As the photograph was used only to explain and illustrate the testimony concerning damage to the car and not to depict the scene of the accident, it was not rendered incompetent by reason of the fact the automobile had been moved from the scene at the time the photograph was taken. Furthermore, the same evidence was offered later without objection.

The court, in reviewing the evidence offered by the respective parties, is not required to give the jury a verbatim recital of the testimony. It must of necessity condense and summarize the essential features thereof in short-hand fashion. All that is required is a summation sufficiently comprehensive to present every substantial and essential feature of the case. When its statement of the evidence in condensed form does not correctly reflect the testimony of the witnesses in any particular respect, it is the duty of counsel to call attention thereto and request a correction.

There was testimony concerning the use of a cast on Steelman while he was in the hospital. The doctors discussed putting him in a cast and "they came to my room and wanted to put me in one but I asked them not to. They said if I observed orders they would not." As to the manner of operation of the taxi, Parsons testified, "When the taxi began to come into the curve he was coming too fast when he started to make the curve he couldn't make it, the car kept veering over toward us." Exceptions to excerpts from the court's review of this and other testimony offered point out inaccurate statements of facts in evidence rather than statements of fact not shown in evidence. Hence *Smith v. Hosiery Mill,* 212 N. C., 661, 194 S. E., 83; *S. v. Wyont,* 218 N. C., 505, 11

S. E. (2d), 473; *Curlee v. Scales,* 223 N. C., 788, 28 S. E. (2d), 576, and like cases are not in point. Instead they fall within the line of decisions represented by *Sorrells v. Decker,* 212 N. C., 251, 193 S. E., 14; *Ellis v. Wellons,* 224 N. C., 269, 29 S. E. (2d), 884; and *S. v. Edwards, ante,* 153. As the Court's attention was not called thereto and exception not entered in apt time, they are not now tenable.

At the time of the occurrence which is the subject matter of this controversy G. S. 20-141 was in full force and effect. Hence, evidence of speed greater than was reasonable and prudent under the conditions then existing and, in any event, in excess of 45 miles per hour, was evidence of negligence. *Kolman v. Silbert,* 219 N. C., 134, 12 S. E. (2d), 915; *Hoke v. Greyhound Corp.,* 226 N. C., 692, 40 S. E. (2d), 345. For present law see Ch. 1067, sec. 17, Session Laws 1947.

The court's charge, considered contextually, discloses that it adequately and clearly defined proximate cause and the degree of care required of a motorist in the operation of his vehicle. Exceptions to excerpts therefrom cannot be sustained.

Other exceptions relied on by appellants have been carefully considered. They present no new or novel question of law and are not of sufficient merit to require discussion.

No harmful or prejudicial error in the trial below is made to appear. Hence the judgments entered must be affirmed.

No error.

E. A. GOINS v. RONALD McLOUD.

(Filed 24 March, 1948.)

1. Ejectment § 2—

A magistrate has jurisdiction of proceedings in summary ejectment only if there is a contract of tenancy creating the relationship of landlord and tenant and if defendant holds over after the expiration of the term, and the remedy does not extend to a tenant at sufferance or at will. G. S., 42-26.

2. Ejectment § 9—

The jurisdiction of the Superior Court on appeals in summary ejectment is derivative, and where the jury, upon conflicting evidence, in a trial free from error, finds that defendant did not enter into possession as tenant of plaintiff, judgment for defendant is not error.

APPEAL by plaintiff from *Patton, Special Judge,* September-October Term, 1947, CALDWELL. No error.

Proceeding in summary ejectment instituted in a magistrate's court and heard on appeal in the court below.

The jury for their verdict found that defendant did not enter upon and occupy the premises as tenant of plaintiff. The court thereupon entered judgment for defendant and plaintiff appealed.

W. H. Strickland for plaintiff appellant.

Max C. Wilson for defendant appellee.

BARNHILL, J. The magistrate before whom this action was instituted had jurisdiction only in the event the relationship of landlord and tenant existed between plaintiff and defendant. G. S. 42-26; *Howell v. Branson*, 226 N. C., 264, 37 S. E. (2d), 687. On appeal the jurisdiction of the Superior Court was derivative and trial there was limited to the issues properly raised in the court of origin. *Wells v. West*, 212 N. C., 656, 194 S. E., 313; *Allen v. Insurance Co.*, 213 N. C., 586, 197 S. E., 200; *Cheek v. Insurance Co.*, 215 N. C., 36, 1 S. E. (2d), 115; *Leonard v. Coble*, 222 N. C., 552, 23 S. E. (2d), 841; *Howell v. Branson, supra*. In brief these were: (1) Was there a contract of tenancy creating the relationship of landlord and tenant; and if so, (2) did defendant hold over or continue in possession after the expiration of his term?

That defendant entered into possession of the premises as tenant of plaintiff was denied. The evidence in respect thereto was in sharp conflict. The jury has resolved the question in favor of defendant, in a trial free from error.

Plaintiff argues that defendant is at least a tenant at sufferance or at will. If so, his remedy is not by summary ejectment, and the issue was not triable in this cause.

In the trial below we find

No error.

STATE v. JAMES LEROY JACKSON.

(Filed 24 March, 1948.)

1. Criminal Law § 53f—

The use of the phrases "tending to show" or "tends to show" in arraying the evidence for the State, the same expressions being used in reciting defendant's testimony, does not constitute an expression of opinion on the facts. G. S., 1-180.

2. Criminal Law § 53d—

The chief purposes of the charge are clarification of the issues, elimination of extraneous matters, and declaration and application of the law arising upon the evidence. G. S., 1-180.

3. Same: Criminal Law § 81c (2)—

The action of the trial court in prefacing a special instruction with a charge that the jury should disregard previous instructions if and to the extent of inconsistency with the instructions about to be given, is not approved, but in the instant case *it is held* not prejudicial.

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

APPEAL by defendant from *Gwyn, J.*, at December Term, 1947, of BURKE.

Criminal prosecution on indictment charging the defendant with the murder of one David H. Francum.

The record discloses that on the night of 18 November, 1947, David H. Francum and his wife, Swamie, drove from their lunch stand in Valdese to their home in the country, a distance of about 1.8 miles, carrying with them most of the money which they had taken in during the day. When they arrived at home, they went into the house, the husband lighted the lamp and fixed the fire in the stove. He then returned to the front porch. Pretty soon his wife heard a shot. She ran out on the porch and found her husband in a slumped position. While trying to assist him, someone began hitting her over the head with a board. She slumped down behind her husband, feigning unconsciousness, and waited for their assailant to depart, which he did after taking what money the husband had in his pockets. The wife then managed to get her husband into the house. He died at 11:15. The wife remained in the house all night, being afraid to get out in the dark and rain, and when it was light she went and called for help.

The defendant, a neighbor living near-by, was arrested and charged with the killing. He confessed to the officers that he shot the deceased, hit his wife over the head with a stick, and took the money. He further stated in his confession, which was admitted without objection, that he planned to shoot the deceased in order to get his money. In time past, the defendant had been a police officer in Cincinnati, Ohio, for about three years.

On the witness stand, the defendant repudiated his confession; said that the shooting was accidental; that he went to the rescue, and that when he saw what he had done he became confused, struck Mrs. Swamie Francum over the head and took her husband's money.

Verdict: Guilty of the capital felony of murder in the first degree.

Judgment: Death by asphyxiation.

The defendant appeals, assigning errors.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

O. L. Horton and Russell Berry for defendant.

STACY, C. J. The case presents little more than issues of fact, determinable alone by the jury. All of the exceptions, here pressed, are directed to portions of the charge, and to the failure of the court to declare and explain the law arising upon the evidence. G. S., 1-180.

First, the defendant contends that by using the words, "tending to show" or "tends to show," in arraying the evidence offered by the State, the court expressed an opinion on the weight of the evidence. The same expressions were used in reciting the defendant's testimony. These expressions have been held not to impinge the provisions of the statute nor to constitute an expression of opinion on the facts. *S. v. Howard,* 222 N. C., 291, 22 S. E. (2d), 917; *S. v. Harris,* 213 N. C., 648, 197 S. E., 142; *S. v. Jackson,* 199 N. C., 321, 154 S. E., 402.

Just before concluding his charge to the jury, the trial court gave a special instruction at the instance of the prosecution, prefacing the same with the following direction: "If the court has at any time given you any instruction inconsistent with the instruction which I shall presently give you, then you will disregard any such former instruction to the extent of such inconsistency and be governed by the following mandate:" (Then follows the special instruction.)

While no particular harm seems to have resulted from this preliminary statement in the instant case, it is not to be approved as a general practice. The trial court ought not to submit his charge to the jury for elimination of inconsistencies. It is his duty to "state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon." G. S., 1-180. The chief purposes of the charge are clarification of the issues, elimination of extraneous matters, and declaration and application of the law arising upon the evidence. *Irvin v. R. R.,* 164 N. C., 6, 80 S. E., 78; *S. v. Matthews,* 78 N. C., 523; *S. v. Dunlop,* 65 N. C., 288. "The jury should see the issues, stripped of all redundant and confusing matters, and in as clear a light as practicable." *S. v. Wilson,* 104 N. C., 868, 10 S. E., 315.

The record in this case is one of moving pathos. A frugal and hard-working couple of Swiss descent or ancestry, living peaceably in their humble home, meet with a monstrous tragedy in a land dedicated to their protection and welfare. Are there no preventives for such crimes? *S. v. Gosnell,* 208 N. C., 401, 181 S. E., 323. Does the deterrence theory

belong exclusively to the field of law enforcement? *S. v. Phifer,* 197 N. C., 729, 150 S. E., 352. A civilized State might well pause and ponder the matter.

The record is free from reversible error. The verdict and judgment will be upheld.

No error.

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

STATE v. GLENN BELL AND MILLARD BELL.

(Filed 24 March, 1948.)

1. Robbery § 3—

Where separate indictments charging defendants with robbing two individuals are consolidated for trial, and there is no evidence that defendants took any money or goods of value from one of the persons named, motion to nonsuit that prosecution should be allowed.

2. Robbery §§ 1a, 1b—

Common law robbery is the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear; and by statutory provision, a more severe punishment is prescribed if the offense be committed by the use or threatened use of firearms or other dangerous weapon whereby the life of a person is endangered or threatened. G. S., 14-87.

3. Robbery § 3—

Defendants' contention that nonsuit should have been allowed on the charge of robbery because the evidence failed to show violence or intimidation in the felonious taking of money from the person of prosecuting witness, it being in evidence that defendants accomplished the taking by impersonating officers of the law and threatening to arrest the victim for an alleged offense, *is held* untenable when there is evidence that defendants also used physical force and threatened to inflict bodily injury.

4. Same—

Where there is evidence that one of defendants, in feloniously taking money from the person of prosecuting witness against his will by violence and intimidation, flourished and threatened to use a pistol, the other defendant being present aiding and abetting the commission of the offense, the evidence is sufficient to sustain conviction of robbery with firearms.

5. Indictment § 22—

An indictment for robbery with firearms will support a conviction of the lesser offenses of common law robbery, assault, larceny from the person, or simple larceny, if there is evidence of guilt of such lesser offenses.

6. Robbery § 3: Criminal Law § 53g—

Where all the evidence tends to show that defendants feloniously took money from the person of prosecuting witness by violence and against his will through the use or threatened use of firearms, the court properly limits the jury to a verdict of guilty of robbery with firearms or a verdict of not guilty, there being no evidence warranting the court in submitting the question of defendants' guilt of less degrees of the crime. G. S., 15-169; G. S., 15-170.

APPEAL by defendants, Glenn Bell and Millard Bell, from *Clement, J.*, and a jury, at September Term, 1947, of YADKIN.

Two separate indictments were returned against the defendants, one in criminal action No. 199 charging them with robbery with firearms of Ernest Fox and the other in criminal action No. 210 charging them with robbery with firearms of Stewart Fox. Upon suggestion of the defendants, the cases were removed from Wilkes County to Yadkin County for trial pursuant to G. S., 1-84. The two indictments were consolidated for trial by consent, and were treated in the court below as separate counts in the same bill. *S. v. Alridge*, 206 N. C., 850, 175 S. E., 191. The defendants pleaded not guilty to both charges,

The defendants offered no evidence relating to the merits. Stripped of its nonessentials, the uncontroverted testimony of the State presented the picture set forth below.

Sometime after midnight on 26 April, 1947, Ernest Fox, his twelve-year-old daughter, Faye Fox, and his sister-in-law, Aileen Fox, were proceeding in a westerly direction along a highway in Wilkes County in a Studebaker pick-up truck owned by Ernest Fox and driven by his brother, Stewart Fox. This truck was chased, overtaken, and stopped by the occupants of an automobile, which was equipped with a spotlight and which was brought to a standstill within six feet of the truck. The two defendants alighted from the automobile, leaving a third man sitting therein with something which Ernest Fox took to be a sawed-off shotgun.

After dismounting from the automobile, the defendants went to the truck and falsely represented themselves and their companion in the automobile to be officers of the law. The defendant, Glenn Bell, wore "a police cap with a badge up in front" and "a blue coat like police wear" and was armed with a pistol which was in plain view of Ernest Fox and the other occupants of the truck. Glenn Bell threatened to arrest Stewart Fox for speeding and demanded that he exhibit to him the registration card covering the Studebaker truck. Upon being informed that the truck belonged to Ernest Fox, Glenn Bell ordered Ernest Fox to get out of the truck and to submit the registration card to his inspection. When Ernest Fox alighted from the truck in response to this command, Glenn Bell forcibly seized and searched him. Upon

finding some pistol cartridges in Ernest Fox's pockets, Glenn Bell accused Ernest Fox of having a "damn gun" and commanded Ernest Fox to surrender such weapon to him. Ernest Fox thereupon took his unloaded pistol from the glove compartment of the truck, and delivered it to Glenn Bell, who subsequently carried it away.

After relieving Ernest Fox of the empty pistol, Glenn Bell said that he was going to arrest Stewart Fox for speeding and Ernest Fox for having a gun, and asked them "about paying a cash bond." At this point, Glenn Bell stuck his own pistol against Ernest Fox's stomach, saying, "See how quick I can get it out. By God, I can use it. By God, I ain't afraid to use it, and I will use it." Glenn Bell then "took his gun down and kept waving it around" and threatened to take Ernest Fox and Stewart Fox to jail unless they paid him $45.00 as fines "for speeding and carrying a gun." Ernest Fox thereupon gave this sum to Glenn Bell, who afterwards carried it away. At this time Ernest Fox's little daughter, Faye Fox, was "crying big."

Ernest Fox paid the $45.00 over to Glenn Bell because Glenn Bell and his companions were armed, because "they had me scared," and because he was afraid that otherwise he and his brother would be forcibly carried to jail by the defendants and their associate, leaving his small daughter and his sister-in-law unprotected upon an unfamiliar and deserted road at 1:30 o'clock in the morning.

While these events took place, Millard Bell and the third man in the automobile were present, and by their acts, gestures, and words, they actively encouraged and incited Glenn Bell to do the acts set out above.

The jury found both of the defendants guilty upon both of the indictments. The court sentenced each defendant separately in each case to imprisonment in the State's prison for not less than fifteen nor more than twenty years, but provided, in effect, for only one punishment as to each defendant by stipulating that the two separate sentences pronounced against each defendant should be executed concurrently. The defendants appealed to this Court, assigning errors in the trial below.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

Allen & Henderson, F. D. B. Harding, and Trivette, Holshouser & Mitchell for defendants, appellants.

ERVIN, J. The defendants stress their contention that the trial court ought to have dismissed both charges for insufficiency of proof in conformity to their motions for judgment of nonsuit under the statute. G. S., 15-173. It is obvious that this position is well taken with respect to the indictment wherein the defendants are alleged to have robbed

Stewart Fox. The consequence is that consideration will be given in detail here only to the assignments of error relating to the case in which the defendants have been convicted of the perpetration of robbery with firearms upon Ernest Fox.

In so far as it is now germane, the statute concerning robbery with firearms or other dangerous weapons reads as follows: "Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another . . . or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not less than five nor more than thirty years." G. S., 14-87.

In his lucid opinion in *S. v. Keller*, 214 N. C., 447, 199 S. E., 620, *Mr. Justice Winborne* pointed out that the Legislature enacted this statute "to provide for more severe punishment for the commission of robbery with firearms, and other specified weapons, than is prescribed for common law robbery." See, also, *S. v. Jones*, 227 N. C., 402, 42 S. E. (2d), 465. Robbery at common law is the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear. *S. v. Burke*, 73 N. C., 83.

The defendants claim at the outset that the testimony of the State itself negatives the existence of the essential element of robbery, whether at common law or under the statute, that the taking of the property must be effected by violence or by putting the victim in fear. They point out that the defendants falsely pretended that they and their companion were officers possessing legal authority to make arrests, and assert that the prosecuting witness, Ernest Fox, gave the money to Glenn Bell merely because the defendants threatened to arrest or prosecute him and his brother, Stewart Fox, for alleged crimes. The evidence is not susceptible to this construction. All of the testimony is to the effect that in addition to impersonating officers, the defendants and their companion enforced their demands upon Ernest Fox for the money in question by the use of physical force and by threats to inflict bodily injury upon him. If a person takes personal property with the requisite felonious intent from the person or presence of another against such other's will by physical force or by threats of bodily injury, he commits robbery, notwithstanding his taking of the property may be accompanied by a pretense that he is an officer of the law and by threats on his part to arrest or prosecute the other for alleged crime. *Montsdoca v. State*, 84 Fla., 82, 93 So., 157, 27 A. L. R., 1291; *State v. Parsons*, 44 Wash.,

299, 87 P., 349, 7 L. R. A. (N. S.), 566, 120 Am. St. Rep., 1003, 12 Ann. Cas., 61; *Bussey v. State,* 71 Ga., 100, 51 Am. Rep., 256. See, also, the following authorities: 23 R. C. L., 1148; 54 C. J., 1022; 46 Am. Jur., Robbery, section 18.

The defendants further insist, however, that, in any event, the evidence at the trial was insufficient to support the action of the court in submitting to the jury the question of whether the defendants were guilty of the major felony of robbery with firearms upon the prosecuting witness, Ernest Fox, within the purview of the statute. The evidence adduced by the State not only tended to show that Glenn Bell took the money of Ernest Fox from his person against his will by violence and intimidation with intent to steal, but it also tended to establish that Glenn Bell was armed with a pistol, that he took the money in question from Ernest Fox by the use and threatened use of such pistol, and that he thereby threatened, if he did not, in fact, actually endanger, the life of Ernest Fox, and that Millard Bell was present, encouraging and inciting Glenn Bell to do such acts. Consequently, the testimony amply supported the theory of the State that Glenn Bell actually committed the crime of robbery with firearms upon Ernest Fox within the meaning of the statute, and that Millard Bell was present, aiding and abetting him in its perpetration.

The defendants excepted to the failure of the court to charge the jury that they might acquit the defendants of the crime of robbery with firearms charged in the indictment under consideration, and convict them of a crime of less degree. G. S., 15-169, 15-170. It is true that in a prosecution for robbery with firearms, an accused may be acquitted of the major charge and convicted of an included or lesser offense, such as common law robbery, or assault, or larceny from the person, or simple larceny, if a verdict for the included or lesser offense is supported by allegations of the indictment and by evidence on the trial. 42 C. J. S., Indictments and Information, sections 275, 283, 293; *S. v. Jones, supra; S. v. Moore,* 211 N. C., 748, 191 S. E., 840; *S. v. Holt,* 192 N. C., 490, 135 S. E., 324; *S. v. Cody,* 60 N. C., 197. If the jury believed the testimony in the case under review, however, it was its duty to convict the defendants of robbery with firearms because all of the evidence tended to show that such offense was committed upon the prosecuting witness, Ernest Fox, as alleged in the indictment There was no testimony tending to establish the commission of an included or lesser crime. The evidence necessarily restricted the jury to the return of one of two verdicts as to each defendant, namely, a verdict of guilty of robbery with firearms upon Ernest Fox, or a verdict of not guilty. It follows that the court did not err in failing to instruct the jury that they might acquit the defendants of the crime of robbery with firearms charged in the indict-

ment in question and convict them of a lesser offense. *S. v. Sawyer,* 224 N. C., 61, 29 S. E. (2d), 34; *S. v. Manning,* 221 N. C., 70, 18 S. E. (2d), 821; *S. v. Cox,* 201 N. C., 357, 160 S. E., 358.

A painstaking examination of the entire record leaves us with the abiding impression that none of the other assignments of error of the defendants in the case under consideration are tenable.

For the reasons given, we find no error in the trial of the action in which the defendants were convicted of robbing Ernest Fox with firearms, and reverse the judgment in the case in which the defendants are charged with having committed a like offense upon Stewart Fox.

No error in criminal action No. 199.

Judgment reversed in criminal action No. 210.

STATE v. THE GLIDDEN COMPANY.

(Filed 24 March, 1948.)

1. Constitutional Law §§ 17, 18—

The proviso of G. S., 113-172, exempting corporations chartered prior to 4 March, 1915, from the proscription against emptying into streams of the State deleterious or poisonous substances inimical to fish, creates a distinction having no relation to the evil sought to be remedied and renders the statute unconstitutional for failure to apply alike to all corporations or persons similarly situated. Constitution of N. C., Art. I, Sec. 7; Art. I, Sec. 17.

2. Constitutional Law § 15½—

The Constitution does not preclude classifications based on reasonable distinctions when the law applies uniformly to all members of the class affected.

3. Constitutional Law § 23: Waters and Watercourses § 3—

No right of prescription to pollute its streams can be acquired against the State.

4. Statutes § 4—

A corporation prosecuted for violating a statutory proscription is entitled to assert the unconstitutionality of the statute in its defense.

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

STATE's appeal from *Gwyn, J.,* November Term, 1947, CALDWELL Superior Court.

This cause was begun by warrant in the recorder's court of Caldwell County and reached the Superior Court of that county on appeal of the

defendant from conviction and fine of $5,000, suspended on condition that defendant, after the 15th day of December, 1947, desist from discharging into the streams and waters of the State, "any substance created from its mining operations."

The warrant was amended in Superior Court by inserting therein the statement that defendant was "a corporation duly chartered on or after the 4th day of March, 1915."

When the case came on for a hearing the defendant, before pleading, demurred to the warrant as not charging a criminal offense, for that the statute on which it is based, to wit: G. S., 113-172, is in violation of Article I, Section 7, of the State Constitution in attempting to confer exclusive or separate emoluments or privileges not in consideration of public services, and Article I, Section 17, guaranteeing due process of law in protection of life, liberty and property. The statute reads as follows:

> "It shall be unlawful to discharge or to cause or permit to be discharged into the waters of the state any deleterious or poisonous substance or substances inimical to the fishes inhabiting the said water; and any person, persons or corporation violating the provisions of this section shall be guilty of a misdemeanor and, upon conviction, be fined or imprisoned in the discretion of the court: Provided, this section shall not apply to corporations chartered either by general law or special act before the 4th day of March, 1915. (1915, c. 84, s. 20; C. S., 1899.)"

Upon inspection of the warrant, the court, being of the opinion that the statute under which it is brought violates the Constitution in the respects pleaded, sustained the demurrer and dismissed the action. The State appealed. G. S., 15-179.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

Williams & Whisnant and F. L. Townsend for defendant, appellee.

SEAWELL, J. Two questions are posed by the appeal: Whether the statute is affected with the constitutional invalidity suggested, and whether the appellee is in position to raise that defense.

It is an old saying that the proof of the pudding is in the eating. If the statute is upheld we shall have the spectacle of one corporation doing things denounced and punishable as crime and another, perhaps side by side on the same stream, doing the same thing with impunity and approval of the law. That situation can hardly be considered exemplary or conducive to what may be called, in Justinian phrase, "dis-

tributive justice." And it has not received the approval of the Court. *S. v. Fowler*, 193 N. C., 290, 136 S. E., 709.

The broad nature of the exception made by the proviso and its lack of useful relation to any purpose which could be attributed to the measure, especially the purported purpose of conserving fish life, is apparent. The exception embraces and immunizes all corporations chartered before the 4th day of March, 1915, without reference to whether the members of the class thus privileged were at that time using the streams to carry off waste products of a deleterious nature, or had any investment which might be impaired by a statutory prohibition, or whether the corporation is domestic or foreign, seated or ambulatory. Corporations chartered prior to March 4, 1915, alone are permitted to pollute the waters, where already engaged, or elsewhere, or, if not, to peruse the map and sit down at any time, at any place, and begin. They thus have a privilege denied to corporations chartered on or after that date and to "any person or persons" whatsoever, without qualification.

If, as suggested, the Legislature had it in mind to compromise the principle of conservation by "scotching" rather than eradicating the evil out of consideration of vested interests and the conveniences heretofore enjoyed in using the streams to carry away poisonous waste products, that is not reflected in the statute. In a law uniformly applicable to all persons engaging in the practice it might have been competent to provide that those already using the streams in that manner might have reasonable time to adjust their operations to the new conditions. But the statute does not contemplate discontinuance of the practice, but merely excepts all natural persons, individuals, partnerships, and newly chartered corporations from the privilege and gives corporations chartered before 1915 a monopoly of the activities which it denounces as offensive, backing it with the strongest weapon the State has in its arsenal of powers,—the police power,—the threat of fine or imprisonment to all those who dare to question it.

"Class legislation" is not offensive to the Constitution when the classification is based on a reasonable distinction and the law is made to apply uniformly to the members of the class affected. Or, as the principle is more often expressed, when the law applies uniformly to all persons in like situation,—which of itself implies that the classification must have a reasonable basis, without arbitrary discrimination between those in like situation.

> "The question always is whether there is any reasonable ground for a classification or whether it is only and simply arbitrary, based upon no real distinction. The authorities are unanimous in their conclusion that the basis on which a classification may validly rest must be reasonable and founded on material differences and substan-

tial distinctions which bear a proper relation to the matters or persons dealt with by the legislation and to the purpose sought to be accomplished." 12 Am. Jur., Constitutional Law, Sec. 485.

"A fundamental principle involved in classification is that it must meet the requirement that a law shall affect alike all persons in the same class and under similar conditions. If a classification in legislation meets the prerequisites indispensable to the establishment of a class that it be reasonable and not arbitrary, and be based upon substantial distinctions with a proper relation to the objects classified and the purposes sought to be achieved, as long as the law operates alike on all members of the class which includes all persons and property similarly situated, it is not subject to any objections that it is special or class legislation, and is not a violation of the Federal guaranty as to the equal protection of the laws. Hence, while classification is proper, there must always be uniformity within the class. If persons under the same circumstances and conditions are treated differently, there is arbitrary discrimination, and not classification.

"In order for a classification to meet the requirements of constitutionality, it must include or embrace all persons who naturally belong to the class. . . . Furthermore, all who are in situations and circumstances relative to the subjects of the discriminatory legislation indistinguishable from those members of the class must be brought under the influence of the law and treated by it in the same way as are the members of the class." *Id.*, ss. 478, 479. *S. v. Fowler, supra.*

"Any classification or discrimination must not be arbitrary or unreasonable; and the legislation must not be discriminatory in the sense of applying unequally to persons pursuing or engaged in the same calling, profession, or business under the same or like conditions or circumstances." 16 C. J. S., Constitutional Law, Sec. 510, p. 1014.

More pointedly applicable to the criminal law in the situation here presented is the text in 16 C. J. S., 1133, Sec. 563:

". . . a statute or ordinance is void as contravening the equal protection guaranty which makes an act a crime when committed by one person, but not so when committed by another in like situation, or which makes punishable acts which were not so when committed, or which makes a question as to whether a certain act is criminal or not depend on an arbitrary or unreasonable distinction between persons or classes of persons committing it." *S. v. Fowler, supra.*

Applying these principles, we are of the opinion that the date line running through the statute has no reasonable relation to the purpose of the law, only serving to mechanically split into two groups persons in like situation with regard to the subject matter dealt with but in sharply contrasting positions as to the incidence and effect of the law; and that the attempted classification is not based upon a justifiable distinction.

However, the contention that the statute is offensive to the Constitution in that without due process of law it deprives the defendant, or may deprive it, or any other person of property rights is not well taken. No matter how long the practice of polluting the waters by waste products from mining or manufacturing has been practiced, there is no prescription against the State when it sees fit to remedy the evil.

As to the right of the defendant to raise this question of the constitutionality of the statute, it might be different if the defendant were attempting to pursue a remedy against other persons, but in this instance the State has invoked the law and the corporation is entitled to its defense. *S. v. Fowler, supra.*

In declaring a statute void by reason of its conflict with the Constitution, the Court is in the exercise of an extraordinary power and must observe the traditional restraints. But we are convinced the court below reached the right conclusion and its judgment is

Affirmed.

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

MATTIE PARKER EGGLESTON v. FRANK EGGLESTON.

(Filed 7 April, 1948.)

1. Pleadings § 24c: Partnership § 1a—

The complaint alleged the existence of a partnership between the parties. By amendment it was alleged that defendant filed partnership tax returns for a specified year and that plaintiff believed defendant, in filing the returns, intended to create a partnership. *Held:* Construing the allegations of the pleading liberally, plaintiff was not limited to evidence of transactions relating to the filing of the income tax returns, but evidence of prior transactions between the parties in regard to the business is competent not only as supporting the contention of the creation of a partnership at the time the returns were filed, but also under the allegations of the original complaint as tending to show there was an implied partnership agreement between the parties whenever or wherever created.

2. Husband and Wife § 12b: Partnership § 1a—

Husband and wife may enter into a contract creating a business partnership between them, G. S., 52-2, but where the wife's separate estate is

involved as a part of the partnership property, the provision of G. S., 52-12, must be observed.

3. Partnership § 1a—

While a partnership rests on contract, the agreement may be written or verbal, express or implied.

4. Same—

Evidence of a course of dealing between the parties is sufficient to establish a partnership between them if it evinces the essential elements of a partnership agreement, including the necessary intent.

5. Same—

Partnership tax returns prepared by defendant are competent as an admission against interest in an action to establish the existence of a partnership between the parties, not as creating a partnership, *per se*, but as evidence to be considered with the other evidence of an implied agreement. The fact that immediately after dispute defendant filed an individual return by way of amendment does not render the original returns incompetent.

6. Husband and Wife § 4—

The presumption that services rendered by the wife to her husband are gratuitous is not conclusive and may be overcome by evidence tending to show that the services were not gratuitous.

7. Husband and Wife § 12b: Partnership § 1a—

Plaintiff relied upon a partnership tax return as evidence in support of her contention of an implied business partnership agreement between herself and husband. *Held:* Testimony of plaintiff that she acted in good faith and not as a participant in a fraudulent attempt to evade payment of income taxes in signing the returns, is competent.

8. Partnership § 1a—

It is not necessary that each partner furnish a part of the partnership capital, but the services of one party may be balanced against the capital furnished by the other, and therefore an instruction to the effect that the partnership capital must belong in common to the parties in order to establish a partnership, is error.

9. Same: Husband and Wife § 12b—

Plaintiff wife sought to establish an implied partnership agreement based upon her personal services to the business. *Held:* An instruction predicating plaintiff's right to a share in the partnership assets solely upon a gift *inter vivos* to her by her husband, is error.

10. Same—

Plaintiff wife contended that over a period of years she performed personal services to the business carried on in the husband's name under an implied partnership agreement. Plaintiff introduced as supporting evidence, partnership tax returns for a specified year prepared by defendant. *Held:* An instruction that in making and filing the returns defendant must have intended to make his wife a partner is error, not only as limiting the question of intent to that one instance, but also as treating the returns as creating the partnership rather than only evidence of its existence.

11. Partnership § 1a—

Plaintiff wife introduced in evidence partnership income tax returns prepared by defendant husband as supporting evidence of an implied partnership agreement. *Held:* An instruction that the jury was not concerned with whether the returns were filed for the purpose of defrauding the government is error as calculated to impress the jury that such a thing, if true, need not reflect upon defendant's credibility as a witness.

12. Divorce §§ 1b, 14—

When the husband by cruel treatment renders the life of the wife intolerable or puts her in such fear for her safety that she is compelled to leave the home, the abandonment is his, and is sufficient ground for alimony without divorce. G. S., 50-16.

13. Divorce § 2½b—

While condonation obliterates the conduct condoned as a cause for divorce, a subsequent renewal of the misconduct may be such as to revive the former offense and render it competent for the consideration of the jury upon the issue.

14. Same: Divorce § 14—

Where plaintiff's evidence discloses assaults and threats over a period of years, an instruction which limits the jury, in determining the issue of abandonment, to the last incident culminating in the wife's leaving the domicile of the husband, must be held for error, since the plaintiff has the right to rely upon the cumulative effect of the years of mistreatment upon this issue.

15. Divorce § 9d—

In an action for alimony without divorce, an instruction which fails to enlighten the jury as to the character of the provocative words or acts on the part of plaintiff which would excuse the conduct of defendant is prejudicial to plaintiff on the question of abandonment and the question of his cruel and inhuman treatment.

PLAINTIFF'S appeal from *Olive, J.*, July Special Term, 1947, ROCKINGHAM Superior Court.

Harry L. Fagge, James Fagge, and Smith, Wharton & Jordan for plaintiff, appellant.

Brooks, McLendon, Brim & Holderness, Price & Osborne, and P. W. Glidewell for defendant, appellee.

SEAWELL, J. The plaintiff brought this suit against her husband for alimony without divorce under G. S., 50-16, joining with this cause of action (b) a cause of action to have herself declared a business partner with her husband and to have her rights under the partnership adjudicated and an account taken and (c) an equitable cause of action respecting the disposition of the body of a deceased child, in which she sued out an injunction against her husband to prevent its disposition as intended

by him. Upon an order to show cause this injunction was continued to the hearing.

When the case was called to trial at the special term of court presided over by Judge Hubert E. Olive, upon the reading of the pleadings, the defendant demurred *ore tenus* to the cause of action with respect to the disposition of the body of the deceased child and the motion was overruled. The defendant then moved for severance of the three causes of action; and thereupon the court granted the motion to sever the action in equity as to the disposition of the deceased child from the other two causes of action and the plaintiff excepted. The case then proceeded to trial, the issues being answered as to both causes of action unfavorably to the plaintiff, who, having taken exceptions hereinafter noted, along with numerous others, preserved them for review by moving to set aside the verdict of the jury for errors committed during the trial, and this motion having been declined, objected and excepted to the judgment, and appealed.

There were 192 exceptions taken by the losing party during the trial and the record with which we have to deal contains 622 typewritten pages.

It is possible to reproduce, in summary, only those portions of the record which are directly pertinent to the decision and necessary to its understanding, giving the general purport of the pleadings and the evidence except where particularity is required.

THE QUESTION OF BUSINESS PARTNERSHIP:

The plaintiff sought to show the existence and nature of the alleged partnership between herself and her husband by evidence of dealings *inter partes* for a long period of years and her contributions to the joint undertaking; and by introducing the joint partnership income tax returns for the year 1945 made by herself and husband to the Federal and State taxing authorities, respectively, with other evidence pertinent to this transaction.

More particular reference to these returns will be made further on. For clarity we may say here that in both of the returns it is declared that a partnership existed between the plaintiff and the defendant for the calendar year 1945, manifesting partnership on equal shares as to the net income. After this suit was brought the defendant filed "amended" or "corrected" returns, in point of fact *individual* returns, eliminating the partnership feature.

The evidence by which plaintiff sought to show the alleged partnership may be summarized as tending to show the following facts and conditions:

When they first moved into the filling station on the Draper road and started business she helped display the stock; while defendant went out

into the "territory" plaintiff was in charge of the filling station, worked there with no assistance except casual help from little boys to whom plaintiff paid small sums; plaintiff had access to the funds, taking in the money and keeping it in the cash drawer; she put her "inheritance money," about $125.00, in the business at this early stage; she sometimes bought, but buying was mostly done by defendant. As more filling stations were added plaintiff went and put up signs in the windows, displayed stock and helped them get set up in the business. She worked regularly during this period, living in the service station for 15 years, and except for a short period of time and vacations in the summer, was there continually, often being compelled to let her housework go. She had often gone without food all day except what she could pick up at the filling station. She sold things out of stock, serviced cars, putting in gas and oil; carried water from the pump in tubs, as there was, for a long time, no running water; washed cars, often making $5.00 a day in this way. Plaintiff handled the paid and unpaid bills, made out statements and sent them out. Later plaintiff took a bookkeeping course and learned to type, and thereafter kept books for the business. After plaintiff and defendant moved into the new home in 1940 until 1946, while plaintiff did not go to the filling station every day because of her illness, the help came to her to inquire about the business and for direction in matters with which she was familiar, and she continued in charge during Mr. Eggleston's absence. Between 1940 and 1946, when they separated, she went down and did book work. During 1945 plaintiff and her brother, Pickett Parker, did the book work together. Plaintiff took part in the conduct of the tire business, sold tires, entertained presidents of tire companies in her home; sold and delivered tires in the service station and in the territory, took orders and saw that they were delivered; delivered tires in the territory; met people on the highways with tires, delivering and taking orders.

All this proffered evidence was rejected upon objection made *seriatim* by defendant, and in the same manner plaintiff excepted.

The plaintiff then testified that during the year 1945, she was not certain of the date, defendant came into the kitchen where she was cooking supper, put his arm around her, started kissing her and told her she was his business partner. "I asked him what he meant and I said I had been his business partner for twenty years. He said I had always been worried about losing a great deal of the business at his death, and he had fixed it so I would not even have to pay inheritance tax on my part of the partnership. He talked to me about it and ten days or two weeks later he signed—he said of course I would have to pay income since I was a partner in the business and he brought some papers in for me to sign. I signed three different sheets, I think, income papers and different papers, and a blank check."

After identification, plaintiff then introduced in evidence copies of the joint partnership income tax returns made by herself and husband for the calendar year 1945 to the Federal and State taxing authorities, respectively. These returns manifest a taxable net income for that year of $20,801.29 and indicate that Mattie P. Eggleston, the plaintiff, and Frank Eggleston, the defendant, were partners upon equal shares in the business, entitling each to one-half of said net income. The partnership appears as "Eggleston Brothers Filling Station." Accompanying these returns there was a partnership return of estimated tax for the year 1946.

Thereupon plaintiff sought to testify that she signed the documents above mentioned in good faith and upon objection by the defendant the evidence was excluded.

At the same time she offered to testify that she believed the defendant when he told her she was his partner and this also was excluded.

On review the rights of the plaintiff and the validity of the trial which purports to deal with them, must be made to depend on the whole evidence, both competent evidence excluded and the evidence which ran the gamut. So, before examining the instructions given the jury on the 4th issue relating to the partnership, it is necessary to turn to the evidence of the plaintiff as above noted—principally her own testimony—of the dealings between herself and husband with relation to the business in which she claims partnership.

This evidence was excluded apparently upon the theory that her complaint setting up the creation of the partnership restricts her to the transactions involved in the filing of the income tax returns, and especially to its organization on January 1, 1945. We are of the opinion that such a restriction does not necessarily follow from the allegations in her complaint, as a whole, liberally construed. However this may be, the evidence as to her contributions to the business and the circumstances under which the services were rendered are of such a nature as to support her further contentions as to the creation of the partnership, strengthening the plausibility and credibility of that claim both as a moral and legal consideration for the formation of the partnership, however and whenever it occurred. Its exclusion was error. But we do not mean by this to limit its effect to the function of supporting evidence for a partnership subsequently created. In our view of the case the whole evidence directed to the existence of the partnership must be taken together, and so taken was competent to be submitted to the jury for their consideration and evaluation.

Under the common law as a consequence of the fictional merger of husband and wife into one person, and other disabilities of the wife incident to coverture, there could be no contract and, therefore, no busi-

ness partnership between husband and wife. 26 Am. Jur., pp. 853, 854; 41 C. J. S., Husband and Wife, p. 594, sec. 121; *id.*, sec. 129 (b), p. 602; *id.*, sec. 178, pp. 656, 657. That incapacity has been removed in many states by the enactment of "Married Women's Acts,"—statutes directly or impliedly giving them the power or the right to contract. The broad general powers of contract given under most of these statutes has in many instances been extended by judicial interpretation to authorize the formation of partnerships with the husband. In this State the "Martin Act," Chapter 109, Laws 1911, G. S., 52-2, has been held to vest the wife with the power to contract with the husband so as to create a business partnership. *Bristol Groc. Co. v. Bails*, 177 N. C., 298, 98 S. E., 768; *Dorsett v. Dorsett*, 183 N. C., 354, 358, 111 S. E., 541, 543; *Carlisle v. Carlisle*, 225 N. C., 462, 35 S. E. (2d), 418. The making of such a partnership is subject to the provisions of G. S., 52-12, applying generally to contracts between husband and wife; but as the separate estate of the wife is not involved here so as to defeat recovery, its discussion is not necessary to the decision.

"A contract, express or implied, is essential to the formation of a partnership." 40 Am. Jur., Partnership, p. 135, sec. 20, see notes 14, 15. But we see no reason why a course of dealing between the parties of sufficient significance and duration may not, along with other proof of the fact, be admitted as evidence tending to establish the fact of partnership provided it has sufficient substance and definiteness to evince the essentials of the legal concept, including, of course, the necessary intent. *Waring v. Grady*, 20 Ala., 465; "Partnership is a legal concept but the determination of the existence or not of a partnership, as in the case of a trust, involves inferences drawn from an analysis of 'all the circumstances attendant on its creation and operation,' *Helvering v. Clifford*, 309 U. S., 331, 335, 60 S. Ct., 554, 556, 84 L. Ed., 788; *Doll v. Commissioner of Internal Revenue*, 8th Cir., 149 F. (2d), 239."

Not only may a partnership be formed orally, but "it may be created by the agreement or conduct of the parties, either express or implied," *Sterman v. Ziem*, 17 Cal. App. (2d), 414, 62 P. (2d), 160, 162. As stated in *Niroad v. Farnell*, 11 Cal. App., 767, 106 P., 252, "A voluntary association of partners may be shown without proving an express agreement to form a partnership; and a finding of its existence may be based upon a rational consideration of the acts and declarations of the parties, warranting the inference that the parties understood that they were partners and acted as such." Of significance on this issue is the statement of the plaintiff, "We divided the profits," and that when they came to a temporary separation the defendant agreed to keep her interest intact. *Cossack v. Burgwyn*, 112 N. C., 304, 16 S. E., 900; *Machine Co. v. Morrow*, 174 N. C., 198, 93 S. E., 722; Uniform Partnership Act, G. S., 59-37, subsection 4.

Where the fact at issue is the existence of partnership the admissions against interest of the person denying the partnership are significant in establishing it. The use and the function of the partnership tax returns as evidence was not *per se* to create the partnership but, together with other evidence directed to the fact, to establish its existence. They must be considered within the light of the circumstances, their purpose and the deliberation required in their composition. While a mere casual remark made on the streets might not be sufficient as evidence of the existence of a partnership, the tax returns in evidence are of greater significance on account of the solemnity of the oath under which they are made and the deliberate and comprehensive statement of the relation of the parties they contain. While we doubt the propriety of admitting the evidence of the amended or corrected returns, because of their self-serving nature, the hasty effort of the defendant to regain his lost status did not cancel out the evidence afforded by the original returns or such legitimate inferences as the jury under proper instructions might have drawn from them as evidence of the existence of the contract or such inferences as they might legitimately draw from the entire transaction as to the credibility of the defendant. The facts presented in the evidence of the plaintiff make out a case sufficient to "hold water taxwise" as creating a partnership. See "Husband and Wife, or 'Family' Partnerships," Indiana Law Journal, Vol. 20, p. 65, containing copious citations of authority applicable to the case at bar.

It is proper to say here that the services rendered by the wife to her husband are presumed to be gratuitous. *Winkler v. Killian,* 141 N. C., 576, 578, 54 S. E., 540; *Dorsett v. Dorsett, supra.* The presumption is not conclusive; *Dorsett v. Dorsett, supra;* and may be overcome by evidence tending to show that the services were not gratuitous. *Stewart v. Wyrick, ante,* 429. That was a matter for the jury.

The court excluded evidence of the plaintiff that she had acted in good faith in signing the papers, including the partnership returns of income tax, and believed what the defendant had stated to her concerning the partnership to be true. This was error. It had a substantive bearing on the existence of the partnership; and the plaintiff had the right to say that she acted in good faith and not as a participant in a fraudulent attempt to deprive the Government or the State of its taxes.

In undertaking to apply the law to the evidence relating to the partnership the court, amongst many other exceptive instructions to which we cannot afford space, gave the following:

> "The Court charges you as a matter of law on this fourth issue that if you are satisfied from the evidence and by the greater weight that the defendant told his wife that he was making a full partner of her; (that he intended by that to give her one-half interest in

the business) and that he made out income tax returns; that is gave her one-half interest; intended to give her and did give her one-half interest in the business and in the share of the profits and in losses, if any, that she had to share and that he filed income tax returns; that he intended by filing those income tax returns that she should have the amount of money on that that was placed after her name; that she was to receive and that he filed an estimated tax return for the year 1946 and he set out there that she was a full partner and that he intended by that that she should own half of the business and be entitled to half the profits and share in half the losses; and you are further satisfied by the greater weight of the evidence that by saying and doing those things he gave her the right to dominion; that is the right to say what should be done with her half interest in that property even though she didn't actually do that; didn't actually say what should be done about her half of the property; but you are satisfied by the greater weight of the evidence on account of these things that she had the right to do it and that she owned one-half interest in the business and was entitled to share in the profits and the losses; entitled to one-half of each and you are satisfied of each and every one of these facts by the greater weight of the evidence, and you are so satisfied by those facts and circumstances by the greater weight of the evidence that she had the right there in this property and profits and losses; and you are satisfied by the greater weight of the evidence that she accepted this gift, this one-half interest in the business and in the profits and losses and you are so satisfied by the greater weight of the evidence, it would be your duty to answer this fourth issue 'Yes.' If you are not so satisfied, you would answer this fourth issue 'No.' "

"Gentlemen of the Jury, if you find from the evidence that the defendant filed income tax returns simply to keep from paying as much taxes as he would have paid if he had filed it in his name, but not with the intent or purpose of making his wife a full partner in the business with him; that he did not ever intend to make her a partner in the business, whether he told her so or not, and if you find that he did not but it was only done for that purpose, and that he had no intention of making her any gift of it, and you so find from the evidence, it would be your duty to answer this issue 'No.' "

"On the fourth issue, the Court charges you that the burden is upon the plaintiff to satisfy you by the greater weight of the evidence that she and the defendant entered into a contract or agreement, providing by its terms that they were to be partners in the ownership and operation of the property, both real estate and personal property, owned by the defendant on and prior to January 1, 1945."

"In order to constitute a partnership between two persons, the Court charges you that it would be necessary for such persons to combine their property, labor and skill under an agreement to share the profits and losses in equal or some specified proportion. The Court charges you that a mere statement made by one person to another that the speaker is making the other person a partner in an existing business owned by the speaker is not sufficient in law to constitute the formation of a partnership."

"The Court charges you that in order to constitute a valid gift under the laws of North Carolina, it is necessary that the person making the gift shall have the intention to give certain property identified and such intention must be accompanied by a delivery of the property, if it is personal property and capable of delivery, or a conveyance by deed or other instrument if the property is real estate."

Without further detail it is sufficient to say that they exhibit amongst other errors, the following: First, it is not necessary to a partnership that property or capital involved in it should belong in common to the parties to the contract. On the contrary, a familiar type of partnership, as indicated by the evidence in this case, occurs where the services of the one party is balanced against the capital furnished by the other; and the statement that the property must be held in common before plaintiff can recover is error; second, the partnership sought to be established did not necessarily involve a gift of property by the husband, and it was error to make her rights depend upon the laws respecting gifts *inter vivos;* third, while in partnership, as in any other kind of contract, there must be an intent, it was error to instruct the jury that before they could find for the plaintiff they must be satisfied by the greater weight of the evidence that the defendant, by the making and filing of the partnership income tax returns in evidence, intended to make his wife a partner. The instruction to that effect has a further infirmity that the plaintiff has not contended and could not contend that the partnership was created by these documents, but only introduced them as evidence of its existence.

A further instruction to the jury to the effect that they were not concerned with the question whether the defendant made and filed the partnership income tax returns for the purpose of defrauding the Government, as that was a matter between defendant and the Government, was calculated to impress the jury that such a thing, if true, need not reflect upon his credibility, and to relieve him from the most damaging situation he had to confront on this issue.

THE CASE FOR ALIMONY:

The trial of the cause of action for enforcing partnership rights with that for alimony led to considerable embarrassment in the admission and rejection of evidence, and placing the admitted evidence in the proper cubicle for consideration. Thus, it is apparent that much of the evidence rejected by the court as not competent on the partnership issue was competent in the proceeding for alimony, and, therefore, was erroneously excluded in its relation to that subject. However, we need only refer briefly to certain salient features of the evidence and pertinent instructions to the jury to make our conclusion understood.

The evidence of the plaintiff tends to show that within a year after the marriage her husband beat her violently with his fists, leaving her bruised and bleeding about the face and mouth, and that he was convicted of the assault; that he was of a violent disposition, quick tempered, addicted to drink, and insanely jealous. She testified that on numerous occasions during the subsequent years she was the victim of brutal and unprovoked assaults, specifying that on one occasion he beat her severely with a shoe, until her body was covered with bruises; again that he threatened her life, locked her in the bathroom and kept her there for hours; that on another occasion, when she questioned the size of the dose of medicine he had been requested to give her, he grew furious and took her by the hair, choked her, and forced her to take it, and another dose of like size that had not been prescribed; that he questioned her fidelity because he saw a sailor going to the house in his absence—the sailor proved to be her brother, just returning from the service,—and furiously upbraided her. She further testified that she had frequently been compelled to leave home because of his cruel treatment, and in many instances he persuaded her to return, promising to reform. That he threatened her life, and because of this mistreatment, and others she detailed, and because of fear for her life she was compelled to seek final refuge in the home of her parents. The incidents, she testified, ran through the whole twenty years of their married life.

The defendant denied all the charges except one. He admitted slapping her during the first year of the marriage, but testified that she had first assaulted him with a fire poker. His testimony represented the wife as morose, moody, capricious, and wanting to engage in fanciful enterprises beyond their means, and attributed her dissatisfaction to that state of mind. He testified that he had always contributed adequately to her support, or attempted to do so.

The plaintiff, in an action for alimony without divorce under G. S., 50-16, can recover only by showing the existence of such conditions as would authorize a divorce from bed and board under G. S., 50-16, or

absolute divorce, G. S., 50-5, *et seq.*, or certain other independent conditions named in G. S., 50-16. Abandonment is one of the conditions upon which the relief may be granted. When the husband by cruel treatment renders the life of the wife intolerable or puts her in such fear for her safety that she is compelled to leave the home, the abandonment is his, not hers. Although the conduct of the spouse may be such as to create a cause of action it may be condoned, or forgiven by the injured party, and become no longer a justiciable grievance. But a renewal of the misconduct may be such as to wipe out the condonation, revive the former offense, and restore its effectiveness in an action for relief. *Page v. Page*, 167 N. C., 346, 347, 83 S. E., 625; *Lassiter v. Lassiter*, 92 N. C., 130.

The trial court was advertent to the rule and took note of it in certain parts of the charge; but upon the second issue relating to abandonment, the right of the plaintiff to rely upon the cumulative effect of the years of mistreatment in leaving the husband's home seems to have been ignored and the answer to that issue was definitely poised upon a single segregated incident in the evidence.

The jury was instructed:

> "If you are satisfied from the evidence and by its greater weight, that the defendant Frank Eggleston told his wife on the day she left, that morning, that he was going to kill her or wipe her out, and that she became afraid and felt that he would kill her and that she was afraid to stay there and felt that he would kill her and that she was afraid to stay there and on account of that, on account of what he said to her and the way he said it to her and what he did about it, if you are satisfied from the evidence and because of its greater weight that she left his home because she was put in fear by what he said and did that morning, by these words, it would be your duty to answer this issue Yes. If you are not so satisfied it would be your duty to answer it No."

The error is, we think, manifest.

It must be said that both upon this issue and upon the third issue relating to the indignities to her person claimed by the wife, the instructions were inadequate in not attempting to enlighten the jury upon the character of the provocative words or acts which might be sufficient to relieve the defendant from liability for enormities of the character appearing in evidence, or, for that matter, for any indignities which the wife might have suffered. The failure to do so is calculated to leave the impression on the jury that any departure from a perfect or equable temper or demeanor in word or act on her part might justify such aggression.

Because of the errors noted the plaintiff is entitled to a trial *de novo*, and it is so ordered.

The question of attorneys' fees and support *pendente lite* is within the discretion of the trial court and its action in the premises will not be reviewed.

New trial.

JOHN W. HUGHES, JESSE B. HUGHES, JAMES H. HUGHES, ALLIE HUGHES TWISDALE AND WALTER H. HUGHES, v. D. R. OLIVER,

and

D. B. OLIVER, TRADING AS W. B. OLIVER AND SON, v. JOHN W. HUGHES AND WIFE, MRS. JOHN W. HUGHES; JESSE B. HUGHES AND WIFE, MRS. JESSE B. HUGHES; J. H. HUGHES AND WIFE, MRS. J. H. HUGHES; SOUTHERN LOAN AND INSURANCE COMPANY, SUCCESSOR TO SOUTHERN TRUST CO., TRUSTEE; D. R. OLIVER AND WIFE, MRS. D. R. OLIVER.

(Filed 7 April, 1948.)

1. Pleadings § 22b—

It is the established practice under our Code system to be liberal in allowing amendments of process and pleadings, to the end that causes may be tried upon their merits.

2. Same—

Upon the hearing of the report of the referee, the court remanded the cause to the referee to hear additional evidence, and allowed appellees ten days in which to file further pleadings setting up laches. *Held:* The court had discretionary power to allow an amendment setting up laches.

3. Appeal and Error § 40b—

The exercise of a discretionary power by the trial court is not reviewable on appeal unless there has been a palpable abuse of discretion.

4. Reference § 9—

Where the court sets aside all the findings of fact and conclusions of law of the referee except in so far as they coincide with the findings and conclusions of the court, exceptions to the referee's findings are not presented in the Supreme Court on appeal, there being no exception to the findings by the court.

5. Reference § 10—

The court has the power upon the filing of the report of the referee to affirm, amend, modify or set it aside, and to make its own findings of fact, and, when such findings are supported by competent evidence, they will not ordinarily be disturbed on appeal.

6. Appeal and Error § 40d—

Where no evidence is set out in the case on appeal, the pleadings may be treated as evidence to support the findings, or, if not so treated, it will be presumed that the findings were based upon sufficient evidence.

7. Same—

Where there are no exceptions to the court's findings of fact, and the findings are sufficient to support the judgment entered, the judgment will be upheld.

8. Adverse Possession § 14—

Seven years' adverse possession, under color of title, is a bar to an action in ejectment as to all parties not under disability. G. S., 1-38.

9. Mortgages § 39e (1)—

An action for the redemption of a mortgage, where the mortgagee has been in possession, is barred after the expiration of ten years from the time the right of action accrued. G. S., 1-47 (4)

10. Same: Equity § 3—

Plaintiff heirs attack foreclosure of a mortgage executed by their ancestor on the ground that the mortgagee purchased at his own sale. It appeared that plaintiffs with full knowledge of all the facts and with knowledge that defendant was placing valuable improvements on the property, waited more than twelve years to attack the foreclosure. The holding of the court that plaintiffs were estopped by their laches from maintaining the action is upheld.

11. Ejectment § 20—

Where, in an action in ejectment, defendants disclaim all right and title to a part of the *locus*, plaintiffs are entitled to recover the reasonable rental value of that part for the three years next preceding the institution of the action. G. S., 1-341.

12. Mortgages § 17—

In an action by the mortgagee in possession to foreclose, defendants may not contend that the mortgagee must account for rents and profits while in possession when no such relief is sought by them in their pleadings. In the present case there was no tender or allegation of a desire to redeem.

13. Marshaling § 1—

In decreeing foreclosure of a deed of trust covering two tracts of land it is proper for the court to order that the tract not covered by a second mortgage should be first sold before resort to the second tract which had been acquired by the second mortgagee.

14. Costs § 3a—

Where two actions are consolidated for trial by consent, one in ejectment by heirs of the mortgagor and the other for foreclosure in which they are defendants, and partial recovery is had by the heirs in their action, the costs should be evenly divided between the parties.

APPEAL by plaintiffs in *Hughes, et als., v. Oliver* and by defendants in *Oliver v. Hughes, et als.*, from *Stevens, J.*, at September Term, 1947, of JOHNSTON.

By agreement of counsel for the respective parties in these actions, the cases were consolidated for the purpose of trial, and referred to Larry F. Wood, Esq., who was appointed by consent, as a Referee to hear the evidence, find the facts and state his conclusions of law.

HUGHES, ET ALS., *v.* D. R. OLIVER.

On 17 October, 1944, the plaintiffs, John W. Hughes and others instituted this action in ejectment against the defendant, D. R. Oliver, alleging that in 1932 D. R. Oliver wrongfully and unlawfully entered into the possession of two tracts of land, a 70-acre tract and a 26.5-acre tract, and that the plaintiffs were and are the owners thereof and entitled to the possession of said lands.

The defendant, D. R. Oliver, filed a duly verified answer, in which he alleges that on 6 January, 1931, John W. Hughes (father of these plaintiffs) was the owner in possession of the aforesaid tracts of land, and that he executed a mortgage on the 70-acre tract of land, to D. B. Oliver (father of defendant), securing an indebtedness of $1,044.84, with interest, due and payable 1 January, 1932; that the mortgage was duly recorded; that the 26.5-acre tract of land was not covered by the mortgage and the defendant disclaims any interest therein; that there was default in the payment of said mortgage and that the mortgagee sold the same at public auction under the power of sale contained therein, on 4 February, 1932, at the courthouse door in Johnston County, and that the defendant, D. R. Oliver, became the last and highest bidder thereon in the sum of $1,000.00.

The plaintiffs filed a reply, alleging that the foreclosure of the said 70-acre tract was irregular and invalid for that, among other things, D. B. Oliver, mortgagee, purchased at his own mortgage sale and subsequently conveyed said land to his son D. R. Oliver, the defendant herein.

The pleadings also contain certain allegations and denials concerning the fair and reasonable rental value of the respective tracts of land.

At the January Term, 1945, of the Superior Court of Johnston County, his Honor, Luther Hamilton, Judge Presiding, signed a decree in accord with the disclaimer of the defendant, adjudging the plaintiffs to be the owners and entitled to the possession of the 26.5-acre tract of land.

D. B. OLIVER *v.* HUGHES, ET ALS.

This action was instituted on 22 December, 1944, by D. B. Oliver against the defendants, in which he seeks to foreclose a certain deed of trust, which he alleges was executed 1 January, 1927, by John W. Hughes, deceased, to the Southern Trust Company, Trustee, to secure a loan of $2,000.00, from the Virginia-Carolina Joint Stock Land Bank of Elizabeth City, N. C., and which he alleges he purchased on 1 Novem-

ber, 1932, for a valuable consideration, to wit, $1,909.35, which sum is due and unpaid, and that he is entitled to recover the same with interest; that the original Trustor is dead and the defendants are his heirs at law, except D. R. Oliver and the Southern Trust Company, Trustee; that the lands conveyed in the deed of trust to secure the aforesaid loan are a 70-acre tract and a 26.5-acre tract; that D. R. Oliver was made a party defendant because he is now the owner of the 70-acre tract, subject to the lien of the aforesaid deed of trust.

The defendant, D. R. Oliver, filed an answer admitting the allegations of the complaint, and for a further defense says he purchased the 70-acre tract at a foreclosure sale under a second mortgage, and as owner he is entitled to have the 26.5-acre tract sold first, and only if a deficiency exists should the 70-acre tract be sold.

The Trustee filed no answer. The other defendants, as heirs at law, filed a demurrer for lack of proper parties, no administrator of John W. Hughes, deceased, being a party. However, by consent the demurrer was withdrawn and John W. Hughes, one of the defendants, was appointed administrator; the administrator filed an answer denying the material allegations of the complaint, plead laches as a bar and also the failure of the plaintiff to list the note for taxation and to pay the taxes due thereon, which answer was adopted by the other defendants.

The Referee heard both cases and filed his report, to which all parties filed exceptions. When this cause came on to be heard upon the Referee's report, it appeared that the Referee had failed to pass on the various pleas in bar or the statutes of limitations pleaded and found no facts in reference thereto, whereupon both cases were remanded to the Referee to hear such additional evidence as might be offered by the several parties and to state his findings of fact and conclusions of law with reference to said statutes of limitations and pleas in bar as set out in the pleadings in both cases. And D. R. Oliver, defendant in *Hughes v. Oliver* and D. B. Oliver, plaintiff in *Oliver v. Hughes,* were allowed ten days in which to file further pleadings setting up laches in said causes.

In the case of *Hughes, et als., v. Oliver,* the Referee found as a fact that John W. Hughes and his heirs had not been in possession of the 70-acre tract of land since on or about 4 February, 1932, that on or about that date D. B. Oliver, mortgagee, entered into possession of the 70-acre tract of land and continued in possession until 12 April, 1937, the date of the execution of the alleged mortgagee's deed from D. B. Oliver to D. R. Oliver, and that on said date the said D. R. Oliver, by virtue of said deed, entered into possession thereof and has been in the continuous possession of said 70-acre tract since that time; that D. B. Oliver, mortgagee, and D. R. Oliver have been in possession of the premises for a period of more than ten years prior to the institution of this action; that John W. Hughes, the mortgagor, surrendered possession of the 70-acre

tract to D. B. Oliver, mortgagee, on or about 4 February, 1932, and said mortgagor had full knowledge of the entry and possession of mortgagee until the time of his death on 29 November, 1934. The Referee found as a fact that the fair and reasonable rental value for the 26.5-acre tract of land was $100.00 per year for the three years next preceding the institution of this action. The defendant did not except to this finding of fact or to the conclusion of law based thereon.

The Referee held as a conclusion of law in his supplemental report, that the plaintiffs' cause of action was barred by the ten-year statute of limitations. Upon appeal to the Superior Court, his Honor overruled the findings of fact and conclusions of law in the Referee's first report, except as they coincide with the Court's findings of fact and conclusions of law. The findings of fact and conclusions of law in the supplemental report of the Referee, except as modified by the Court, were approved and confirmed. Upon the facts found, the Court entered judgment to the effect that the defendant's title was good, he having occupied the premises for more than seven years under color of title; and that neither the plaintiffs nor their ancestor in title, John W. Hughes, having been in possession of any of said lands within a period of ten years prior to the institution of this action, their cause of action is barred by the ten-year statute of limitations as set out in G. S., 1-47, and pleaded by the defendant, D. R. Oliver, in his answer, and that the plaintiffs are guilty of laches and are estopped from claiming any right, title or interest in the 70-acre tract of land.

In the case of *Oliver v. Hughes*, the Referee found as a fact that certain installments due on the note held by the plaintiff, fell due more than ten years prior to the institution of this action, and that the remaining installments were not barred by any statute of limitations; and that the defendants in this action have not sought to recover any sum for rent during the time of the mortgagor's possession of the lands described in the deed of trust. Exceptions were filed by plaintiffs and defendants to the Referee's first report, but no exceptions were filed to the supplemental report. His Honor overruled the findings of fact and conclusions of law of the Referee as stated in his first report, except in so far as they coincide with his findings of fact and conclusions of law. The findings of fact and conclusions of law in the Referee's second report, except as modified by the judgment entered, were approved and confirmed.

Whereupon, judgment was entered to the effect that D. B. Oliver is the owner and holder of the note which was executed by John W. Hughes and wife, 1 January, 1927, to the Virginia-Carolina Joint Stock Land Bank, in the original sum of $2,000.00, secured by deed of trust on both tracts of land referred to herein; that the balance due is $1,909.35, with interest thereon from 1 November, 1932, except such installments as matured prior to and including 1 July, 1934; and that D. B. Oliver is

entitled to have said lands sold to pay the balance due on said note; and ordered the lands be sold in the inverse order of alienation, that is, that the 26.5-acre tract should be sold first and the proceeds derived therefrom applied on the note, and if any balance then remains unpaid, the 70-acre tract should be sold to pay the balance. A commissioner was appointed to sell the property.

The plaintiffs appealed in the case of *Hughes v. Oliver*, and the defendants appealed in the case of *Oliver v. Hughes*, assigning error.

Wellons, Martin & Wellons for appellees.
E. G. Hobbs, O. L. Duncan, and Leon G. Stevens for appellants.

DENNY, J. The first assignment of error is applicable to both appeals, and is directed to the refusal of the court below to strike out the pleadings filed by the appellees after the first report of the Referee had been filed. By permission of the court, and without objection on the part of any of the parties, all of whom were represented before the court at the time the order was made, the appellees were allowed ten days in which to file further pleadings setting up laches. This permission to file additional pleadings was granted in the same order in which the cases were remanded to the Referee to hear such additional evidence as might be offered by the several parties and to state his findings of fact and conclusions of law with reference to the statutes of limitations and pleas in bar set out in the respective pleadings.

The appellants contend that after the first hearing by the Referee, the respective parties were bound by their original pleadings. The contention is not well founded. It is the established practice under our Code system to be liberal in allowing amendments of process and pleadings, to the end that causes may be tried upon their merits. *Garrett v. Trotter*, 65 N. C., 430; *Gilchrist v. Kitchen*, 86 N. C., 20; *Page v. McDonald*, 159 N. C., 38, 74 S. E., 642; *Whitehurst v. Hinton*, 222 N. C., 85, 21 S. E. (2d), 874; *McDaniel v. Leggett*, 224 N. C., 806, 32 S. E. (2d), 602; *Hatcher v. Williams*, 225 N. C., 112, 33 S. E. (2d), 617. It is discretionary with the trial court whether or not to allow an amendment to pleadings setting up laches. The rule relative to such plea is similar to that which allows the trial Judge in his discretion, to allow an amendment to set up the statute of limitations. *Smith v. Smith*, 123 N. C., 229, 31 S. E., 471; *Balk v. Harris*, 130 N. C., 381, 41 S. E., 940; *Hardin v. Greene*, 164 N. C., 99, 80 S. E., 413.

It is well settled in this State that the exercise of a discretionary power by the trial court is not reviewable upon appeal, unless there has been a palpable abuse of such discretion. *Gordon v. Pintsch Gas Co.*, 178 N. C., 435, 100 S. E., 878; *Life Ins. Co. v. Edgerton*, 206 N. C., 402, 174 S. E., 96; *Hogsed v. Pearlman*, 213 N. C., 240, 195 S. E., 789; *Byers*

v. Byers, 223 N. C., 85, 25 S. E. (2d), 466; *Pharr v. Pharr*, 223 N. C., 115, 25 S. E. (2d), 471. No abuse of discretion has been made to appear on this record.

PLAINTIFFS' APPEAL IN HUGHES, ET ALS., *v.* OLIVER.

The plaintiffs assign as error the refusal of the court below to sustain their exceptions filed to the original report of the Referee. This assignment of error cannot be sustained, for the reason that upon the hearing before the court below, his Honor overruled all the exceptions, and set aside all the findings of fact and conclusions of law of the Referee, except in so far as they coincide with the findings of fact and conclusions of law of the court. Whereupon his Honor proceeded to find the facts, set out his conclusions of law, and to enter judgment accordingly.

The court found as a fact that D. B. Oliver, mortgagee, upon default in the payment of the aforesaid mortgage on the 70-acre tract of land, offered said land for sale at public auction on 4 February, 1932, after due advertisement, and that said land was bid off in the name of D. R. Oliver, but no deed was executed by D. B. Oliver, mortgagee, to D. R. Oliver until 21 April, 1937; that on that day a deed was executed reciting the mortgage sale above referred to and said deed is dated 16 February, 1932, and was duly recorded 18 May, 1937, in the Registry of Johnston County. The other findings of fact are in substantial accord with the Referee's findings set out herein, except as to rent. The court below did not pass upon whether or not the plaintiffs are entitled to rents for the use of the 26.5-acre tract, as found by the Referee and to which finding of fact and conclusion of law the defendant did not except.

The court had the power upon the filing of the report of the Referee to affirm, amend, modify or set it aside, and to make its own findings of fact, and, when such findings are supported by competent evidence, they will not ordinarily be disturbed on appeal. *Thigpen v. Trust Co.*, 203 N. C., 291, 165 S. E., 720. Moreover, there is no evidence set out in the case on appeal, unless the pleadings be treated as such. If they are so treated, they are sufficient to sustain the court's findings of fact. But if not so treated, it will be presumed that the findings of fact were based upon sufficient evidence. *Radeker v. Royal Pines Park Co.*, 207 N. C., 209, 176 S. E., 285. There are no exceptions to the court's findings of fact, and the findings of fact are sufficient to support the judgment entered below. *Wilson v. Charlotte*, 206 N. C., 856, 175 S. E., 306; *Efird v. Smith*, 208 N. C., 395, 180 S. E., 581; *Wilson v. Robinson*, 224 N. C., 851, 32 S. E. (2d), 601; *Rader v. Coach Co.*, 225 N. C., 537, 35 S. E. (2d), 609; *Fox v. Mills, Inc.*, 225 N. C., 580, 35 S. E. (2d), 869; *Roach v. Pritchett, post*, 747.

The judgment entered below denies a recovery to the plaintiff on three grounds: (1) The defendant having been in possession of the premises,

under color of title, for seven years next preceding the institution of this action, plaintiffs' cause of action is barred by the seven-year statute of limitations, as set out in G. S., 1-38, and pleaded by the defendant; (2) that the plaintiffs, and their ancestor in title, John W. Hughes, not having been in possession of any of said lands within a period of ten years prior to the institution of this action, their cause of action is barred by the ten-year statute of limitations, as set out in G. S., 1-47, subsection 4, and pleaded by the defendants; and (3) that the plaintiffs and their ancestor in title, John W. Hughes, up and until the time of his death, knew that D. R. Oliver claimed this 70-acre tract of land and that he constructed buildings thereon and made many improvements on said land, and over a long period of time, these plaintiffs, with full knowledge of these facts, made no claim of right, title or interest in the premises; that they are guilty of laches and are thereby estopped from claiming any interest in said tract of land.

Seven years' adverse possession, under color of title, is a bar in an action in ejectment as to all parties not under disability. G. S., 1-38; *Locklear v. Savage,* 159 N. C., 236, 74 S. E., 347; *Carswell v. Creswell,* 217 N. C., 40, 7 S. E. (2d), 58; *Ward v. Smith,* 223 N. C., 141, 25 S. E. (2d), 463; *Vance v. Guy,* 223 N. C., 409, 27 S. E. (2d), 117.

An action for the redemption of a mortgage, where the mortgagee has been in possession, is barred after the expiration of ten years from the time the right of action accrued. G. S., 1-47, subsection 4; *Frederick v. Williams,* 103 N. C., 189, 9 S. E., 298; *Crews v. Crews,* 192 N. C., 679, 135 S. E., 784; *Ownbey v. Parkway Properties, Inc.,* 222 N. C., 54, 21 S. E. (2d), 900.

One guilty of laches has simply omitted "to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to adverse party." Black's Law Dictionary (3rd Ed.), p. 1062. *Peedin v. Oliver,* 222 N. C., 665, 24 S. E. (2d), 519; *Stell v. Trust Co.,* 223 N. C., 550, 27 S. E. (2d), 524; *Hardy v. Mayo,* 224 N. C., 558, 31 S. E. (2d), 748.

Here the plaintiffs, with full knowledge of all the facts relative to the 70-acre tract of land, and knowing the defendant was placing valuable improvements on the property, waited more than twelve years to assert any claim thereto. We think his Honor properly held them to be guilty of laches and are thereby estopped from claiming any right, title or interest in the property.

The judgment of the court below, in so far as it holds the defendant to be the owner and entitled to the possession of the 70-acre tract of land, will be upheld.

The plaintiffs, however, excepted to the refusal of the court below to render judgment in their favor for rent. The plaintiffs are not entitled to rent for the use and occupancy of the 70-acre tract of land. But, in

view of the defendant's disclaimer of title to the 26.5-acre tract of land, which he had occupied for more than seven years, and the finding of fact by the Referee that the reasonable rental value thereof was $100.00 per year for three years next preceding the institution of this action, and to which finding the defendant did not except, we think the plaintiffs are entitled to judgment for such rents. G. S., 1-341.

DEFENDANTS' APPEAL IN OLIVER v. HUGHES, ET ALS.

It appears from the record that the plaintiff herein went into possession of the 26.5-acre tract of land under the erroneous impression that his mortgage covered both the 70-acre tract and the 26.5-acre tract. But when it was discovered in 1944 that the foreclosed mortgage did not cover both tracts of land, the plaintiff elected to institute an action to foreclose the deed of trust held by him on both tracts, rather than to undertake to assert title otherwise.

The defendants, who are heirs at law of John W. Hughes, contend that if the plaintiff is entitled to foreclose his deed of trust, as provided in the judgment entered below, he must account for rents and profits while he was in possession of the respective tracts of land. This contention cannot be sustained on this record, for the reason no such relief is sought by them in their pleadings. It will also be noted that these defendants made no tender, nor do they allege a willingness or desire to exercise their right to redeem the lands conveyed in said deed of trust.

We have carefully examined the exceptions of the defendants bearing on the plaintiff's right to foreclose his deed of trust in the manner set forth in the judgment below, and they are without merit. The court below had the power to order the sale of the respective tracts of land included in the deed of trust, in the inverse order of alienation. *Brown v. Jennings,* 188 N. C., 155, 124 S. E., 150; *Berry v. Boomer,* 180 N. C., 67, 103 S. E., 914.

The plaintiffs further except to the ruling of the court below, taxing them with the costs in the case of *Hughes et als., v. Oliver,* and to the taxing of the costs against the defendants in the case of *Oliver v. Hughes, et als.*

The cases were consolidated for trial and referred by consent of all parties. The plaintiffs in the case of *Hughes, et als., v. Oliver* having been adjudged the owners of the 26.5-acre tract of land in controversy and having established their right to certain rents by reason of the occupancy of said land by the defendant, their exception is not without merit.

We think the costs in the Superior Court in the case of *Hughes, et als., v. Oliver,* should be divided equally between the plaintiffs and defendant; and the costs in the case of *Oliver v. Hughes, et als.,* should be divided equally between the plaintiff and the defendants John W. Hughes, and others, heirs at law of John W. Hughes, deceased.

The case of *Hughes, et als., v. Oliver* is remanded for judgment in accord with this opinion.

The case of *Oliver v. Hughes, et als.*, will be affirmed except as modified herein.

The case of *Hughes, et als., v. Oliver*—Error and remanded.

The case of *Oliver v. Hughes, et als.*—Modified and affirmed.

STATE v. BUSTER HOOKS.

(Filed 7 April, 1948.)

1. Rape § 4—

Evidence *held* sufficient to overrule motion to nonsuit in this prosecution for rape.

2. Criminal Law § 81c (3)—

The admission of evidence corroborating the testimony of a witness as to a fact not controverted by defendant could not be prejudicial.

3. Criminal Law § 42d—

The prosecuting witness identified defendant upon the trial as the perpetrator of the crime. Testimony of statements made by prosecutrix immediately after the crime was committed to the effect that a colored man had broken into her house and attacked her but that she did not know his name, and that when defendant was shortly thereafter brought before her, she identified him, *is held* competent for the purpose of corroborating the testimony of the prosecuting witness.

4. Same—

Where defendant has attacked the credibility of a State's witness by cross-examination, the scope of evidence competent for the purpose of corroborating the witness is not limited to those facts testified to by her which are controverted by defendant.

5. Criminal Law § 50d—

A remark of the court that it would allow the introduction of the fingerprints as found at the scene and the fingerprints of defendant for the purpose of identification, will not be held for error as an expression of opinion that the fingerprints were actually taken from the scene of the crime, it being obvious that the court was merely identifying the exhibits offered by the State.

6. Criminal Law § 38c—

The introduction in evidence of the cap found at the scene of the crime shortly after its occurrence, identified by defendant's mother-in-law as being defendant's cap, is without error when there is evidence that defendant was wearing the cap when he left his home shortly before the crime was committed and returned without it.

7. Criminal Law § 78e (2)—

A misstatement made in stating the contentions of the State that defendant had admitted a witness to be a fingerprint expert, will not be held for error on defendant's exception when the misstatement is not called to the court's attention at the time.

DEFENDANT'S appeal from *Pittman, J.*, September Term, 1947, RANDOLPH Superior Court.

The defendant was brought to trial on an indictment charging him with raping one Ora Hughes Bouldin. The evidence was substantially as follows:

Mrs. Bouldin testified that she was at home on the night of the occurrence, in her house near Archdale with her two children, one about seven and the other about 11. That she didn't know Buster Hooks by name, but had seen him pass the house twice a day going to and from his house which was about one and one-half miles from her house; that there are three or four houses with colored people up there.

After she had gone to bed and got to sleep she heard a noise—heard matches striking, and saw the defendant at the foot of her bed. She jumped up, screaming, and ran to the door. Before she could get it open the defendant reached her and took her by the throat, and choked her so that she turned blind. As she tried to "holler" he choked and cursed her, and threatened to kill them all. She jerked loose and tried to reach the door again and he knocked her back, and in her second attempt to get to the door he knocked her down. When she came to he knocked her to the floor again, and then completed the act of sexual intercourse. The little girls were still in bed.

She testified that when he got ready to leave he asked her if she had any idea who he was, and she told him no. Then he asked her if she'd ever seen him before, and she replied that she had not; but she had seen him pass the road every day and she knew where he lived. He had never been to her house for anything. He then told her he was a convict, cursed her and told her not to turn on the light until he got out of the house. In going out he ran into the piano, and stepped on the little 11-year-old girl.

Witness saw him after he got out of the house, running in the direction of his home. While in the house he was barefoot but he had on his shoes when he left, going down the road.

Witness got the children and ran to a house back of the barn. She was afraid the defendant might see her if she tried to cross the road. She went to Mr. Harrington's who lives on their place. His daughter married Calhoun and he was also there.

The sheriff came while she was there. She told them who she thought the man was, where he lived. That morning, about daylight, a deputy

brought the man in and witness identified him. She had seen him pass the house every morning and evening, walking on the hard surface to and from Archdale. A photograph of the witness taken after the occurrence, showing bruises, was identified and used to illustrate her evidence.

Witness was carried to the hospital where she remained a few days and then went to the home of a brother. Witness exhibited to the jury the marks she said defendant made on her neck, which she said were made by "the Hooks man."

The defendant, she testified, entered the house through a bedroom window. The doors were all locked. She was sleeping in the living room.

The cross-examination brought a reiteration of the same matter.

Dr. Croom testified that he examined the prosecutrix the morning of the 16th and found a fresh bruise just anterior to the left ear, and multiple scratch marks on the left side of the neck, extending from the angle of the jaw to the midline of the neck, and a scratch under the right collar bone. She was in a state of nervous collapse. The scratches, in his opinion, were caused by fingernails, and the bruise on the side of her face was caused by a blow from a semi-solid object. She was admitted to the hospital about mid-morning and was in his care until the 18th, and was seen again in his office the 23rd of August.

Betsy Bouldin, daughter of the prosecutrix, testified that she was ten years old, and in the fifth grade in school. On the night of the 16th, she was sleeping on a pallet in the living room. The witness then corroborated her mother as to what took place and identified the defendant as the man who assaulted her mother. She said she had seen him pass the house frequently.

P. E. Calhoun testified that prosecutrix came to his house about morning of the 16th. He first heard her screaming and when he opened the door she ran in, accompanied by her little children.

When witness undertook to tell what she said, attorneys for defendant objected, and the court instructed the jury that it was admitted for the purpose of corroborating Mrs. Bouldin and not as substantive evidence. Calhoun then said Mrs. Bouldin stated a colored man had broken into her house. Witness said she was in a hysterical condition. She had these marks on her neck. Witness had the sheriff called, and they went to Buster Hooks' home and saw him in the house—he had no clothes on but later put on blue overalls and blue shirt, black saddletop shoes with buckle. They carried Hooks back to Calhoun's house, where Mrs. Bouldin was much agitated at seeing him. She declared that he was the man.

On cross-examination the witness stated that Mrs. Bouldin was very disturbed. When she first got there she said somebody had broken in her house. "She told me exactly where this guy here lived. She said she

didn't know his name; she told me somebody else lived in that house and it was the largest fellow. I did not see the other one in there that night. I'd say about 45 pounds difference in the weight of this man and the other and about four inches in height."

R. L. White was asked to testify to a statement made by Mrs. Bouldin before him at the Calhoun's house, and on objection was permitted to testify, as corroborative of Mrs. Bouldin only, "that a colored man broke into her house and attacked her; that she knew where he lived, but didn't know his name. There were two colored men living in the same house, but she would know which one attacked her; said she had seen him. In consequence of that we went to his house and got him and brought him to Mr. Calhoun's and Mrs. Bouldin said that was the man."

"Q. What statement did she make there in the presence of the defendant?" Objection, overruled, exception.

"A. She said that was the man that attacked her."

W. B. Lassiter testified that he is an officer of the County. That Mrs. Bouldin had told him a darky had broken into her house and attacked her. (Admitted for purpose of corroboration only.) She said she did not know who it was, but he lived up the road in the third house.

When the defendant was brought before them at the Calhoun place both the prosecutrix and her daughter identified him. The defendant denied that he had been in the house. Hooks made no effort to escape. He did not seem excited or scared; witness stated that he was the jailer; knew the other colored man who lived in the third house.

A. E. Garner, presented as a fingerprint expert, testified to his training and experience in that line or skill, and, over the objection and exception of the defendant, was admitted to testify as an expert. His testimony was to the effect that he had taken photographs of the back room window, which were used to illustrate the evidence. On the inside of the window sill witness found several prints, not many of them good. Witness took pictures of a few of them. "I photographed prints on the inside of this frame. The screen was open about like it shows and there was a cut place. I photographed those fingerprints. I made this enlarged fingerprint; . . . I later took the fingerprints of the defendant Buster Hooks . . . for identification." Witness referred to an enlarged photograph of the fingerprints of the right ring finger of defendant. State's Exhibit E.

The Court: "The Court will allow the introduction of the fingerprint as found on the frame of the screen of the home of Mrs. Bouldin and also the fingerprints of defendant for the purpose of identification." Objection by defendant. Overruled, and defendant excepts. (Witness takes Exhibits C and E.)

Witness testified that Exhibit E was taken from the right ring finger of Buster Hooks' hand. The other exhibit was taken from the frame of the screen at Mrs. Bouldin's. Witness then compared the exhibits in detail and stated they were identical, and added, "In my experience and work I have never found two fingerprints alike unless they came from the same finger."

Cross-examined, the witness testified that he had picked the best pictures to be enlarged; that he had photographed all fingerprints found. It could be possible somebody else had left some fingerprints there; couldn't swear all are the same as those; "there was no way to tell how long the fingerprints had been on the window; after they've been there so long they age and won't take powder—I'd say ten or twelve hours. On the outside in the weather, dew, etc., they won't last as long as on the inside."

There would be some similarity in fingerprints in some cases—"I found another fingerprint that corresponded with this card but I did not enlarge them. . . . There probably have been mistakes made on fingerprints but there are no mistakes made on this one because I took the picture. I have 12 points of identification; they are exactly alike. . . . This is the first case I have been in involving a capital case."

W. P. Whitley, admitted by defendant to be an expert, testified that he had charge of the City-County Identification Bureau at Raleigh and had been in that work 22 years. He had examined Exhibit D containing a complete set of fingerprints on a card marked Buster Hooks and found that fingerprints on five or six of the photographs corresponded with fingerprints on that card. That he examined Exhibits C and E and found points in the prints from 1 to 12 corresponded exactly. Witness stated he was positive the prints were from one and the same person.

On cross-examination witness stated he did not know personally where the prints came from.

A. E. Garner, recalled, identified a cap or toboggan exhibited to him, and stated he had picked it up in the living room of Mrs. Bouldin's home on the morning of the 16th of August. The cap was introduced in evidence. Defendant excepted.

Lillie Bowman testified that she was Buster Hooks' mother-in-law; that the cap put in evidence was Buster Hooks' and the last time she saw it, it was on his head. That on the night of the 16th Buster came home about 12 o'clock with witness' daughter, declined to eat, smoked, and went to bed. He then got up and went out, staying about an hour. He had the cap on when he went out, but did not have it on when he came back.

The other man in the house was her son. He was not there when the officers came. Did not know where he was.

There was testimony as to the good character of Mrs. Bouldin.

The State rested. Defendant demurred to the evidence and moved for judgment of nonsuit. Motion was overruled and defendant excepted.

Exceptions to the charge discussed in the opinion embrace objections to statements of the court in arraying and reviewing the evidence, as follows:

Reference to the statement of the witness Calhoun that Mrs. Bouldin had stated to him the defendant was the man who attacked her; to the statement that A. E. Garner was "admitted" as an expert in the science of fingerprinting; to the State's contention that when taken the defendant did not have a cap.

The evidence was submitted to the jury who returned a verdict that the defendant was guilty of the crime of rape.

The defendant moved to set aside the verdict for errors committed during the trial and the motion was declined. Defendant excepted. To the ensuing sentence of death defendant objected, excepted, and appealed, assigning errors.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

Smith & Walker for defendant, appellant.

SEAWELL, J. This appeal brings up for review exceptions taken on the trial to the admission of evidence, the refusal to nonsuit the case on defendant's demurrer to the evidence, the remarks made by the court in the course of the trial, and the validity of certain instructions in the judge's charge.

The motion to nonsuit was properly denied.

Some of the exceptions have been abandoned and are not brought forward in the brief, and certain others have not been considered of sufficient merit to demand discussion, although they have been carefully examined. Those exceptions upon which the appellant most seriously insists have been carefully noted and discussion will be directed to them.

Considerable attention is given in appellant's brief to the admission of the testimony of Calhoun and White to the effect that the prosecutrix had previously, shortly after the occurrence, stated to them that a colored man had broken into the house; and that she had used certain expressions in identifying the defendant before them which it is argued were too vague for identification.

The evidence was confined to corroboration of Mrs. Bouldin's testimony on the trial. The gist of the objections made in this respect is that Mrs. Bouldin's testimony as to the main fact of the assault had not been challenged and, therefore, corroborative evidence was not admissible in its support.

There are two answers to this objection: First, if the defendant makes no question as to the commission of the crime but merely depends upon a want of identification of himself as the perpetrator, it is not apparent how he could be prejudiced as to corroboration of the occurrence; and, second, the statements of these two witnesses are so interwoven with the question of identification—which the appellant does challenge—as to repel any objection to its admission. Moreover the aid of corroboratory evidence is not as narrowly restricted as appellant suggests.

Mrs. Bouldin was subjected to a searching cross-examination which, of course, it was the duty of defense counsel to make, and it was calculated to raise the question of her credibility, whether directly or inferentially we need not inquire, and corroboration was not offensive to the suggested rule. *S. v. Parish,* 79 N. C., 610; *S. v. Rowe,* 98 N. C., 629, 4 S. E., 506; *S. v. Maultsby,* 130 N. C., 664, 41 S. E., 97; *S. v. Spencer,* 176 N. C., 709, 97 S. E., 155; *S. v. Gore,* 207 N. C., 618, 178 S. E., 209. Also see *S. v. Brabham,* 108 N. C., 793, 13 S. E., 217; *S. v. Bethea,* 186 N. C., 22, 118 S. E., 800; *S. v. Brodie,* 190 N. C., 554, 130 S. E., 205; *S. v. Scoggins,* 225 N. C., 71, 33 S. E. (2d), 473; *S. v Walker,* 226 N. C., 458, 38 S. E. (2d), 531.

In *S. v. Litteral,* 227 N. C., 527, 43 S. E. (2d), 84, the Court said:

> ". . . Her (prosecutrix) testimony was challenged and its credibility put at issue by the pleas of not guilty and by extended cross-examination. Hence the testimony of her mother that prosecutrix did not return home that night and she, the witness, so reported to the officers and the radio station was competent in support of her testimony . . ."

Exceptions are made to the mention of these matters in the judge's charge in the statement of the State's contentions; and to this the same reasoning applies.

On the evidence of Garner, who was admitted by the court to testify as an expert in the science of fingerprinting, the judge remarked: "The Court will allow the introduction of the fingerprint as found on the frame of the screen of the home of Mrs. Bouldin and also the fingerprints of defendant for the purpose of identification."

The appellant contends that this constitutes an expression of opinion to the jury (in violation of G. S., 1-180), that the pictures were actually made at the Bouldin house and that the fingerprints with which they were compared were taken from the defendant.

In reply to this the State points out that the remarks of the judge, reasonably considered, were intended only to identify exhibits which were admitted. Expressions comparable in factual similarity, and made in similar situations have not been held by the Court to constitute preju-

dicial error. *S. v. Cash,* 219 N. C., 818, 820, 15 S. E. (2d), 277; *S. v. Cureton,* 215 N. C., 778, 790, 3 S. E. (2d), 343; *S. v. Fain,* 216 N. C., 157, 158, 4 S. E. (2d), 319; *S. v. Bullins,* 226 N. C., 142, 144, 36 S. E. (2d), 915.

> "In *State v. Cureton, supra,* this Court approved the following question put by the Court to a witness: 'When did he (defendant) shoot him (deceased) the last time?' "
>
> "In *State v. Cash,* 219 N. C., 818, 820, this Court approved the following remarks made by the judge to counsel for defendant in answer to his argument directed to the competency of certain evidence: 'I am against you on that.' This Court held that this remark 'amounted to no more than a ruling upon the evidence.' "
>
> "In *State v. Fain,* 216 N. C., 157, 158, this Court approved the following comment of the Court upon the defendant's confession as evidence: 'which the court has held to be competent in this case because it appears that the confession was taken without hope of reward or without any extortion or fear, and that it was fairly taken after the prisoner had been duly warned of his rights.' In approving this comment, the Court said: 'This did not constitute an expression of opinion, such as is prohibited by C. S., 654, for the judge said no more than that the confession had been duly admitted in evidence, and he gave his reasons for admitting it.' "

A further objection is made to the introduction in evidence of a cap found shortly after the occurrence in the living room of the prosecutrix and identified as that of defendant and to the reference to this evidence in the statement of the contention of the parties in the judge's charge.

The hat in question appears to have been picked up by Garner in the living room of the Bouldin house where the prosecutrix testified she was assaulted, and it was identified by the defendant's mother-in-law as being defendant's cap. This witness further stated that when he went out of the house in which they both lived that night he had the cap on and when he returned he did not have it. There was an inference from the evidence that when the officers arrived and took him in custody some while after the occurrence he did not have the hat. We do not find that the objection has any merit.

In stating the contentions of the State the court observed in reference to the fingerprint evidence:

> "The State says and contends that this defendant is the man that committed the crime upon Mrs. Bouldin; that in his attempt to get out or into the house, that he pushed the screen of one of the win-

dows open, (and that fingerprints on the frame of the screen were taken by a man who is admitted to be an expert.)"

The appellant points out that the defense did not admit this witness to be an expert and that the form in which the contention is stated is prejudicial.

This exception, as several others noted above, is to a matter occurring in the array of the evidence and the statement of the contentions and comes under the general rule that to avail himself of the exception the defendant must have called the matter to the attention of the court at the time. *S. v. Dawson,* ante, 85, 89; *S. v. Warren,* 227 N. C., 380, 42 S. E. (2d), 350; *S. v. Thompson,* 227 N. C., 19, 40 S. E. (2d), 620.

Not only was this not done, but an opportunity was directly given to the defendant by the court to make the correction had he wished to do so and he did not avail himself of it.

We fully realize that we are dealing with a capital case, but the exceptive matter is not of such a character as to take it out of this rule, and the exception cannot be sustained.

The Court is unable to find sufficient reason to disturb the verdict. On the record we find

No error.

W. M. GASKINS, ADMINISTRATOR OF THE ESTATE OF MRS. MAUDE S. GASKINS v. DR. RICHARD S. KELLY, JR.

(Filed 7 April, 1948.)

1. Automobiles §§ 8i, 16—

G. S., 20-174 (a), does not apply to an unmarked cross-walk at an intersection of highways, and an instruction placing the duty upon a pedestrian to yield the right-of-way to vehicles in traversing a highway at such intersection must be held for error.

2. Same—

A pedestrian is required to use due care for his own safety in attempting to cross a highway at an intersection of highways, and a motorist is under duty to approach the intersection in the manner required by statute and to observe due care to avoid injury to pedestrians in the intersection.

3. Automobiles § 18i: Trial § 31b—Charge held for error in presenting only the inferences favorable to defendant on material phase of the case.

Intestate was struck at night by a car as she was attempting to cross the highway at an intersection after she had alighted from a bus. Defendant's evidence tended to show that intestate suddenly came from behind the bus, which was then in motion, into the path of defendant's

car, and that the impact occurred on his right side of the road. Plaintiff's evidence was to the effect that defendant had an unobstructed view for at least 200 yards and did not slacken speed before the impact, and that defendant admitted he was traveling from 45 to 50 miles per hour. *Held:* An instruction on the issue of contributory negligence to the effect that if intestate's act in suddenly coming from behind the bus into the path of defendant's car was a proximate cause of the injury, to answer the issue in the affirmative, must be held for error in failing to present plaintiff's contrary inferences from the evidence that intestate was lawfully in the intersection as defendant approached, and had the right to rely on defendant's observance of the rules requiring him to slacken speed in approaching an intersection and to observe due care to avoid injury to pedestrians within the intersection.

PLAINTIFF'S appeal from *Grady, Emergency Judge,* September Civil Term, 1947, HARNETT Superior Court.

This is an action brought by an administrator to recover for the death of his intestate, alleged to have been caused by the negligence of the defendant in the operation of an automobile upon the highway.

The plaintiff's evidence, summarized, tends to show that Mrs. Maude S. Gaskins, plaintiff's intestate, was a passenger on a bus operated between Durham and Dunn on Highway No. 55. She got on at Erwin Cotton Mills around midnight to return home from her night shift at the mill and was proceeding to Currin's store, a bus stop approximately three miles east of Angier and about 18 miles from where she got on the bus. At the point to which she had purchased her ticket there is an intersection of another road with the highway—the county road crossing it. There was a highway sign indicating the approach to an intersecting road from both directions—"the customary highway sign." At that point the total width of the highway is approximately 40 feet and the hard surface 22 or 24 feet. The bus came to a stop at Currin's filling station to discharge Mrs. Gaskins as a passenger about 12:20 o'clock. The bus had crossed the county road indicated before coming to a stop, on the right hand side of the road headed westerly toward Angier, pulled off on the shoulder of the road. The bus was lighted on the inside when she got off. The headlights were on and all the marker lights—the latter lights were amber lights on each side of the bus. The driver who testified saw Mrs. Gaskins get off the bus. At the time Mrs. Gaskins got off, the left hand wheels were adjoining the edge of the hard surface and the right wheels completely off. When Mrs. Gaskins got off the bus she went toward the rear and the driver watched her until she was out of sight from the rear view mirror, then checked his passengers and proceeded to drive off. From this intersection the road is straight for approximately 200 yards west and about the same distance east, being slightly downhill east.

H. J. Hunt testified that he was a member of the Highway Patrol and the night of the occurrence above mentioned he was at the police station in Angier on duty. From information he had around 12:30 he went to the scene of the wreck. At that point, testified the witness, there is a crossing by the county road, one road going to Buies Creek and another county road leading back into the county. The road appeared to be around 24 feet wide and is regularly used by traffic.

The witness arrived at the scene, found a 1946 coach on the right hand and southwest side of the road, headed towards Coats, with the left front wheel on the hard surface, and the car had skidded and come to a stop on the right hand side of the road. On the highway opposite Currin's store there were blood spots along the road going south—the right hand side of the paved surface. When witness got to the old filling station opposite Currin's store he found where somebody had been struck, apparently in the center of the intersection on the right hand side. The distance from where the car was found to the point where the body was struck was 81 feet, and Mrs. Gaskins' body was found in front of the car. The defendant told witness that Mrs. Gaskins' body, which had been moved, had been lying where he found the blood. From the front of the car to the spot was 18 feet. Defendant stated he pulled her body from the center of the road toward the shoulder to keep anybody from hitting her.

Defendant told witnesses he had been driving approximately 45 miles per hour and that he didn't see Mrs. Gaskins until about the time he struck her. The left front fender and headlight, and hood of the car were mashed in. Witness testified as to the highway signs indicating the cross road or intersection and said the highway was straight both ways from the intersection. A driver coming south on No. 55 could see clearly for at least 200 yards. Witness described the marks of injury upon the body.

On cross-examination the witness stated that the blood first found indicated that Mrs. Gaskins was hit about two feet to the right of the center of the road. There is no sign at this place indicating where pedestrians may cross. The skid marks left by the wheel upon the braking of the automobile started around three feet west of the center line.

K. C. Matthews testified for the plaintiff that he got to the scene of the wreck shortly after its occurrence with Patrolman Hunt. Dr. Kelly stated that he had checked the body as soon as he got out of his car and found that Mrs. Gaskins was dead. He said that he was coming on the hard surface—witness learned from a ball game—and meeting the bus, and that he hit something and later found out it was Mrs. Gaskins. The defendant said he was traveling approximately 45 miles per hour and didn't see anything until he hit something.

C. B. Allred, witness for plaintiff, testified as to the condition of the body with respect to injuries—that her skull was fractured, both legs broken, and her body bruised and lacerated pretty well all over. He made inquiry of Dr. Kelly as to the circumstances under which it occurred. Dr. Kelly said he was driving approximately 45 miles an hour and didn't see Mrs. Gaskins until after he struck her. The distance of his car from the point of impact with Mrs. Gaskins was 81 feet. There were blood stains on the pavement indicating where her body had come to rest. The body was 90 feet from the point of impact to where her body came to rest.

Thomas Surles testified for the plaintiff that he lived about 300 yards from where the accident happened, down the Buies Creek road, and that Mrs. Gaskins stayed with them. He went to the scene as soon as he heard about it, about 1:00 o'clock. He testified that Dr. Kelly told him he didn't see Mrs. Gaskins, or the bus either, until after he hit her. Mrs. Surles testified for plaintiff that she lived just a short distance from Currin's store intersection and her daughter Maude (the deceased) lived there in her home with her two children. That she was working for the Erwin Mills at the time of her death. She gave further evidence as to the earning capacity and physical condition of the intestate at the time of her death.

At the conclusion of plaintiff's evidence the defendant moved for judgment of nonsuit, which was denied.

The defendant then put on his evidence, testifying for himself substantially as follows:

On the night of Mrs. Gaskins' death defendant was traveling from Angier towards Erwin; he saw that he was meeting a car and in approaching the site of the accident was traveling approximately 45 to 50 miles per hour. The car lights were in his eyes, "blurring" his sight. Plaintiff dimmed his lights, and as he passed by a woman stepped from behind the bus, which was in gear and pulling away, and into the path of his automobile; she stepped into the left front fender. Defendant noticed that he was meeting a vehicle the lights of which were shining in his face and as he passed it became aware that it was a bus, then in motion. His car was on the right side of the highway and he saw the woman a split second before he hit her; she was crossing defendant's side of the road, had come across the center line and was on defendant's side of the road. The front end of defendant's automobile had passed the front end of the bus and he was looking at the road straight ahead. His lights were burning and the mechanical condition of his car was excellent, brakes excellent.

Defendant stopped as quick as he could and took her from her place in the road, examined her and found she was no longer alive. Defendant stated that he could not say in what manner the lady was crossing the

road—all he could say was that she was coming across the road over to his side. She came out from behind the bus. Defendant denied ever having said to anybody that he did not see the bus.

On cross-examination defendant said he made the trip from Asheville to Raleigh that day, about 280 miles. That he went to the football game in Raleigh that night and after the game went to the Sir Walter Hotel and from Raleigh drove to Erwin. Defendant denied having said that the lights of the bus blinded him but said "you get a blur of the lights;" stated that he did not see the highway sign indicating that he was approaching an intersection and did not know there was one there; he had been up and down those roads many times in years gone by but was not so familiar with them because he had not been there in several years.

Currin's service station had been there for many years and was 12 or 13 miles from where defendant lived and when he went to Raleigh he went by there. He was not currently familiar with the road to Buies Creek. By the time defendant saw the bus it was in motion on the highway. He couldn't say how far he was from the bus when he first saw it.

Defendant said that when he hit the lady she was on his side of the highway, had crossed half of the highway, coming from behind the bus and that he hit her on his side but couldn't tell how far over on the side it was. The bus was changing gears in the process of moving away. Defendant had not applied his brakes at the time he struck Mrs. Gaskins and had not reduced his speed.

Defendant was not sure that she went 90 feet down the highway after being struck but did not think he dragged her; got the impression that she was on the left front fender.

"I pulled my car to the right. She was not hanging on my car. It was bound to be the force of the blow." Defendant stated that he saw the lady come out from behind the bus; that he pulled to the right after he hit her but had not changed his course until the impact. "After seeing her come out from behind the bus there was room for me to turn to my right. I could not see through the bus. I didn't hit her where the bus was; I hit her over on my right."

Mary Jane Coleman testified that she was in the car with Dr. Kelly at the time of the occurrence. They were traveling 45-50 miles per hour. That she didn't see the lady until they got parallel with the bus, and she walked from behind it on defendant's side; that defendant didn't have a chance to apply his brakes and she didn't think he applied them until after she was hit. That it all happened in a second's time. The witness testified that Mrs. Gaskins was running when she saw her. That they were parallel with the bus before she saw Mrs. Gaskins, who was distant "about as far as from here to the first man on the jury." The bus was pulling off and she was coming out from behind the bus and was about in the middle of the road, going towards Currin's store, crossing to the

other side of the highway. On cross-examination this witness stated that she first saw the bus when it was a long way ahead of them and does not believe that it was moving at the time, but by the time they got there it was. Couldn't tell whether it was parked or being operated until they got pretty close to it. Dr. Kelly kept on down the road without changing his speed and without knowing whether the bus was parked or not, driving 45-50 miles per hour and was traveling at that speed at the time he hit this woman. He had not changed his speed or direction.

H. J. Hunt, recalled, testified on re-cross examination that the defendant told him on the night of the accident that he was traveling south approximately 45-50 miles per hour and that the bus was pulling off from a parked position meeting him and that there was a woman whom he struck about the center or a little across the center of the road; that he struck her and that he didn't see her until about the time he hit her. That he immediately brought his car to a stop after the impact and that it had thrown her where he pointed out some blood was lying in the middle of the road. That he picked her up and found that she was dead.

The first blood witness found was in the intersection of the two highways, just across the center line. There were no skid marks until the car was beyond the point of impact. There was no indication that the brakes had been applied before the impact. There was a space the width of the shoulder and the width of the paved surface to the right that Dr. Kelly could have turned if he had swerved. The point of impact was in the intersection. The distance from the rear left corner of that bus to where the witness found the blood would be about 18 feet.

Other witnesses testified in corroboration of the statements made by Dr. Kelly as to how the accident occurred. The defendant rested. Plaintiff introduced no other evidence. Defendant renewed his motion for nonsuit at the end of all the evidence. The motion was denied and defendant excepted.

Issues were submitted to the jury presenting the question of negligence, contributory negligence, and damages. Plaintiff's exceptions dealt with in this opinion are to the instructions given to the jury on the issue of contributory negligence. As a matter of convenience these are reproduced in the opinion with pertinent comment rather than quoted here.

Douglass & McMillan, John R. Hood, and J. M. Broughton for plaintiff, appellant.

A. J. Fletcher, F. T. Dupree, Jr., and Dupree & Strickland for defendant, appellee.

SEAWELL, J.. In answer to the first issue the jury found that Mrs. Gaskins was killed by the negligence of the defendant as alleged in the

complaint. The exceptions brought forward challenge the adequacy and correctness of the instructions to the jury on the second issue, presenting the question of contributory negligence on the part of the intestate.

We examine first plaintiff's challenge to the following instruction to the jury on this issue:

> "It was the duty of Mrs. Gaskins, gentlemen, in crossing a highway at a point other than within a marked cross-walk, and according to the evidence here there was no cross-mark there, or within an unmarked cross-walk at an intersection, to yield the right of way to defendant's car approaching upon the roadway, and the defendant, in the absence of anything which gave or should have given notice to the contrary, was entitled to assume and to act upon the assumption that Mrs. Gaskins would use reasonable care and caution commensurate with visible conditions and that she would observe and obey the rules of the road. Now, gentlemen, that is the law."

In this instruction the court undertook to apply G. S., 20-174, to the situation presented in the evidence. That section reads as follows:

> "(a) Every pedestrian crossing a roadway at any point other than within a marked cross-walk or within an unmarked cross-walk at an intersection shall yield the right-of-way to all vehicles upon the roadway."

In support of this instruction the appellee cites *Tysinger v. Dairy Products,* 225 N. C., 717, 36 S. E. (2d), 46. The *Tysinger case,* however, did not deal with an intersection and is not in point. In the opinion of the Court, G. S., 20-174, is not applicable to the facts of this case and its presentation to the jury with the instruction based upon it must be held for reversible error. It was calculated to leave the impression on the minds of the jury that the deceased was at the time in violation of the law, or of a rule of the highway which made it her positive duty to yield the right of way, and that she was contributorily negligent in not so doing.

Of course, the intestate was required to use reasonable precautions, or due care, in attempting to cross the highway at the intersection; but the duty of yielding the right of way under the provisions of this statute could not under the circumstances be superadded so as to make her chargeable with contributory negligence or relieve the defendant from the duty of approaching in the manner required by the statute and observing due care to avoid injury to a pedestrian within the intersection. *Ward v. Bowles, ante,* 273.

The following instruction has also been made the subject of exception:

> "If you find as a fact from the evidence and by its greater weight that as the defendant Dr. Kelly approached the scene of the accident the plaintiff's intestate, Mrs. Gaskins, suddenly came from behind the bus into the path of defendant's car and was struck, and that this action on the part of Mrs. Gaskins was one of the proximate causes of her injury and death, it would be your duty to answer the second issue YES."

Plaintiff's objection to this instruction is that it presents a special phase of the defendant's evidence, while contrary inferences which might reasonably be drawn from the evidence taken in its most favorable light for the plaintiff are withdrawn from consideration by the jury, and not presented here or elsewhere.

We must, in conformity with the custom of the Court, refrain as far as practicable from discussion of the evidence in sending this case back for retrial, but a direct challenge of this sort renders unavoidable some reference to the evidence appellant contends was ignored, and the inferences which he claims might be drawn from it.

The appellant points out that there is evidence tending to show that the bus was parked on the shoulder, entirely off the paved surface of the highway; that the road was straight, level, and the view unobstructed for at least 200 yards back from that point in the direction from which defendant was approaching; that Mrs. Gaskins had already crossed more than half the highway when she was hit; that defendant admitted he was traveling 45-50 miles an hour in approaching and traversing the intersection and did not slacken his speed or "swerve" from his course until he hit deceased. The appellant contends that a reasonable inference may be drawn from this evidence that Mrs. Gaskins was lawfully within the intersection as defendant approached, and had the right to rely on his observance of the rules of the highway requiring him to slacken his speed in approaching the intersection, and observe due care in avoiding the injury. Huddy, Auto, 7th Ed., p. 557; Berry, Auto, 4th Ed., p. 378; Babbitt, Motor Vehicles, 3rd Ed., pp. 1330, 1682. "Failure to anticipate omission of such care does not render him negligent." *Deputy v. Kimmell,* 73 W. Va., 595, 80 S. E., 919. It is pointed out also, that there is no evidence that Mrs. Gaskins failed to look or take other reasonable precaution upon entering the highway except that which might be inferred from the "suddenness" of her coming from behind the bus and into the pathway of the car; and since she had gone such a distance before she was hit, and in view of the speed of the approach, defendant's evidence is inconclusive as to her failure to look at the approaching car; that the matter was a jury question upon the whole

evidence. 5 Am. Jur., 758, sec. 448; *Ritter v. Hicks,* 102 W. Va., 541, 135 S. E., 601, 50 A. L. R., 1505, 1509; *Knapp v. Barrett* (opinion by *Justice Cardozo*), 216 N. Y., 226, 110 N. E., 428; *Thornton v. Cater,* 94 N. J. L., 435, 111 A., 158.

We think the exception is tenable on the face of the record and while the jury is privileged to draw such inferences from the evidence as conscience and sound judgment may dictate, plaintiff was entitled to have this phase of the evidence presented to them for their consideration.

For these reasons there must be a trial *de novo.* It is so ordered.

New trial.

THE STATE OF NORTH CAROLINA BY ITS ATTORNEY-GENERAL, ON THE RELATION OF DELMAR C. OWENS, v. C. R. CHAPLIN.

(Filed 7 April, 1948.)

1. Quo Warranto § 2—

The official certificate of election is *prima facie* evidence that the person designated is entitled to the office, and imposes the burden on relator of establishing the grounds of his complaint.

2. Appeal and Error § 40d—

The findings of fact of the trial court are binding on appeal if supported by evidence.

3. Elections § 2f—

Residence as a prerequisite to the right to vote in this State within the purview of N. C. Constitution, Art. VI, sec. 2, is synonymous with domicile, which denotes a permanent dwelling place to which a person, when absent, intends to return.

4. Same—

Domicile, once established, cannot be lost until a new one is acquired, and therefore where an elector is a resident at the time of registration he is entitled to vote in the precinct of his residence unless prior to the election he abandons his residence here and acquires a new domicile by moving to another place with intention of making it his permanent home.

5. Same—

Uncontroverted testimony discloses that electors whose votes were challenged on the ground of nonresidence, left their homes and moved to another state or to another county in this State for temporary purposes, but that at no time did they intend making the other state or the other county in this State a permanent home, is insufficient to support a finding that they had lost their domicile in the county for the purpose of voting.

6. Elections § 1—

The General Assembly is without power to prescribe qualifications for voters different from those found in the Constitution, and the meaning of

the term "residence" within the purview of N. C. Constitution, Art. VI, sec. 2, is a judicial question and cannot be made the matter of legislative construction. G. S., 163-25 (d) and (f).

7. Elections § 11b—

Where the evidence supports the findings that certain absentee voters were not sworn, the rejection of their ballots is proper. G. S., 163-57; G. S., 163-58.

8. Same—

The fact that the oaths of absentee voters were not taken by them upon the Bible but were taken with uplifted hands, does not invalidate their votes.

9. Same—

The interest of the Clerk of the Superior Court in his own re-election, standing alone, does not disqualify him from administering oaths to absentee voters, G. S., 163-57; G. S., 163-58, administering the oaths being ministerial and not judicial.

10. Same—

The fact that the Chairman of the County Board of Elections, in company with candidates in the election, delivers absentee ballots to absentee voters at their temporary residences in another state or county is insufficient, of itself, to vitiate their votes, there being no evidence remotely suggesting coercion, fraud or imposition.

11. Same—

Persons in all respects qualified to cast absentee ballots will not be disfranchised for the mistake or even willful misconduct of election officials in performing their duties when the mistake or misconduct does not amount to coercion, fraud or imposition and it appears that the ballots expressed only the free choices of the electors themselves. G. S., 163-54.

12. State § 5—

In proper instances the State has the power to permit acts to be done outside its borders when the legal consequences of such acts are to take place within its boundaries.

13. Elections §§ 8, 11b—

The fact that the Chairman of a County Board of Elections delivers absentee ballots in person to the voters at their temporary residences outside the boundaries of the State, and that the voters deliver the votes in the sealed containers to him in person instead of mailing them, G. S., 163-58, is not sufficient, standing alone, to vitiate the votes. G. S., 163-55; G. S., 163-56; G. S., 163-57.

14. Quo Warranto § 2—

Where, in an action in the nature of *quo warranto* the evidence is insufficient to invalidate a sufficient number of votes to change the result of the election, the motion by defendant for judgment as of nonsuit should be granted.

OWENS *v.* CHAPLIN.

APPEAL by defendant, C. R. Chaplin, from *Parker, J.*, at September Term, 1947, of TYRRELL.

This is a civil action in the nature of a *quo warranto* to try title to the office of Clerk of the Superior Court of Tyrrell County for the four year term commencing on the first Monday in December, 1946.

The relator, Delmar C. Owens, as the Republican candidate, and the defendant, C. R. Chaplin, as the Democratic nominee, sought election to the office in controversy at the general election on 5 November, 1946. The Tyrrell County Board of Elections met at the courthouse of the county at the appointed day after the election and opened the returns of the several precincts of the county, canvassed the votes cast in the county, judicially determined that 686 votes were cast for the defendant and that 666 votes were given for the relator, and officially declared the defendant elected to the office of Clerk of the Superior Court of Tyrrell County. Within ten days thereafter, the Chairman of the Tyrrell County Board of Elections furnished to the defendant a certificate of election under his hand and seal, and on the first Monday in December, 1946, the defendant qualified as Clerk of the Superior Court of Tyrrell County, and ever since has been discharging the duties of the office and enjoying its fees and emoluments.

This action was brought by the relator, upon the leave of the Attorney-General, on 23 December, 1946, after he had exhausted administrative machinery before the Tyrrell County Board of Elections and the State Board of Elections.

As made out by the complaint, the claim of the relator to the office in controversy may be summarized as follows: According to the official canvass of the vote by the Tyrrell County Board of Elections, the defendant was elected by a majority of 20. But such was not the true and lawful result of the election. More than 20 illegal votes were cast and counted for the defendant, and but for such illegal votes, the official canvass would have shown the relator's election. The relator is entitled to have the illegal votes rejected by the court. As the exclusion of the illegal votes would show that the relator received a majority of the legal votes cast for candidates for the office and would thus change the result of the election, the relator is entitled to the entry of a judgment ousting the defendant from the office and putting the relator in possession of it.

The validity of the relator's claim was denied by the answer of the defendant.

All of the issues in the action were referred to Honorable Kemp D. Battle for trial by the written consent of the parties. The relator presented to the referee the depositions or personal testimony of fifty-three witnesses, including virtually all of the persons alleged to have cast illegal ballots for the defendant. The defendant, however, insisted that

the testimony adduced by the relator was insufficient to support his claim, and refrained from offering any testimony in his own behalf. Mention will hereafter be made in the opinion of such of the testimony as may be necessary to an understanding of the matters at issue on this appeal.

The report of the referee as modified and confirmed by the judge found that 37 illegal votes were cast and counted for the defendant, and concluded that the relator had been elected to the office in question by a majority of 17. Judgment was entered thereon on application of the relator adjudging that the defendant be ousted from the office of Clerk of the Superior Court of Tyrrell County, and that the relator be put in possession of it. The defendant thereupon appealed to this Court upon exceptions duly preserved to practically all the findings of fact, conclusions of law, and rulings made below.

R. Clarence Dozier, Willis Briggs, H. S. Ward, and John A. Wilkinson for the relator, appellee.

Ehringhaus & Ehringhaus for defendant, appellant.

ERVIN, J. The official certificate of election constituted *prima facie* evidence that the defendant was entitled to the office of Clerk of the Superior Court of Tyrrell County, and imposed on the relator the burden of establishing the grounds of his complaint. *Jones v. Flynt,* 159 N. C., 87, 74 S. E., 817; *Rodwell v. Rowland,* 137 N. C., 617, 50 S. E., 319; *Boyer v. Teague,* 106 N. C., 576, 11 S. E., 665, 19 Am. S. R., 547; *Roberts v. Calvert,* 98 N. C., 580, 4 S. E., 127. The referee and the judge have found that the relator has successfully met this burden. Their findings of fact are binding upon us if they are supported by evidence. *Lindsay v. Brawley,* 226 N. C., 468, 38 S. E. (2d), 528; *Thigpen v. Trust Co.,* 203 N. C., 291, 165 S. E., 720.

As modified and confirmed by the judge, the report of the referee contains findings to the effect that 35 of the 37 persons alleged to have cast illegal ballots in favor of the defendant were disqualified to vote in Tyrrell County because of nonresidence.

The qualifications of voters in this State are established by the Constitution. It is therein provided as a prerequisite to the right to vote that an elector "shall reside in the State of North Carolina for one year and in the precinct, ward, or other election district in which he offers to vote four months next preceding the election." N. C. Const., Art. VI, section 2. It has been held by this Court without variation that residence within the purview of this constitutional provision is synonymous with domicile, denoting a permanent dwelling place, to which the party, when absent, intends to return. *Hannon v. Grizzard,* 89 N. C., 115; *Boyer v. Teague, supra; Groves v. Comrs.,* 180 N. C., 568, 105 S. E.,

172; *Gower v. Carter,* 195 N. C., 697, 143 S. E., 513. This constitutional provision applies primarily to an incoming person who is not permitted to exercise political rights until after he has been in the State and the voting precinct for the prescribed periods, and is not designed to disfranchise a citizen of the State when he leaves his home and goes into another State or into another county of this State for temporary purposes with the intention of retaining his home and of returning to it when the objects which call him away are attained. *Hannon v. Grizzard, supra.*

It appears that each of the 35 persons now under consideration was registered in the precinct in Tyrrell County in which his ballot was cast in the election of 1946, and that he had his legal residence in such precinct within the meaning of Article VI, section 2, of the Constitution at the time his name was placed upon the registration books. It is a well settled principle that when once established, a domicile is never lost until a new one is acquired. *Hannon v. Grizzard, supra; Groves v. Comrs., supra;* 29 C. J. S., Elections, sec. 19. It follows that each of these 35 persons was entitled to vote in Tyrrell County at the time in controversy unless he had changed his domicile at some time subsequent to his registration and prior to the election.

It is well established that "to effect a change of domicile, there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence at another place, or within another jurisdiction, coupled with the intention of making the last acquired residence a permanent home." *In re Finlayson,* 206 N. C., 362, 173 S. E., 902; *In re Martin,* 185 N. C., 472, 117 S. E., 561.

The relator called virtually all of the 35 persons now under consideration to the stand for the avowed purposes of establishing that they had changed their domiciles from Tyrrell County to another state or to other counties in this State between the times of their respective registrations and the election of 5 November, 1946. We have studied with extreme care the testimony of these witnesses and all of the other evidence in the 275 page record, and have reached the conclusion that the testimony is sufficient to sustain the findings that four of these persons, namely, J. H. Beck, Dewey Jones, Blanche Jones, and Fred Patrick were nonresidents of Tyrrell County on 5 November, 1946, but that there is no evidence in the record to support the findings of nonresidence with respect to the other 31 persons who are alleged to have lost their domiciles in Tyrrell County. Uncontroverted testimony offered by the relator shows that each of these 31 persons had a permanent residence in the precinct of Tyrrell County wherein his ballot was cast within the purview of Article VI, section 2, of the Constitution; that he left his home in Tyrrell

County and went to another state or to another county in this State for temporary purposes; that he intended at all times to return to Tyrrell County when the temporary objects which had called him away were attained; and that he had at no time any intention of making the other state or the other county in this State his permanent home.

It is apparent that undue stress was placed in the hearing below upon the fourth and sixth rules prescribed by the Legislature for the guidance of registrars and judges of election in determining the residence of a person offering to register or vote. G. S., 163-25, subsections d and f. The meaning of the term "residence" for voting purposes, as used in Article VI, section 2, of the Constitution of North Carolina, is a judicial question. It cannot be made a matter of legislative construction. This is true because the Legislature cannot prescribe any qualifications for voters different from those found in the organic law. *Van Bokkelen v. Canaday,* 73 N. C., 198; *Smith v. Carolina Beach,* 206 N. C., 834, 175 S. E., 313.

The relator questioned the validity of the absentee ballots cast by 12 persons for the defendant on account of alleged defects or irregularities relative to the execution of the statutory affidavits which absent voters are required to make at the time of marking and sealing their votes. G. S., 163-57; G. S., 163-58. The evidence supports the findings that five of these absentee voters were not sworn. They were F. C. Everton, Minnie Everton, Ralph D. Godwin, Alonzo Reynolds, and Lillian Reynolds. Hence, the rejection of their ballots by the court below is upheld here. *Bouldin v. Davis,* 200 N. C., 24, 156 S. E., 103.

A similar ruling cannot be made, however, with respect to the 7 ballots challenged by the relator upon the ground that the oaths were not administered to the voters upon the Bible, but were taken by them with uplifted hands. We sustain the validity of the votes of these seven electors upon the authority of the well considered decision in *DeBerry v. Nicholson,* 102 N. C., 465, 9 S. E., 545, 11 Am. S. R., 767.

Four absent voters took and subscribed before the defendant in his capacity as Clerk of the Superior Court of Tyrrell County the affidavits which the statute requires absentee voters to take at the time of marking and sealing their ballots. G. S., 163-57; G. S., 163-58. The court below rejected these ballots and deducted them from the defendant's count upon the ground that the defendant's interest in his own re-election to the office of Clerk disqualified him to administer the oaths to these voters and vitiated their ballots. The testimony shows that the transactions were otherwise free from any basis for criticism or objection, and that the ballots under consideration expressed the free choices of the voters. It may be that a due sense of propriety would have induced the defendant to refrain from administering the oath to these voters. We are unable,

however, to concur in the ruling of the court rejecting these ballots. When he administered the oath to these electors, the defendant performed a simple and definite duty imposed by law regarding which nothing was left to his discretion. His act was ministerial and not judicial. *S. v. Knight,* 84 N. C., 790. It follows that his interest in the outcome of the election did not invalidate the ballots in question. 46 C. J., Oaths and Affirmations, section 6; *Lamagdelaine v. Tremblay,* 162 Mass., 339, 39 N. E., 38; *Evans v. Etheridge,* 96 N. C., 42, 1 S. E., 633.

For reasons hitherto stated, the court below properly discarded nine of the votes cast for the defendant. All of these rejected votes were cast by absent voters. We forego any further discussion with respect to these nine votes, and pass to the claim of the relator that 21 other absentee ballots were illegally voted for the defendant by persons sojourning in another state or in other counties of this State because of alleged misconduct of the Chairman of the Tyrrell County Board of Elections in delivering absentee ballots to such persons beyond the borders of Tyrrell County.

The question raised by this contention is a difficult one, necessitating a careful examination of our statutes relating to absentee voting. We undertake this task with the conviction that *Chief Justice Andrews* of the Court of Appeals of New York laid down a sound basis for judicial action in election contests when he declared: "We can conceive of no principle which permits the disfranchisement of innocent voters for the mistake, or even the willful misconduct, of election officials in performing the duty cast upon them. The object of elections is to ascertain the popular will, and not to thwart it. The object of election laws is to secure the rights of duly qualified electors, and not to defeat them." *People v. Wood,* 148 N. Y., 142, 42 N. E., 536.

The facts on this phase of the case are plain. Each of these absent voters was a duly qualified elector in Tyrrell County under Article VI, section 2, of the Constitution, and was duly registered in the voting precinct in which his absentee ballot was deposited, and was entitled to vote in such precinct at the general election on 5 November, 1946, under the statutes regulating absentee voting because he was then temporarily absent from Tyrrell County. G. S., 163-54.

Needham Brickhouse, the Chairman of the Tyrrell County Board of Elections, visited these 21 absent voters at their respective temporary residences in Norfolk, Virginia, or in Pasquotank, Perquimans, or Washington Counties, North Carolina. He was accompanied by the defendant, a candidate for re-election to the office of Clerk of the Superior Court of Tyrrell County, and by Earl Cahoon, the nominee of the defendant's party for the post of representative from Tyrrell County in the General Assembly. These circumstances, however, merit no great

stress because the testimony in the record does not suggest even remotely that any coercion, fraud, or imposition was practiced by anyone, or that the absentee votes here considered expressed anything except the free choices of the electors themselves.

These events occurred while Brickhouse was outside the territorial limits of Tyrrell County visiting these 21 absent voters at their respective temporary residences. They applied to him in person in the mode prescribed by G. S., 163-55, for absentee ballots to be voted by them in their respective precincts in Tyrrell County in the general election on 5 November, 1946. Pursuant to their applications, Brickhouse issued and delivered to these voters in person absentee ballots and container envelopes in the manner specified in the statutes. G. S., 163-55; G. S., 163-56; G. S., 163-57. The electors voted such ballots according to their personal choices before officers authorized to administer oaths in complete compliance with the procedure set out in G. S., 163-58, and delivered them in person to Brickhouse in securely sealed container envelopes.

After accepting delivery of the absentee ballots in person, Brickhouse carried them in unopened container envelopes to his office in Tyrrell County. Here he retained them in his custody as Chairman of the Tyrrell County Board of Elections in conformity to the pertinent statutes until the morning of the general election, when he delivered them in the unopened container envelopes to the registrars of the several precincts of Tyrrell County in which these absent voters were respectively registered. G. S., 163-58; G. S., 163-59; G. S., 163-60. Thereafter the election officials in these precincts opened the container envelopes, removed the absentee ballots therefrom, inspected the ballots, found them to be in due form, and voted and counted them in the manner prescribed by G. S., 163-61.

If it be legally permissible to add the events occurring outside Tyrrell County to those transpiring within its boundaries, the 21 absentee ballots now at issue were voted in literal compliance with the statutes governing absentee voting, except in the particular that the voters returned the ballots in person to the chairman of the county board of elections (a mode of return authorized by the statute for voters within the county) instead of mailing them to him (the method of return specified in the statute for voters absent from the county). G. S., 163-58. We are unwilling to hold, however, that this variation in the manner of the return of the ballots is sufficient of itself to invalidate these votes because it is inconceivable that the Legislature intended so to glorify form and crucify substance.

It was adjudged in the court below that the ballots cast by these 21 absent voters were illegal because Brickhouse's authority to act as Chairman of the Tyrrell County Board of Elections stopped at the boundaries

of Tyrrell County and the absentee ballots in question were delivered to these electors by Brickhouse in another state or in other counties of this State.

This view, we think, overlooks the primary purpose of the laws authorizing absentee voting and denies to the State its undoubted power to permit acts to be done outside its borders when the legal consequences of such acts are to take place within its boundaries. See *S. v. Scott,* 182 N. C., 865, 109 S. E., 789, where it is said: "We must not be understood as holding that the Legislature may not require certain official acts to be done beyond the State's limits, for it can legally do so, as for example in requiring depositions of witnesses or the acknowledgment of a deed or other instrument, to be taken in some other State, or even in a foreign country, and perhaps there are other illustrations of this legislative power."

The purpose of the statutes regulating absentee voting is to enable a qualified voter in a county of the State to vote at a general election in the precinct of his domicile when he is temporarily absent in another state or county. To effect this object, it may be necessary that an absentee ballot be placed in the hands of the absentee voter in the other state or county, that the absent voter perform the acts incident to voting the ballot on his part in the other state or county, and that the ballot be then returned from the absent voter in the other state or county to the precinct of his domicile in this State. Manifestly, the absentee voting law contemplates that the acts required by these procedures may be done in the other state or county where the absent voter is sojourning.

Our statutes relating to absentee voting prescribe methods for effecting the delivery and return of absentee ballots. G. S., 163-55; G. S., 163-56; G. S., 163-57; G. S., 163-58. There is nothing explicit or implicit in the statutes requiring or justifying the virtual disfranchisement of these 21 qualified voters of Tyrrell County because the Chairman of the Tyrrell County Board of Elections delivered the absentee ballots to them beyond the limits of Tyrrell County and returned such absentee ballots to the voting precincts of such voters in Tyrrell County after they had voted such ballots at their respective temporary residence outside of Tyrrell County. We hold that these ballots were cast in substantial compliance with the requirements of the statutes governing absentee voting.

The relator insists, however, that the decision of the court below rejecting these ballots ought to be sustained here upon the ground that the Chairman of the Tyrrell County Board of Elections violated a due sense of propriety in performing the acts under review beyond the borders of Tyrrell County under the circumstances shown by the record. The answer to this assertion is that given by this Court to a similar contention in *Evans v. Etheridge, supra:* "That may be so, but the law does not provide otherwise, and it fixes the standard of legal propriety."

The evidence adduced by the relator was sufficient to justify the rejection of nine of the votes cast and counted for him, and to reduce the defendant's majority from 20 to 11. It was insufficient, however, to change the result of the election, and the motions made by the defendant in the court below for judgment of involuntary nonsuit ought to have been granted. For the reasons stated, the judgment entered below is

Reversed.

MRS. ANNIE M. McRARY v. HORACE E. McRARY AND WIFE, MARTHA L. McRARY; T. J. VINES AND WIFE, VERNA McRARY VINES.

(Filed 7 April, 1948.)

1. Deeds § 8—

A grantee in a deed given without consideration does not come under the protection of G. S., 47-18.

2. Constitutional Law § 28—

Where the court of another state does not have jurisdiction of the subject matter, its judgment is *coram non judice* and a nullity, and does not come within the protection of the full faith and credit clause of the Federal Constitution. Constitution of the U. S., Art. IV, sec. 1.

3. Judgments § 27b—

Jurisdiction is a prerequisite of a valid judgment, and a judgment rendered without jurisdiction is a nullity and may be collaterally attacked or ignored without proof or suggestion of merit.

4. States § 5: Judgments § 31—

A state has exclusive control over all the legal incidents of real property within its boundaries, and no other state has power to affect such lands by laws, judgments or decrees.

5. Courts § 2: Judgments § 31: Constitutional Law § 28—

The court of another state, having jurisdiction of the parties, entered decree for divorce, and in awarding alimony, directed the husband to convey to his wife his interest in lands located in North Carolina and provided that upon his failure to do so the decree should operate as a conveyance. *Held:* While the divorce decree was within its jurisdiction and it had authority to enforce its order for alimony by its process *in personam*, the judgment *in rem* is a nullity and does not affect title to the lands in this State nor establish any right in the property enforceable in this State.

6. Judgments § 1—

A consent judgment is not the judgment of the court upon the merits, but is the agreement of the parties which acquires the status of a judgment through approval of the judge and its recordation in the records of the court.

7. Same—

A consent judgment should show upon its face that it is an agreement of the parties entered upon the records with the consent of the court, and when a judgment discloses that the cause came on for hearing by a court and that the court considered and decided the controversy on its merits, the judgment is not a consent judgment, and the fact that the "OK" of counsel is entered at the foot of the judgment does not alter its character.

8. Same—

A consent judgment has no greater force or effect than a judgment rendered upon trial of issues, and if the court has no jurisdiction of the subject matter, the judgment acquires no validity by reason of the fact that it is a consent judgment.

9. Courts § 2—

Jurisdiction cannot be conferred upon a court by the consent of the parties.

Appeal by plaintiff from *Patton, Special Judge,* September Term, 1947, Caldwell. Affirmed.

Civil action to reduce judgment of another state to judgment in this state and to vacate a deed on the grounds of fraud and want of consideration.

On 6 September 1945, defendant Horace E. McRary, then being a resident of Ohio, instituted an action in Summit County, Ohio, against his wife, plaintiff herein, for divorce. Mrs. McRary was duly served with process, appeared and filed answer in which she set up and pleaded a cross action for divorce on the grounds therein stated.

When the cause came on for hearing 31 August 1946, Horace E. McRary withdrew his petition and the cause was heard on the cross complaint. The judge heard the evidence, found the facts, and decreed "that the marriage contract . . . is hereby dissolved and both parties are released from the obligations of same." Custody of the four children born of the marriage was awarded to Mrs. McRary.

The court proceeded to award the wife alimony. In so doing it found "that the parties are the owners in common" of a certain 14.5 acre tract of land in Caldwell County, N. C., which is the *res* in controversy here. It ordered and adjudged that Mrs. McRary "have and possess as and for alimony, said entire premises, divested of all and every claim, title, and interest, by curtesy or otherwise, of her said husband" subject to an outstanding mortgage or deed of trust. Defendant herein was ordered to convey his interest in said premises to plaintiff in compliance with said judgment "within five days from the entry hereof" upon failure of which "this decree shall operate as said conveyance."

At the foot of the judgment and below the signature of the judge the following appears:

"O.K. Fred T. Childs for Pltf.

"O.K. Hadley & Weaver, for Def."

Defendant McRary remarried and on 21 April 1947, he and his wife, for a purported consideration of $2,000, conveyed a one-half undivided interest in and to said tract, by warranty deed, to his sister, Verna McRary Vines, and her husband, T. J. Vines, defendants herein.

Thereafter, on 19 May 1947, plaintiff instituted this action to reduce the Ohio judgment to judgment in Caldwell County, the *situs* of the property, and to have the deed from McRary and wife to Vines and wife vacated and annulled.

At the hearing plaintiff offered in evidence an amplified copy of the Ohio judgment. She also offered evidence tending to show that Vines and his wife had actual knowledge of the contents of the Ohio judgment and that the deed from McRary and wife to Vines and wife was without consideration.

At the conclusion of the evidence for plaintiff, the court, on motion of defendants, entered judgment dismissing the action as in case of nonsuit. Plaintiff excepted and appealed.

Folger Townsend and Fate J. Beal for plaintiff appellant.

Williams & Whisnant for defendant appellees Horace E. McRary and Martha L. McRary.

Hal V. Adams for defendant appellees T. J. Vines and Verna McRary Vines.

BARNHILL, J. G. S. 47-18 protects only creditors and purchasers for value. Plaintiff offered evidence tending to show that in fact there was no consideration paid for the deed from McRary and wife to Vines and wife. Hence, if she otherwise has a good cause of action, she is entitled to a jury trial on this issue.

Did the court below, by entering a judgment of nonsuit, fail to accord full faith and credit to a judgment of a court of a sister state in violation of the provisions of Art. IV, sec. 1, of the United States Constitution? The answer is no.

The full faith and credit clause has never been applied without limitation. It has no application when the court rendering the judgment did not have jurisdiction of the subject matter. Instead, it is uniformly held that a foreign judgment rendered without jurisdiction is a nullity and may be collaterally attacked or ignored without proof or suggestion of merit. *Picket v. Johns,* 16 N. C., 123; *Bonnett-Brown Corp. v. Coble,* 195 N. C., 491, 142 S. E., 772; *Hat Co., Inc., v. Chizik,* 223 N. C., 371,

26 S. E. (2d), 871; *Cline v. Niblo*, 66 A. L. R., 916, Anno. p. 926; *Stewart v. Eaton*, 120 A. L. R., 1354, Anno. p. 1366; *Priest v. Board of Trustees*, 232 U. S., 604, 58 L. Ed., 751; *Baker v. Baker, Eccles, & Co.*, 242 U. S., 394, 61 L. Ed., 386; *Perkins v. Mining Co.*, 132 P. (2d), 70; *Sharp v. Sharp*, 166 P., 175, L. R. A., 1917 F, 562.

Jurisdiction is a prerequisite of a valid judgment, 31 A. J., 70; *Fitzsimmons v. City of Oklahoma City*, 135 P. (2d), 340, and if jurisdiction does not exist, enforcement thereof in another state is not compelled by the full faith and credit clause of the Constitution. *Sharp v. Sharp, supra; Taylor v. Taylor*, 218 P., 756, 51 A. L. R., 1074; *Perkins v. Mining Co., supra.*

The rendition of a judgment without jurisdiction is a usurpation of power and makes the judgment itself *coram non judice* and *ipso facto* void. 31 A. J., 68; *Vallely v. Northern F. & M. Ins. Co.*, 254 U. S., 348, 65 L. Ed., 297; *Sharp v. Sharp, supra.*

No principle is more fundamental or firmly settled than that the local sovereignty by itself, or its judicial agencies, can alone adjudicate upon and determine the status of land within its borders, including its title and incidents and the mode in which it may be charged or conveyed. Neither the laws of another sovereignty nor the judicial proceedings, decrees, and judgments of its courts can in the least degree affect such lands. *Davenport v. Gannon*, 123 N. C., 362, 68 Am. St. Rep., 827; *Bullock v. Bullock*, 30 A., 676 (N. J.); *Taylor v. Taylor, supra; Cook v. Brown*, 128 A. L. R., 1396 (Mo.); *Cline v. Niblo, supra;* Anno. 13 A. L. R., 502; Anno. 51 A. L. R., 1081; Anno. 94 Am. St. Rep., 535; Anno. 103 Am. St. Rep., 321.

The interest of a state in controlling all the legal incidents of real property located within its boundaries is deemed so complete and so final to the exercise of sovereign government within its own territory as to exclude any control over them by the statutes or judgments of other states.

However plausibly the contrary view may be sustained, the doctrine that a court, not having jurisdiction of the *res*, cannot affect it by its decree nor by a deed made by a commissioner in accordance with the decree is firmly established. *Fall v. Eastin*, 215 U. S., 1, 54 L. Ed., 65, 23 L. R. A., 924, 17 Ann. Cas., 853.

The familiar principle that a court having jurisdiction of the parties may, in a proper case, by a decree *in personam*, require the execution of a conveyance of real property in another state, or some other act in respect thereto, and to enforce its order through its coercive jurisdiction or authority is not here involved. The plaintiff seeks to establish the Ohio judgment as a muniment of title and to recover the *locus* on the strength thereof. That raises the question of the validity and efficacy

of the Ohio decree as a judgment affecting the title and right of possession to land in North Carolina.

The Ohio court had jurisdiction to allot alimony to plaintiff herein. *Bates v. Bodie,* 245 U. S., 520, 62 L. Ed., 444. Even so, the jurisdiction acquired over the parties was purely *in personam.* Its judgment cannot have any extraterritorial force *in rem.* Nor did it create a personal obligation upon the defendant McRary which the courts of this state are bound to compel him to perform. At most it imposed a duty, the performance of which may be enforced by the process of the Ohio court.

The courts of the *situs* of lands cannot be compelled to issue their decrees to enforce the process of courts of another state, or the performance of acts required by the decrees of such courts, ancillary to the relief thereby granted, affecting such lands. *Bullock v. Bullock, supra; Taylor v. Taylor, supra; Reams v. Sinclair,* 130 N. W., 562, 23 Ann. Cas., 989, Anno. p. 991.

By means of its power over the person of the parties before it, a court may, in proper cases, compel them to act in relation to property not within its jurisdiction, but its decrees do not operate directly upon the property nor affect its title. The court's order is made effectual only through its coercive authority. 31 A. J., 162; *Taylor v. Taylor, supra;* Anno. 51 A. L. R., 1081; *Bullock v. Bullock, supra; Corbett v. Nutt,* 77 U. S., 464, 19 L. Ed., 976; *Carpenter v. Strange,* 141 U. S., 87, 35 L. Ed., 640; *Dull v. Blackman,* 169 U. S., 243, 42 L. Ed., 733; *Bailey v. Tully,* 7 N. W. (2d), 837, 145 A. L. R., 578, Anno. 145 A. L. R., 583.

A judgment seeking to apportion the rights of the parties to property outside the jurisdiction of the court rendering it may be given extra-state effect for many purposes, but it does not establish any right in the property itself, enforceable in the state of its *situs. Fall v. Eastin, supra; Hood v. McGehee,* 237 U. S., 611, 59 L. Ed., 1144; *Olmstead v. Olmstead,* 216 U. S., 386, 54 L. Ed., 530; *Clarke v. Clarke,* 178 U. S., 186, 44 L. Ed., 1028; 31 A. J., 162.

But the plaintiff now insists that the Ohio judgment is a consent judgment and that it should be recognized and enforced as a contract between the parties. We are unable to sustain this contention.

The Ohio judgment is primarily a decree of divorce. If entered by consent, it is in direct contravention of the Ohio statutes, Ohio Code of 1940, Anno. 11979-4, 11986, Wright's Supreme Court Reports, 212, and "diametrically opposed to public policy." *Rodriguez v. Rodriguez,* 224 N. C., 275 (282), 29 S. E. (2d), 901. The court must hear the evidence and determine the cause. *S. v. Cleveland,* 161 N. E., 918.

Furthermore, this judgment is not a consent judgment.

In the vernacular of the courtroom "consent judgment" is frequently used to designate a judgment entered by the court on the merits, to which

the parties or their counsel assent in writing by signing their names at the foot of the judgment, but in a legal sense, as here used, such is not a consent judgment.

A judgment by consent is the agreement of the parties, their decree, entered upon the record with the sanction of the court. *Cason v. Shute,* 211 N. C., 195, 189 S. E., 494, and cited cases. It is not a judicial determination of the rights of the parties and does not purport to represent the judgment of the court, but merely records the pre-existing agreement of the parties. 49 C. J. S., 308; *Holloway v. Durham,* 176 N. C., 550, 97 S. E., 486; *Morris v. Patterson,* 180 N. C., 484, 105 S. E., 25; *Belcher v. Cobb,* 169 N. C., 689, 86 S. E., 600; *Bunn v. Braswell,* 139 N. C., 135; *Bank v. Commissioners,* 119 N. C., 214; *Bergman v. Rhodes,* 165 N. E., 598, 65 A. L. R., 344; *Karnes v. Black,* 215 S. W., 191; *Corby v. Abbott,* 73 P., 120. It acquires the status of a judgment, with all its incidents, through the approval of the judge and its recordation in the records of the court.

That a decree is a consent judgment and not a decree on the merits of the case should be made to appear on the face of the judgment or in some other appropriate manner. 49 C. J. S., 313; 31 A. J., 106; 3 Freeman, Judgments, 5th Ed., 2771, sec. 1348.

When a decree is entered by a court upon consideration of the pleadings, evidence and admissions made, as a judicial determination of the rights of the parties, it is essentially a judgment of the court, and the fact the parties have superadded their consent does not convert it into a judgment by consent, however formally such consent or approval may be made. 49 C. J. S., 308; *Placer County v. Freeman,* 87 P., 628; *Fall v. Eastin, supra; Bank of Gauley v. Osenton,* 114 S. E., 435.

"O.K." means "correct," "all right," "approved." *Keel v. Wynne,* 210 N. C., 426. When endorsed on the judgment it merely evidences the adoption of the terms and conditions specified. *Everett v. Receivers,* 121 N. C., 519. See also *Bank of Gauley v. Osenton, supra,* where this term and the effect of its use on a judgment is fully discussed.

The judgment under consideration here recites that the complaint came on for hearing on the cross-petition and the evidence and "on consideration thereof the court finds" certain facts. There are other recitals evidencing the fact the court considered and decided the controversy on its merits. The superadded "O.K." of counsel, entered at the foot of the judgment, will not be permitted to override or supersede these positive recitals of the judgment itself, so as to convert it into a judgment by consent.

But even if it be conceded that the decree is a judgment by consent, the result is the same.

While a consent judgment and a judgment on the merits are distinguishable in many respects, for enforcement purposes they stand on a

parity. "The fact that a judgment is rendered by consent gives it neither less nor greater force and effect than it would have had it been rendered after protracted litigation, except to the extent that the consent excuses error and operates to end all controversy between the parties." 31 A. J., 107. The validity of each rests upon the jurisdiction of the court. 34 C. J., 130. If the court is without jurisdiction of the subject matter the judgment is void and unenforceable whether entered on the merits or by consent. *Morris v. Patterson, supra; Keen v. Parker,* 217 N. C., 378, 8 S. E. (2d), 209; *Holloway v. Durham, supra;* 31 A. J., 106; 34 C. J., 130; Anno. 86 A. L. R., 88; 3 Freeman, Judgments, 5th Ed., 2772, sec. 1349.

If the court is without jurisdiction of the subject matter the parties cannot confer it, *Holloway v. Durham, supra; High v. Pearce,* 220 N. C., 266, 17 S. E. (2d), 108; *Reaves v. Mill Co.,* 216 N. C., 462, 5 S. E. (2d), 305; *Saunderson v. Saunderson,* 195 N. C., 169, 141 S. E., 572; *Bank v. Commissioners, supra;* Anno. 86 A. L. R., 88; "for no agreement or assent of parties will enable the court to render a judgment which the law does not warrant." *Trust Co. v. Brewster,* 134 N. E., 616; *Bank v. Commissioners, supra.*

So much of the Ohio judgment as attempts to affect the title to the *locus,* upon which plaintiff now relies, was outside the jurisdiction of the court and is a nullity. *Stewart v. Eaton, supra.* The court below was not required to accord it full faith and credit. *Perkins v. Mining Co., supra; Sharp v. Sharp, supra.* Its refusal so to do may not be held for error. *Treinies v. Sunshine Mining Co.,* 308 U. S., 66, 84 L. Ed., 85. Hence the judgment entered must be

Affirmed.

STATE v. BOOKER T. ANDERSON.

(Filed 7 April, 1948.)

1. Criminal Law § 27: Evidence § 2—

The courts will take judicial notice of the day of the week on which a particular date falls, the dates of the terms of the Superior Courts, and of the judges of the Superior Court. G. S., 7-50; G. S., 7-70.

2. Judges § 2c—

The recitation of an erroneous date in the concluding part of a commission to an emergency judge to hold a term of court will not invalidate the commission when it is manifestly a clerical error without tendency to mislead when the commission is construed in its entirety in the light of the dates for the commencement of the terms of court. Constitution of N. C., Art. IV, sec. 11; G. S., 7-50.

3. Jury § 9—

A written order entitled as of the action, commanding the sheriff to summon a special venire of twenty-five freeholders from the body of the county to appear on a specified date to act as jurors in the case, is in substance a special writ of *venire facias.*

4. Same—

An order for a special venire properly specifies that the veniremen are to be freeholders. G. S., 9-11; G. S., 9-16; G. S., 15-165.

5. Same—

The failure of the trial judge to sign the order for a special venire does not alone invalidate the special venire, it having been ordered and summoned in all other respects in conformity with statute. G. S., 9-29.

6. Jury § 4½—

Objection to a special venire is waived by failure to challenge the array until after trial and judgment.

7. Same—

Objection to individual jurors is waived by failure of challenge to the polls and failure to exhaust peremptory challenges.

8. Arson § 7—

Evidence tending to show that a dwelling house was willfully and maliciously burned by the criminal agency of some responsible person and that such person was the defendant, is sufficient to overrule nonsuit in a prosecution for arson.

9. Homicide § 25—

Evidence tending to show that defendant perpetrated or attempted to perpetrate the crime of arson upon a dwelling house and thereby proximately caused the deaths of the occupants, is sufficient to be submitted to the jury on the charge of murder in the first degree. G. S., 14-17.

10. Criminal Law § 81c (3)—

Exception to the admission of evidence cannot be sustained when evidence to the same effect is admitted without objection.

11. Criminal Law § 53f—

The fact that the court necessarily consumes more time in stating the contentions of the State because of the greater volume of the State's testimony is not ground for exception, it being incumbent upon defendant to call the court's attention at the time to any asserted failure to fully and accurately state his contentions or if he desires any amplification thereof.

12. Criminal Law § 78e (1)—

An exception to the charge "as a whole" is unavailing as an unpointed exception.

13. Arson § 8: Homicide § 29—

Upon verdict of guilty of arson, G. S., 14-58, there being no recommendation by the jury in respect to the punishment, and verdict of guilty of murder in the first degree, G. S., 14-17, sentence of death is mandatory.

APPEAL by prisoner, Booker T. Anderson, from *Grady, Emergency Judge,* and a jury, at the August Term, 1947, of PITT.

The August Term of the Superior Court of Pitt County opened on Monday, 25 August, 1947. Honorable Henry A. Grady, an Emergency Judge, presided over the term under a commission directed to him by the Governor, reciting that it had been made to appear to the Governor that good and sufficient reasons existed why Honorable W. C. Harris, the Judge assigned thereto under Article IV, Section 11, of the State Constitution, was unable to hold the regular term of the Superior Court of Pitt County "beginning August 25th, 1947," and commissioning Judge Grady "to hold said term of said Court for the County aforesaid, beginning on Monday, the 25th day of July, 1947, and continue one week, or until the business is disposed of."

Separate counts of the indictment charged the prisoner with the commission of the following four capital felonies, namely: (1) The willful and malicious burning of the dwelling house of Willie Belle Cratch, Bobbie Eugene Cratch, and Jessie Cratch; (2) the murder of Willie Belle Cratch; (3) the murder of Bobbie Eugene Cratch; and (4) the murder of Jessie Cratch.

Upon his arraignment, the prisoner pleaded not guilty to all matters charged against him. Thereupon the judge, acting upon the joint recommendation of the solicitor and counsel for the defense, made an order in this cause in open court in the presence of the prisoner, commanding the sheriff to summon a special venire of twenty-five freeholders from the body of Pitt County to appear before the court "on Wednesday morning, August 27, 1947, at 9:30 A. M. to serve as jurors in this cause." The order was not signed by the judge, but it was reduced to writing, entered on the minutes, and issued to the sheriff by his direction. The sheriff executed the order and returned it to the clerk of the court on the day when it was returnable, with the names of the twenty-five special veniremen summoned by him. The petit jury was chosen in part from the original panel drawn by the board of county commissioners before the term, and in part from the special venire summoned by the sheriff under the order of the judge. The prisoner did not object in any way before judgment to the validity of the order for the special venire, or to the mode in which it was summoned. The record does not indicate that the prisoner was compelled to accept any petit juror over his objection, or that the peremptory challenges allowed him by statute were exhausted when the jury was completed.

The testimony adduced by the State at the trial tended to show the circumstances hereafter set out. Willie Belle Cratch, a young widow, regularly resided in a dwelling house on Cotanche Street in Greenville with her mother, Annie Belle Spain, her six-year-old son, Bobbie Eugene Cratch, and her one-year-old daughter, Jessie Cratch. Shortly before

eleven o'clock on the night of 15 May, 1947, Willie Belle Cratch and the two children went to sleep in the same bed in their bedroom in this residence. After their retirement, Annie Belle Spain visited a neighbor about half an hour. As she was returning home, she saw the dwelling house "afire," smelled rags burning, and turned in the alarm.

After fire fighters thus called to the scene had subdued the flames, the house was entered, and it was ascertained that both of the children had been "burned very badly" and were already dead. The body of Jessie Cratch was on the bed, and that of Bobbie Eugene Cratch was on the floor beside the bed. Willie Belle Cratch lay in an unconscious state upon the floor some eight feet away. She was burned from head to feet, and died early the next morning.

The fire had been virtually confined to the bedroom occupied by the decedents. The floor of this room was "very much charred," and the door between it and the adjoining hallway was also "badly charred." Other parts of the room "were scorched by the radiation of heat." The fire had been "worse around the bed" and a nearby closet. The bed was "charred mighty bad," and one of its side rails "had been burned in two." Annie Belle Spain owned a white enameled dish pan which was habitually kept on the back porch of the dwelling. After the fire, this pan was discovered at the bed "exactly where the side rail had burned in two." The pan was "burned black inside" and "had a kerosene smell to it." The police found a glass jar containing some kerosene oil in the hallway just outside the bedroom of the decedents. This jar did not belong to any of the occupants of the house and had not been seen upon the premises before the fire.

The prisoner lived "on Douglas Avenue, about a mile from the house that was burned." Some three or four hours prior to the fire, he rode to the immediate neighborhood of the dwelling of the decedents in a taxi. At that time, he was carrying a "wrapped-up package." After the fire alarm sounded, the prisoner was observed about a half mile distant from the burning house on Cotanche Street, running towards his home on Douglas Avenue.

The prisoner had been keeping company with Willie Belle Cratch before these events, but Annie Belle Spain had objected to the association and had forbidden him to call upon her daughter. Soon after the fire, the prisoner was taken into custody as a suspect. He first denied that he had had anything to do with the burning, but he subsequently confessed that he had set the dwelling on fire with intent thereby to destroy the house. He stated, however, that he had no purpose to harm any of the decedents, and had no knowledge that any persons were inside the house when he started the fire by throwing a lighted match into a pan containing kerosene oil setting under the head of the bed. Accord-

ing to the State's witness, J. R. Tanner, chief of police of Greenville, the prisoner explained his motive for setting the fire as follows: "He said the reason he did it was he had a place fixed on Douglas Avenue to move Willie Belle Cratch and her children to, but that he could not make any headway because of her mother, Annie Belle Spain; . . . that he was just trying to put Willie Belle Cratch on the street so that she would have to come and live with him, and that if he could have only gotten rid of Annie Belle Spain this would not have happened."

After the prisoner had made his confession, he was escorted to the premises by the police, and there re-enacted his version of the setting of the fire.

The prisoner offered testimony at the trial tending to show that he had no connection with the burning of the house, and that he did not make any admissions or confessions to that effect.

The petit jury, however, did not accept the evidence presented in behalf of the prisoner because it returned a verdict finding the prisoner "guilty of arson and murder in the first degree." The jury made no recommendation with respect to the punishment on the conviction for arson. Sentence of death was pronounced against the prisoner, and he thereupon appealed to this Court, relying upon the exceptions hereafter considered.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

J. H. Harrell for the prisoner, appellant.

ERVIN, J. Subsequent to the passing of the death sentence, the prisoner challenged the validity of his trial for two reasons not theretofore advanced by him. He then asserted for the first time that the court was "illegally constituted and without authority to try and sentence him at the term beginning August 25, 1947, as the commission of the Governor commissioned Judge Henry A. Grady to hold a term of court in Pitt County beginning on Monday, the 25th day of July, 1947," and that the members of the petit jury "who were of the special venire were illegally summoned and therefore not duly constituted jurors as no order was signed and issued by the trial judge to the sheriff of Pitt County to summon the special venire."

This Court judicially knows these things: (1) That 25 July, 1947, fell on Friday and not on Monday, 31 C. J. S., Evidence, section 100; (2) that no regular term of the Superior Court of Pitt County was scheduled to begin on 25 July, 1947, or on any other day during such month, G. S., 7-70; (3) that a regular term of the Superior Court of Pitt County was appointed by law to begin on Monday, 25 August, 1947, and to continue

for one week for the trial of criminal and civil cases, G. S., 7-70; *Corbin v. Berry,* 83 N. C., 28; 31 C. J. S., Evidence, section 47; (4) that Honorable W. C. Harris, the Judge of the Seventh Judicial District, was assigned to hold such term of the Superior Court of Pitt County under Article IV, Section 11, of the State Constitution, *Corbin v. Berry, supra;* (5) that Honorable Henry A. Grady was an Emergency Judge of the Superior Court at the times in question. *Reid v. Reid,* 199 N. C., 740, 155 S. E., 719; *Bohannon v. Trust Co.,* 198 N. C., 702, 153 S. E., 263. When the commission of the Governor is read and construed in its entirety in the light of these matters, it becomes indisputably manifest that the Governor thereby commissioned Judge Grady to hold the term of the Superior Court of Pitt County convening on Monday, 25 August, 1947, and that the recited date "July 25, 1947," in the concluding part of the commission constituted a mere clerical error without tendency to mislead. Consequently, we overrule the challenge to the authority of Judge Grady to hold the court at which the prisoner was tried, convicted, and sentenced. See N. C. Const., Art. IV, Section 11; G. S., 7-50.

The written order made out by the court and placed in the hands of the sheriff for execution was entitled as of this action, and commanded the sheriff to summon a special venire of twenty-five freeholders from the body of Pitt County to appear before the court on a specified day to act as jurors in this particular case. Clearly it was, in substance, a special writ of *venire facias. Durrah v. State,* 44 Miss., 789, 796; *Waterbury v. Miller,* 13 Ind. App., 197, 41 N. E., 383; *Thurman v. Commonwealth,* 107 Va., 912, 60 S. E., 99. As the special venire was not to be drawn from the box, the order properly specified that the veniremen were to be freeholders. G. S., 9-11; G. S., 9-16; G. S., 15-165; *S. v. Lord,* 225 N. C., 354, 34 S. E. (2d), 206. The record discloses that the sheriff executed the order and returned it to the clerk of the court on the day when it was returnable, with the names of the twenty-five freeholders summoned by him. It, therefore, appears that the special venire was ordered and summoned in substantial compliance with the relevant statute. G. S., 9-29. See, also, *S. v. Parker,* 132 N. C., 1014, 43 S. E., 830. As there is nothing in the record indicating that such omission adversely affected in any degree the inherent right of the prisoner to a trial by a fair and impartial jury, we are constrained to hold that the failure of the trial judge to sign the order was at most an irregularity which did not invalidate the special venire.

Moreover, the prisoner's objection to the jurors is unavailing for the additional reasons that it was not raised in apt time or in the appointed way. It is to be noted that the ground of his objection to the petit jurors "who were of the special venire" was apparent to the prisoner on the face of the record before the court embarked upon the task of selecting a trial jury, and the prisoner did not assert that such jurors were dis-

qualified until after he had been convicted and sentenced to death. He waived any right to question the competency of the special venire as a whole by proceeding to trial without interposing a challenge to the array. *S. v. Douglass*, 63 N. C., 500; *S. v. Kirksey*, 227 N. C., 445, 42 S. E. (2d), 613. He did not object to the jurors in question as individuals by challenges to the polls. *S. v. Kirksey, supra; S. v. Koritz*, 227 N. C., 552, 43 S. E. (2d), 77. Besides, the petit jury was obtained from the original panel and the special venire without the peremptory challenges allowed the prisoner by statute being exhausted. *S. v. Brogden*, 111 N. C., 656, 16 S. E., 170.

The prisoner challenged the sufficiency of the State's evidence to sustain convictions for arson and murder by motions for judgment of nonsuit, and reserved exceptions to adverse rulings on these motions.

Obviously, the testimony offered by the State was sufficient to justify the conclusions that the dwelling house of Willie Belle Cratch, Bobbie Eugene Cratch, and Jessie Cratch was willfully and maliciously burned by the criminal agency of some responsible person, and that such person was the prisoner. It follows that the court properly submitted to the jury the question of the prisoner's guilt upon the first count in the indictment charging arson. *S. v. Laughlin*, 53 N. C., 455; *S. v. Porter*, 90 N. C., 719; *S. v. McCarter*, 98 N. C., 637, 4 S. E., 553. Furthermore, it is plain that the evidence adduced by the State was ample to warrant a finding that the prisoner perpetrated or attempted to perpetrate the crime of arson upon the dwelling house of Willie Belle Cratch, Bobbie Eugene Cratch, and Jessie Cratch, and thereby proximately caused their deaths. It thus appears that the court was required to leave to the jury the questions of whether the prisoner was guilty of murder in the first degree as charged in the second, third, and fourth counts. G. S., 14-17.

The testimony of the State's witnesses, George Gardner and Bunion Taft, seems to have been competent. Be this as it may, however, the prisoner waived the benefit of his exceptions to its admission by permitting other evidence to the same effect to be received without objection. *S. v. Oxendine*, 224 N. C., 825, 32 S. E. (2d), 648.

The record does not sustain the prisoner's contention that he suffered prejudice because the court in its charge used more time in reviewing the contentions of the State than it did in outlining those of the prisoner. The action of the court in this respect was made inevitable by the fact that the volume of the State's testimony was much greater than that presented in behalf of the accused. *S. v. Cureton*, 218 N. C., 491, 11 S. E. (2d), 469. As *Mr. Justice Barnhill* observed in *S. v. Jessup*, 219 N. C., 620, 14 S. E. (2d), 668, if the prisoner "considered that the court had failed to give fully and accurately the contentions made by him, or if he desired any amplification thereof, it was his duty to call the court's

attention thereto at the time." The prisoner's exception to the charge "as a whole" is an unpointed exception which is unavailing on appeal. *Miller v. Bottling Co.,* 204 N. C., 608, 169 S. E., 194. The other exceptions to the charge have been abandoned under Rule 28.

The jury found the prisoner guilty of the crime of arson, but did not recommend that his punishment therefor should be imprisonment for life rather than death as authorized by the statute. G. S., 14-58. Likewise, it convicted him of murder in the first degree. G. S., 14-17. Hence, the sentence of death was mandatory.

We have striven to give the matters at issue on this appeal a consideration commensurate with the present plight of the prisoner and the deplorable tragedy out of which the prosecution arose. Our endeavor in this respect convinces us that no error in law occurred on the trial.

No error.

N. C. HAHN, ADMINISTRATOR OF NORMAN CECIL HAHN, v. ERNEST L. PERKINS AND M. GAIUS LINK.

(Filed 7 April, 1948.)

1. Negligence § 19b (4)—

Circumstantial evidence which raises a reasonable inference of negligence is sufficient to be submitted to the jury.

2. Negligence § 4f (1)—

One who is a patron of a place of recreation conducted for profit is an invitee.

3. Negligence § 4f (2)—

A proprietor is not an insurer of the safety of invitees but is under duty to exercise due care to see that the premises are reasonably safe for the purposes for which they are maintained.

4. Same—

The evidence tended to show that intestate's body was found in the deep water of defendants' swimming pool and that before, during, and for sometime after his disappearance was noted, two lifeguards were on duty and several hundred persons were crowding the pool and the lands bordering thereon. *Held:* The evidence does not raise an inference of negligence on the part of the proprietors on the ground that they failed to provide a reasonably sufficient number of lifeguards, since there is no basis for the claim that additional lifeguards, however numerous or however competent, would have prevented the death.

5. Same—

The evidence tended to show that intestate, a twelve-year-old boy, was in the company of his mother near the refreshment stand at defendants'

swimming pool, that he became lost in the crowd, and that his body was found the next morning in the deep water of the pool. Sometime after the boy's disappearance the mother informed a lifeguard on duty that he was missing, but did not inform the guard that intestate could not swim or that he was last seen in or near the pool. The guard did not give the alarm but remained at his post where he could observe the bathers. *Held:* The circumstances fail to support the conclusion that any immediate action on the part of the guard would have prevented the boy's death.

6. Same—

The evidence disclosed that intestate, a twelve-year-old boy, while a patron of a swimming pool, was missed by his relatives during the afternoon and that his body was found the next morning in the deep waters of the pool, some ten feet below a reef of slippery rocks, and that there was a bruised place on his forehead. *Held:* Conceding that the proprietors were negligent in failing to mark the varying depths of the waters of the pool, the evidence fails to indicate any causal relation between such negligence and the death of intestate.

APPEAL by plaintiff from *Patton, Special Judge,* at the September Term, 1947, of CALDWELL.

The plaintiff, N. C. Hahn, as administrator, sought to recover damages of the defendants, Ernest L. Perkins and M. Gaius Link, upon a complaint charging that his intestate, Norman Cecil Hahn, suffered death as the proximate result of the wrongful act, neglect, or default of the defendants while the deceased was patronizing a public swimming pool conducted by the defendants for profit at a point on Wilson's Creek in Caldwell County known as Brown Mountain Beach. G. S., 28-173. The plaintiff undertook to sustain his alleged cause of action at the trial by the facts set forth below.

For the most part, Wilson's Creek, a natural watercourse, is both shallow and swift. It is impounded by a small dam near the foot of Brown Mountain in Caldwell County. After being released from this artificial pond through a mill-race, the waters of the creek run rapidly over a ledge of slippery rocks and suddenly broaden, forming a relatively still and wide pool, varying in depth from a few inches to twelve feet.

During the summer of 1942, the defendants controlled this pool and the adjacent land. Here they conducted a public swimming pool and public picnic grounds for personal profit. To protect their patrons in the use of the pool, the defendants stationed lifeguards in positions where they could supervise the bathers, and separated the shallow and deep waters in the central and lower parts of the pool by barriers consisting of ropes and floating barrels. They did not, however, erect or maintain any warning signs in the upper reaches of the pool. At one place in this area some ten feet downstream from the reef of rocks, the bottom dropped abruptly from extremely shallow water to a depth of twelve feet.

On 19 July, 1942, the plaintiff's intestate, a bright boy twelve years of age, went to the premises of the defendants as a patron with a group of five relatives, including his mother and an adult brother-in-law. It does not appear that he had ever been there before. He was unable to swim, but this fact was not communicated to the defendants or their employees. He wore a bathing suit so that he might wade in the shallow portions of the pool.

Shortly before three o'clock in the afternoon, the boy and his mother left the edge of the pool with a view to buying cold drinks at a nearby refreshment stand operated by the defendants. At this time both the pool and the land lying between it and the stand were crowded with people. The mother testified that there were then "three or four hundred people on the grounds and in the water." While they were going towards the refreshment stand, the boy suddenly pushed ahead of his mother and vanished in the crowd near the stand. This was the last time he was seen alive by any of the witnesses.

The mother soon reported the boy's disappearance to his brother-in-law, and they spent the remainder of the afternoon looking for him in vain among the crowds in the pool and on its banks. The testimony presented by the plaintiff shows that the defendants kept at least two lifeguards on duty at all times throughout the afternoon in positions where they could watch the pool and supervise persons bathing therein. Sometime after three o'clock and again an hour later, the mother told one of the lifeguards stationed at the pool that the boy was missing, and suggested that he notify the "people in the water" of that fact. The lifeguard replied that "he knew that he would not be able to attract the attention of the people in the pool" and remained at his post, observing the bathers. The mother did not intimate to the lifeguard on either occasion that she believed that her son was in the water or that she had any reason to suspect that he had sustained an accident.

About five-thirty o'clock in the afternoon, the mother and brother-in-law finally became apprehensive on account of their failure to locate the intestate among the dwindling crowds in the pool and along the banks. They then notified the defendants personally that the boy was missing and that they entertained fears for his safety. Thereupon a general alarm was given, and an organized search of the creek and of the adjacent lands was begun. The searchers persevered in their undertaking until seven o'clock the next morning, when the dead body of the intestate was found submerged in approximately twelve feet of water in the upper reaches of the pool, some ten feet below the reef of slippery rocks. There was a bruised place "about the size of half a dollar on the boy's forehead, or close to his eye." The evidence did not reveal the nature or extent of the injury reflected by the bruise, or whether there was any water in

the lifeless lungs of the deceased. No opinion testimony was offered in regard to the cause of death.

The action was dismissed in the court below upon an involuntary judgment of nonsuit under G. S., 1-183, after all the evidence on both sides was in, and the plaintiff appealed.

Williams & Whisnant and Hal B. Adams for plaintiff, appellant.
W. H. Strickland and J. E. Butler for defendants, appellees.

ERVIN, J. The plaintiff relied upon circumstantial evidence to make out his case against the defendants. Hence, his appeal raises this question: When interpreted most favorably for the plaintiff, were the circumstances shown on the trial sufficient to justify a reasonable inference that the death of Norman Cecil Hahn was the proximate result of the alleged wrongful act, neglect, or default of the defendants? *Corum v. Tobacco Co.*, 205 N. C., 213, 171 S. E., 78.

Since the intestate entered the place of recreation conducted by the defendants for profit in the character of a patron, he occupied the status of an invitee. *Englehardt v. Phillips*, 136 Ohio St., 73, 25 N. E. (2d), 829. See, also, *Jones v. R. R.*, 199 N. C., 1, 153 S. E., 637; *Adams v. Enka Corporation*, 202 N. C., 767, 164 S. E., 367. This fact did not make the defendants insurers of his safety while he remained upon their premises, but it did impose upon them the legal duty of exercising due care to see that such premises were reasonably safe for the purposes of bathing and picnicking. *Brooks v. Mills Co.*, 182 N. C., 719, 110 S. E., 96; *Smith v. Agricultural Society*, 163 N. C., 346, 79 S. E., 632, Ann. Cas. 1915 B, 544.

The plaintiff insists here that the trial court erred in nonsuiting the case upon the ground that the circumstances adduced on the hearing were sufficient to justify reasonable deductions that the defendants negligently violated their duty to the deceased by failing to provide skilled attendants in sufficient numbers to supervise bathers and to rescue any apparently in danger, and by failing to place or maintain signs indicating the dangerous depths of the water in the upper reaches of the pool, and by failing to institute immediate search for the deceased when their lifeguard was informed that he was missing, and that such negligent breach of duty on the part of the defendants was the proximate cause of the death of the deceased.

To uphold this position, the plaintiff invokes the decisions of courts in other states holding, in substance, that his obligation to exercise due care for the safety of his patrons may impose upon the proprietor of a public bathing resort in a particular case the duty of doing one or more of the following things: (1) To exercise ordinary care to provide a reasonably sufficient number of competent attendants to supervise bathers and to

rescue any apparently in danger; (2) to install and maintain in proper positions signs warning patrons of dangerous depths of water; and (3) to institute a timely search in the water for a missing bather on ascertaining that such bather may have been lost in the water. *Levinski v. Cooper* (Tex. Civ. App.), 142 S. W., 959; *Larkin v. Saltair Beach Co.*, 30 Utah, 86, 83 P., 686, 3 L. R. A. (N. S.), 982, 116 Am. St. Rep., 818, 8 Ann. Cas., 977; *Beaman v. Grooms*, 138 Tenn., 320, 197 S. W., 1090, L. R. A., 1918 B, 305; *Brotherton v. Manhattan Beach Improv. Co.*, 48 Neb., 563, 67 N. W., 479, 33 L. R. A., 598, 58 Am. St. Rep., 709. These rulings seem to be quite correct applications of sound principles of the law of negligence as recognized and enforced in this jurisdiction.

In our opinion, however, the contention of the plaintiff is untenable, even if it be granted that the facts adduced on the trial imposed upon the defendants all of the specific duties suggested above.

The assumption of the plaintiff that the defendants may be charged with actionable negligence on the theory that they did not exercise ordinary care to provide a reasonably sufficient number of competent attendants to guard and protect their patrons from the danger of drowning is plainly controverted by everything in the record. The defendants kept at least two lifeguards on duty at all times in positions where they could watch the bathers and rescue any apparently in danger, and neither they nor any of the multitude of persons crowding the pool and the lands bordering thereon ever saw the deceased in any difficulty in the pool or elsewhere. There is no basis whatever for the claim that additional lifeguards, however numerous or however competent, could have saved the boy from death.

The plaintiff urges that the defendants ought to be deemed guilty of actionable negligence because their lifeguard neglected "to take any measure to locate and rescue the child" on being notified by the mother that he was missing. It should be noted that the lifeguard was not informed that the deceased was last seen in or near the pool. It is suggested here, however, that if he had been so advised, he could hardly have pursued a more appropriate course than that of staying at his post, where he commanded a view of the pool and its occupants. In any event, the record is destitute of circumstances supporting the conclusion that any immediate action on the part of the lifeguard would have resulted in the rescue of the boy before death.

Even if it be conceded that the neglect of the defendants to mark the varying depths of the water in the upper part of the pool constituted negligence, there is a lack of testimony indicating any causal relation between such negligence and the death of the deceased. It is true that his body was found in deep water in the upper reaches of the pool just below the ledge of rocks. But this tragic fact answers none of the

questions it raises. Did the lad meet death in the pool, or on the slippery rocks above the pool, or somewhere farther upstream? Did his death result from drowning, or accident, or disease? If his death was caused by drowning, did it occur in the pool, or somewhere upstream? If he was drowned in the pool, did the drowning take place in the deep water where his body was found, or in some nearby shallow water where he became helpless from cramp or other sudden seizure?

When all is said, the testimony merely shows that the boy vanished in the crowd near the refreshment stand one afternoon, and that his lifeless body was found submerged in deep water in the upper portion of the pool on the following morning. The witnesses are unable to account for his disappearance, and the evidence does not reveal how, when, or where he died. All of these matters are left by the testimony to pure speculation. It cannot be reasonably inferred that the intestate was exposed to peril by any act or omission of the defendants or their employees, or that any action which they could have taken would have saved his life. For the reasons given, the judgment of involuntary nonsuit must be

Affirmed.

VERNA MAY WILLIAMS AND HUSBAND, DAN WILLIAMS; RAYMOND PHILLIPS AND WIFE, ATHLENE PHILLIPS; HERBERT PHILLIPS AND WIFE, EVA PHILLIPS; HADIE PHILLIPS AND WIFE, LILLIAN G. PHILLIPS; SETH PHILLIPS AND WIFE, KATIE PHILLIPS, AND HELEN PHILLIPS, WIDOW OF JESSE PHILLIPS, v. MARGUERITE JOHNSON; FRANCIS WILLIAMS; DANIEL W. WILLIAMS, ELIZABETH WILLIAMS; SHIRLEY MAE WILLIAMS; RACHEL DAVIS WILLIAMS; JEANETTE PHILLIPS; POLLY ANN PHILLIPS; DONNA JOYCE PHILLIPS; SARAH JANE PHILLIPS; S. L. PHILLIPS, JR.; MARY COOPER PHILLIPS; JOSEPH C. PHILLIPS; LINDA KAY PHILLIPS; RUTH PHILLIPS; AND JESSE RAY PHILLIPS, THE LAST FIFTEEN ABOVE NAMED DEFENDANTS BEING MINORS AND REPRESENTED BY THEIR GUARDIAN AD LITEM, WALTER SHEPPARD; AND WALTER G. SHEPPARD, GUARDIAN AD LITEM OF ALL UNBORN CHILDREN AND NEXT OF KIN OF VERNA MAY WILLIAMS, RAYMOND PHILLIPS, HERBERT PHILLIPS, HADIE PHILLIPS AND SETH PHILLIPS, AND JESSE RAY PHILLIPS.

(Filed 7 April, 1948.)

1. Wills § 33b—

The rule in *Shelley's case* does not apply to a devise to testator's grandchildren during the term of their natural lives, then "to their bodily heirs, or issue surviving them," with limitation over of the share of any grandchild who should die without issue, since it is apparent that the word "heirs" was not used in its technical sense, and the grandchildren take only a life estate.

2. Wills § 34—

A limitation over to the life tenant's next of kin in the event of the life tenant's death without issue him surviving, takes the estate upon the happening of the contingency, to the brothers and sisters of the life tenant to the exclusion of issue of deceased brothers and sisters, "next of kin" in such instance meaning "nearest of kin" or "next blood relation," and not "heir" or "heirs."

3. Wills § 33c—

A devise to the widow of testator's son for life, then to testator's grandchildren for life with remainder in fee to the issue of the grandchildren, with provision that upon the death of any grandchild "without leaving him surviving issue or issues, then to his next of kin, in fee simple," vests the remainder in fee in the issue of the grandchildren, defeasible as to the share of each grandchild upon his death without issue him or her surviving.

4. Wills § 34—

A devise for life to testator's grandchildren remainder in fee to testator's great-grandchildren, with limitation over to the next of kin of any grandchild failing to leave issue him or her surviving, takes the estate to the issue of each grandchild *per stirpes*, since, had the testator intended that the issue of the grandchildren take *per capita*, there would have been no necessity for a limitation over upon the failure of any grandchild to leave surviving issue.

APPEAL by plaintiffs from *Frizzelle, J.*, at Chambers in Snow Hill, N. C., 7 February, 1948. From GREENE.

This is a civil action instituted 7 February, 1946, by the plaintiffs under the provisions of the Uniform Declaratory Judgment Act, G. S., 1-253, *et seq.*, for the purpose of obtaining a construction of the last will and testament of Jesse Phillips, late of the County of Greene, which will was duly probated in March, 1925.

Jesse Phillips died seized of a tract of land situate in Greene County, N. C., near the Town of Hookerton, and being the lands purchased by him from Ed Flanagan and wife.

Under Item 3 of said will, the devisor gave a life estate in said tract of land to Mrs. Odie Phillips, wife of Mat Phillips, who was the son of the devisor, provided she remain a widow.

Item 4 of the will provides as follows: "After the death of the said Odie Phillips, I give and devise to my beloved grandchildren, to-wit: the children of my beloved son, Mat Phillips, for and during the term of their natural lives, the said farm above described, and after the death of my said grandchildren as aforesaid, then to their bodily heirs, or issue surviving them, and in the event any of said grandchildren shall die, without leaving him surviving issue or issues, then to his next of kin in fee simple forever."

The plaintiffs, Verna May Williams, Raymond Phillips, Herbert Phillips, Hadie Phillips, and Seth Phillips, are the now living grandchildren of the devisor, the late Jesse Phillips; one grandchild is dead, to wit: Jesse Phillips, who left surviving him his widow, the plaintiff Helen Phillips, and one child Jesse Ray Phillips, one of the defendants.

The defendants are the great-grandchildren of the devisor and all but one are minors. Said minors, as well as all unborn children and next of kin of the plaintiffs, are represented herein by guardian *ad litem*.

The court below held that the plaintiffs are the owners of a life estate after the death of Mrs. Odie Phillips in said lands with remainder to their bodily heirs or issue surviving them or their next of kin in fee simple, the rule in *Shelley's case* not being applicable, and that the provisions of the General Statutes, Section 41-1, do not apply; and that after the death of the life tenant, Mrs. Odie Phillips, the life tenants and the representative of such as are deceased, take their interest in said lands *per capita* and not *per stirpes*. The plaintiffs appeal, assigning error.

Walter G. Sheppard for plaintiffs.

K. A. Pittman for defendants.

DENNY, J. The appellants contend the court below erred in holding that the rule in *Shelley's case* does not apply to the devise under consideration. The contention is untenable. It is clear that in using the phrase "their bodily heirs or issues surviving them," the devisor meant children or issue of his grandchildren. Furthermore, this conclusion is supported by the limitation over to the effect that "in the event any of the said grandchildren shall die without leaving him surviving issue or issues, then to his next of kin, in fee simple forever." *Moore v. Baker*, 224 N. C., 133, 29 S. E. (2d), 452; *Williamson v. Cox*, 218 N. C., 177, 10 S. E. (2d), 662; *Edwards v. Faulkner*, 215 N. C., 586, 2 S. E. (2d), 703; *Brown v. Mitchell*, 207 N. C., 132, 176 S. E., 258; *Fields v. Rollins*, 186 N. C., 221, 119 S. E., 207; *Wallace v. Wallace*, 181 N. C., 158, 106 S. E., 501; *Jones v. Whichard*, 163 N. C., 241, 79 S. E., 503; *Puckett v. Morgan*, 158 N. C., 344, 74 S. E., 15.

In the case of *Puckett v. Morgan, supra*, the devise was to "Martha Morgan . . . during her life, then to her bodily heirs, if any, but if she have none, back to her brothers and sisters." *Brown, J.*, in delivering the opinion of the Court, said: "In the will now under consideration, we think the testator Pace has so explained and qualified the use of the words 'her bodily heirs' as to plainly indicate that he meant the children or issue of his daughter Martha, and that the words are not employed in their legal or technical sense as representing heirs in general, but

only as descriptive of a certain class of heirs. The words 'if any' would be quite appropriate to indicate the possibility of no issue, but not to indicate the contingency of no lawful heirs, for it is rarely possible for one to die without heirs, and not uncommon to die without children. Then again the reversion over is to a class of heirs at law who would certainly inherit in the event of a failure of issue. It is also manifest that the testator did not intend that his daughter should take an estate in fee, for in express words he devised her an estate for life only, and the context shows that he intended that her children should take at her death, and in the event of her death without children, then that her brothers and sisters should receive the property."

Likewise, in *Wallace v. Wallace, supra,* it was held that a conveyance to C. A. Wallace for life, and after his death "to his bodily heirs in fee simple, if any, and if none, to go to his next of kin," created a life estate only in Wallace, remainder to his children, if any, and if none, then over to his next of kin.

It seems clear that the devisor in the instrument under consideration intended to limit the estate devised to his grandchildren to one for life and upon their death to such of their children or issue as might survive them, but if any grandchild should die without issue then to such grandchild's next of kin. The term "next of kin," when used in a deed or will in connection with a limitation over upon the failure of issue, nothing else appearing to the contrary, means "nearest of kin" or "nearest blood relation," and restricts its meaning to a limited class of nearest blood relations, to the exclusion of those enumerated as next of kin in the statute of distribution. *Williamson v. Cox, supra; Knox v. Knox,* 208 N. C., 141, 179 S. E., 610; *Wallace v. Wallace, supra.* "The word 'heir' or 'heirs' is not synonymous with the term 'nearest blood relation.'" *Miller v. Harding,* 167 N. C., 53, 83 S. E., 25.

We think the judgment below must be upheld in so far as it holds that the living grandchildren of Jesse Phillips, the devisor, have a life estate only in the devised premises. The children of these plaintiffs have a remainder in fee, defeasible upon their failure or the failure of their issue to survive the death of the maternal or paternal ancestor who was a grandchild of the devisor.

The defendant Jesse Ray Phillips, being the sole surviving child of Jesse Phillips, deceased, one of the six grandchildren of the devisor, is seized in fee simple of a one-sixth undivided interest in and to the premises, subject to the life estate of his grandmother, Mrs. Odie Phillips. And should any of the remaining grandchildren die without issue surviving, his or her interest in the premises will go to his or her next of kin, who will be his or her surviving brothers and sisters, to the exclusion of any issue of a deceased brother or sister. *Wallace v. Wallace, supra.*

The court below held that after the death of the life tenant, Mrs. Odie Phillips, the life tenants and the representatives of such as are deceased, take their interest in said lands *per capita* and not *per stirpes*. This ruling is not material in so far as it affects the interest of any of the parties to this action at the present time, the deceased grandchild, Jesse Phillips, having left surviving him only one child. However, the devise under consideration was to the grandchildren of the devisor as a class, and we think it was the intent of the devisor that the children or issue of each grandchild should take *per stirpes* and not *per capita*. If he had intended that his grandchildren and their issue should constitute a class and take *per capita*, there would have been no necessity for a limitation over upon the failure of any grandchild to leave issue surviving him. See *In re Estate of Poindexter*, 221 N. C., 246, 20 S. E. (2d), 49, 140 A. L. R., 1138, and *Wooten v. Outland*, 226 N. C., 245, 37 S. E. (2d), 682, where authorities are assembled in connection with a discussion of the general rule, as to when beneficiaries take *per capita* and when they take *per stirpes*.

Except as modified herein, the judgment of the court below is affirmed.

Modified and affirmed.

STATE v. EDWIN PETERSON (ALIAS BOYMAN PETERSON).

(Filed 7 April, 1948.)

1. Intoxicating Liquor § 9d—

Evidence that defendant was apprehended at a still which was then in operation and which had manufactured about a gallon of whiskey, and that upon seeing the officer, he fled, is sufficient to be submitted to the jury on each of the charges of possession of nontax-paid whiskey and possession of property designed for the manufacture of intoxicating liquor and aiding and abetting in its manufacture.

2. Criminal Law § 34d—

The fact that defendant, upon being apprehended at a still in operation, fled immediately upon seeing an officer, is competent to be considered by the jury in connection with the other circumstances.

3. Criminal Law § 62f: Courts § 4b—

No appeal lies to the Superior Court from judgment of the general county court executing a suspended sentence on condition broken, review being solely by *certiorari*.

4. Criminal Law § 67: Appeal and Error § 31j—

Where the Superior Court has no jurisdiction, the Supreme Court can acquire none by appeal, and when lack of jurisdiction is apparent, the appeal will be dismissed on plea, suggestion, motion, or *ex mero motu*.

STATE *v.* PETERSON.

APPEAL by defendant from *Burney, J.*, at December Term, 1947, of DUPLIN.

Criminal prosecution on warrant No. 6208, executed 3 March, 1944, amended to charge that on 21 January, 1944, defendant (1) "did have in his possession intoxicating liquors upon which the taxes imposed by the laws of the Congress of the United States and the State of North Carolina had not been paid," and (2) "did possess property designed for the manufacture of liquor and did aid and abet in the manufacture of intoxicating liquor," contrary to the form of the statute, etc., tried 6 March, 1944, in General County Court of Duplin County. The General County Court found defendant guilty, and pronounced judgment that he be confined in the common jail, etc. He appealed therefrom to Superior Court—the case being given there number 2789.

When the case came on for hearing in Superior Court defendant pleaded not guilty and was tried anew.

The State offered as witnesses two officers whose testimony tends to show these facts: That on 21 January, 1944, they "went in" on a "submarine like still" which was "fired up" and in operation southwest of Warsaw; that defendant, who was the only person there, raised up, and, when he saw one of the officers, "went to running" out right by the other officer; that there were four barrels of beer-mash at the still; that liquor was running out of the still at the time; that there was some whiskey that had just run out, about a gallon in a jug,—some manufactured whiskey in a container or jug; and that though the officers tried to catch defendant, they did not apprehend him that day.

Verdict: Guilty on both counts, first, guilty of possession of nontax-paid whiskey, and second, guilty of possession of materials for the purpose of manufacturing nontax-paid whiskey.

Judgment—On the first count: That defendant be confined in the common jail of Duplin County for a term of 18 months and assigned to work the public roads of the State under the supervision of the State Highway & Public Works Commission as provided by law.

On the second count: Prison sentence identical with that on the first count—"to run concurrently therewith."

Defendant appeals therefrom to Supreme Court and assigns error.

And the record on this appeal also shows that at a term of General County Court of Duplin County held "on the 4th day of May, 1943," defendant was tried upon a warrant No. 5892 amended to charge that on 11 November, 1942, defendant "did have in his possession intoxicating liquors upon which the taxes imposed by the laws of the Congress of the United States and the State of North Carolina had not been paid and did transport same . . . contrary to the form of the statute," etc., that his plea of guilty was accepted; and that thereupon the court pro-

nounced judgment that defendant be confined in the common jail of Duplin County for a term of eight months, and assigned to work the public roads, etc., the road sentence being "suspended for two years on good behavior, and that he especially obey the intoxicants laws of the State, and pay a fine of $15.00 and cost."

The record further shows at the session of General County Court of Duplin County held 6 March, 1944, upon prayer of the solicitor in No. 5892, the court, finding that "defendant having been this day convicted of possession of materials and apparatus for the purpose of manufacturing whiskey and aiding and abetting in the manufacture of whiskey in case No. 6208," and "that the conditions of suspension of judgment in this case have been violated," "ordered that the defendant be committed to serve the term of eight (8) months heretofore imposed in this case on May 3, 1943." Defendant gave "notice of appeal to the Superior Court," and it appears that in Superior Court the case was given No. 2788.

The record further shows that the Superior Court took cognizance of the case bearing County Court No. 5892, and given Superior Court No. 2788, and, after finding that defendant has willfully violated the terms of the sentence therein, ordered that the judgment of the General County Court is in all respects affirmed, and the Clerk directed to issue a commitment and the defendant be required to serve the eight months sentence, which shall begin at the expiration of the eighteen months sentence this date imposed on the defendant in case No. 2789.

Defendant excepted and gave formal notice of appeal to Supreme Court.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes and Moody for the State.

J. Faison Thomson, E. Walker Stevens, and Scott B. Berkeley for defendant, appellant.

WINBORNE, J. One assignment only is debated on this appeal. It challenges the correctness of the ruling of the trial court in denying defendant's motion for judgment as of nonsuit, and in submitting the case to the jury.

In this connection, the evidence set out in the case on appeal tends to show that, as seen by two officers, a still,—"submarine-like," for the manufacture of whiskey was "fired up" and in operation. Barrels of beer or mash were at the still. Whiskey was running out of the still at the time. About a gallon in a jug had just run out. And defendant alone was present,—stooping over, and, upon seeing the officer, he fled.

When this evidence is taken in the light most favorable to the State, as is done in considering a motion for judgment as of nonsuit, it is suffi-

cient to take the case to the jury, and to support a verdict of guilty on both counts with which defendant stands charged.

This holding finds support in numerous decisions of this Court. *S. v. Ogleston,* 177 N. C., 541, 98 S. E., 537; *S. v. Perry,* 179 N. C., 718, 102 S. E., 277; *S. v. Blackwell,* 180 N. C., 733, 105 S. E., 178; *S. v. Smith,* 183 N. C., 725, 110 S. E., 654.

The *Ogleston case* is similar in factual situation to that in the present case. In that case the still was in actual operation and defendants were the only persons present. The Court held that the inference that defendants were in charge of the still and operating it was at least permissible.

Moreover, the fact of flight by defendant, when discovered at the still, is competent evidence to be considered by the jury in connection with other circumstances in passing upon the question of guilt. *S. v. Payne,* 213 N. C., 719, 197 S. E., 573; and cases cited. See also *S. v. Adams,* 191 N. C., 526, 132 S. E., 281.

After careful consideration of all questions presented, we find in the judgment below

No error.

Regarding the appeal from the judgment of the Superior Court in No. 2788 affirming judgment of the General County Court No. 5892, which put into effect the eight months road sentence theretofore imposed by it and suspended on condition, and which the court finds the defendant has breached:

The Attorney-General moves to dismiss this appeal on the ground that no provision is made for an appeal from an inferior court to the Superior Court in such cases,—the remedy being by *certiorari* to be obtained from Superior Court upon proper showing aptly made. *S. v. King,* 222 N. C., 137, 22 S. E. (2d), 241; *S. v. Miller,* 225 N. C., 213, 34 S. E. (2d), 143.

In this connection, in the absence of a showing of record that the case came to the Superior Court by means of a writ of *certiorari,* or to show that the case docketed in Superior Court as upon appeal was treated as a return to a writ of *certiorari,* the Superior Court acquired no jurisdiction, and the case should have been dismissed. And, in this Court, where the lack of jurisdiction is apparent, the Court may, and will, on plea, suggestion, motion, or *ex mero motu,* stop the proceedings. See *S. v. King, supra; S. v. Miller, supra; Gill, Comr., v. McLean,* 227 N. C., 201, 41 S. E. (2d), 514.

The argument directed to the assignments of error in the principal case on this appeal is the only argument advanced by the defendant as reason for disturbing the action of the General County Court,—a kind

of saving clause, just in case error be found therein. Motion to dismiss is allowed.

MYRTLE ROSE HARE v. BOYD R. HARE.

(Filed 7 April, 1948.)

1. Process § 5b—

A defendant in a criminal action is immune from service of process in a civil action arising out of the same facts as the criminal proceeding provided he is brought into the State by, or after waiver of extradition proceedings, G. S., 15-79; G. S., 15-82; G. S., 8-68.

2. Same—

Where it does not appear that a defendant in a criminal action was brought into the State by, or after waiver of extradition proceedings, his exception to the refusal of his motion to strike out return of summons issued in a civil action and served on him while in this State for the purpose of attending a criminal term of court at which he was under bond to appear, cannot be sustained.

3. Divorce § 12—

Averment that defendant had obtained an absolute divorce from plaintiff suing for alimony without divorce, is a matter of defense to the cause of action but does not preclude the court from allowing alimony *pendente lite* and counsel fees.

APPEAL by defendant from *Phillips, J.*, at December Term, 1947, of RANDOLPH.

Civil action instituted 3 December, 1947, by plaintiff for alimony without divorce.

After service of summons, the defendant in apt time made a special appearance through his counsel, and moved to strike out the return of the sheriff made on the summons issued in this action, for the reason that the defendant is a nonresident of the State of North Carolina; and was in this State on the date the summons was served for no other purpose than to attend the December Criminal Term, 1947, of the Superior Court of Randolph County, as a defendant, to which term he was under bond to appear. A mistrial was ordered in the criminal action against the defendant, and he was again released on bond. The motion was supported by affidavit to the effect that the defendant is and has been a *bona fide* citizen and resident of the State of California since September, 1946; and that prior to the institution of this action the defendant had been granted an absolute divorce from the plaintiff.

The court overruled the motion, found no facts but proceeded to hear plaintiff's motion for alimony *pendente lite* and for counsel fees. At the

conclusion of the hearing on the latter motion, the court entered an order allowing the plaintiff $125.00 per month alimony *pendente lite* and her counsel a fee of $200.00. The defendant appeals, assigning error.

No counsel contra.

John G. Prevette for defendant.

DENNY, J. Conceding that the appellant was a nonresident of North Carolina at the time the summons was issued and served on him; and, further conceding that at such time he was in this State for no other purpose than to attend the December Criminal Term, 1947, of the Superior Court of Randolph County, to which term he was under bond to appear: Was he exempt from service of civil process while coming to court, during the period he was required by his bond to remain in court, and for a reasonable time thereafter in which to return to the State of his residence? We think our statutes and the decisions of this Court require a negative answer.

G. S., 15-79, reads as follows: "A person brought into this state by, or after waiver of, extradition based on a criminal charge shall not be subject to service of personal process in civil actions arising out of the same facts as the criminal proceedings to answer which he is being or has been returned until he has been convicted in the criminal proceeding or, if acquitted until he has had reasonable opportunity to return to the state from which he was extradited."

However, G. S., 15-82, contains the following provision: "After a person has been brought back to this state by, or after waiver of extradition proceedings, he may be tried in this state for other crimes which he may be charged with having committed here as well as that specified in the requisition for his extradition."

Our statutes, G. S., 8-65, *et seq.*, grant immunity to a person from service of process, civil or criminal, in connection with matters which arose before his entrance into this State, when such person comes into the State in obedience to a summons or subpoena for the purpose of testifying in a pending civil or criminal proceeding. *Cooper v. Wyman,* 122 N. C., 784, 29 S. E., 947; *Winder v. Penniman,* 181 N. C., 8, 105 S. E., 884, 13 A. L. R., 364; *Bangle v. Webb,* 220 N. C., 423, 17 S. E. (2d), 613; *Current v. Webb,* 220 N. C., 425, 17 S. E. (2d), 614; *Cf. Greenleaf v. People's Bank,* 133 N. C., 292, 45 S. E., 638; *Brown v. Taylor,* 174 N. C., 423, 93 S. E., 982. But our statutes do not purport to grant immunity from service of process to a defendant in a criminal proceeding except when he is brought into the State by, or after waiver of extradition proceedings. Even then, the exemption is limited by the statute, to process "in civil actions arising out of the same facts as the

criminal proceedings" upon which the extradition proceedings were based. G. S., 15-79, *supra.* Furthermore, if the Legislature had not recognized the lack of immunity from service of process on a defendant in a criminal proceeding in this jurisdiction, it would have been unnecessary to provide immunity for persons brought into this State pursuant to the provisions of our extradition law.

In some jurisdictions it is held that a nonresident defendant is exempt from service of civil process while his presence in the State is in compliance with the conditions of a bail bond. However, we have not so held.

In the case of *Moore v. Green,* 73 N. C., 394, the holding of the Court is briefly stated in the syllabus of the opinion, in the following language: "A defendant, who has been brought into Court on criminal process, and discharged from arrest under the same on bail, is not privileged from being arrested on civil process immediately afterwards, during the sitting of the Court and before he leaves the Court room." And in *White v. Underwood,* 125 N. C., 25, 34 S. E., 104, the defendant was served with process while confined in jail upon failure to give bond for his appearance to answer a criminal charge. *Clark, J.,* in speaking for the Court, said: "The sheriff has authority to serve process anywhere in his county, in jail as well as elsewhere. The jail possesses no 'privilege of sanctuary.' The reason for the exemption of witnesses and jurors from civil arrest (Code, secs. 1367 and 1735) and of nonresident parties and witnesses voluntarily attending Court here from service of any civil process (*Cooper v. Wyman,* 122 N. C., 784), do not apply to parties arrested in criminal proceeding. *Moore v. Green,* 73 N. C., 394. There is no public policy to encourage the latter."

The record before us is silent as to the manner in which the defendant was originally brought into court. Whether extradition papers were issued for him and he was extradited, or came into the State after waiver of extradition proceedings, is not disclosed. Hence, upon this record, the defendant's exception to the overruling of his motion, cannot be sustained.

The further information contained in the defendant's affidavit to the effect that he had obtained an absolute divorce from the plaintiff prior to the institution of this action, is a matter that may be pleaded as a defense to plaintiff's alleged cause of action, but it has no bearing on the question presented on this appeal.

The judgment of the court below will be upheld.

Affirmed.

IN THE MATTER OF BOYD BIGGERS AND LAWRENCE BIGGERS, MINORS.

(Filed 7 April, 1948.)

1. Constitutional Law § 28: Divorce § 10—

Where defendant enters an appearance and files answer in a divorce action instituted in another state, she is bound by the divorce decree entered, and the decree is valid here under the full faith and credit clause of the Federal Constitution, Art. IV, sec. 1.

2. Constitutional Law § 28: Divorce § 17—

Whether a decree awarding the custody of children of the marriage, entered by a court of another state upon its decree for divorce, is binding here depends upon whether the children were and are residents of such other state or were or have become residents of this State, and when the fact of their residence does not appear of record the cause will be remanded to the Superior Court.

3. Habeas Corpus § 3—

A petition for review and modification of an order awarding custody of minor children as between the parents separated but not divorced, G. S., 17-39, and to have respondent attached for contempt for failure to comply with the order as originally entered, was dismissed for want of service of notice upon respondent. *Held:* The fact of dismissal, alone, does not preclude the court from considering a subsequent petition.

APPEAL by petitioner, Annie Bost Biggers Bennick, from *Patton, Special Judge,* at November Term, 1947, of CABARRUS. Remanded.

This was a motion upon notice to review and modify an order of court as to the custody of the children named in the caption, and to have respondent J. L. Biggers attached for contempt for failure to comply with said order as originally entered.

It appears that in 1944 on petition of Annie Bost Biggers, then separated from her husband J. L. Biggers, an order apportioning the custody of the two children of the marriage between the parents was made by Judge Bobbitt. The children were before the court in response to a writ of *habeas corpus* (G. S., 17-39). Thereafter J. L. Biggers removed to Florida, taking the children with him, and there instituted suit for divorce from the petitioner. In the Florida court the petitioner Annie Bost Biggers appeared, employed counsel and filed answer, and on 11 December, 1945, judgment was rendered dissolving the bonds of matrimony, and awarding the custody of the children to the father, J. L. Biggers. In February, 1946, Annie Bost Biggers married James Bennick, and thereafter moved in the Superior Court of Cabarrus County that J. L. Biggers be attached for contempt for failure to comply with the order of Judge Bobbitt. The petition was dismissed, but on appeal the matter was remanded (*In re Biggers,* 226 N. C., 647, 39 S. E. (2d),

805). At April Term, 1947, petition was again dismissed by Judge Alley, no notice thereof having been served on the respondent J. L. Biggers. At November Term, 1947, on petition filed 21 October, 1947, and notice duly served, petitioner again moved that J. L. Biggers be attached for contempt, and that the original order as to the custody of the children be reviewed and modified. No answer thereto appears to have been filed.

In the petition it was alleged that after the order of Judge Bobbitt was entered J. L. Biggers took the children to Florida and kept them there for the purpose of defeating the order of the court, and has continued to keep them; that when this matter was pending in this Court (Fall Term, 1946) he again left the State, and only recently returned to Cabarrus County, bringing the children with him; "that after bringing the said minor children to the County of Cabarrus, the said J. L. Biggers then again left, and left the said minor children with his father, H. N. Biggers, who is a resident of Cabarrus County, North Carolina."

After finding certain facts the motion was denied, and petitioner appealed.

Hartsell & Hartsell for respondent, appellee.

E. Johnston Irvin for petitioner, appellant.

DEVIN, J. This is another of those unfortunate cases of the children of divorced parents.

The petitioner, Mrs. Annie Bost Biggers, now Mrs. Bennick, having entered an appearance and filed answer in the suit instituted by her former husband, J. L. Biggers, in the State of Florida, she is bound by the judgment duly entered in that court in so far as it dissolved the marriage ties. Under the full faith and credit clause of the Constitution of the United States, Art. IV, sec. 1, the Florida divorce decree is valid here. *S. v. Williams,* 224 N. C., 183, 29 S. E. (2d), 744; *McRary v. McRary, ante,* 714; *Williams v. North Carolina,* 317 U. S., 287.

But it does not necessarily follow as a corollary therefrom that the decree of the Florida court awarding the custody of the children to J. L. Biggers is binding upon the courts of North Carolina. That decree, in so far as it operates upon the children, has no extra-territorial effect. *In re Alderman,* 157 N. C., 507, 73 S. E., 126. So that, if these children were at the time of the decree, or have since become and were at the time of the hearing below, residents of North Carolina and within the jurisdiction of the court in which relief on their behalf was sought, the Superior Court of Cabarrus County was not without authority or power to hear and determine questions as to their custody and welfare when properly raised. *In re Alderman, supra; Burrowes v. Burrowes,* 210 N. C.,

788, 188 S. E., 648; *In re Ogden,* 211 N. C., 100, 189 S. E., 119; *In re Prevatt,* 223 N. C., 833, 28 S. E. (2d), 564; *In re Morris,* 225 N. C., 48 (51), 33 S. E. (2d), 243; *In re DeFord,* 226 N. C., 189, 37 S. E. (2d), 516. If, on the other hand, the children were and are residents of Florida, the court of that state as incident to its jurisdiction to grant divorce had power to make provision for the care and custody of the children of the marriage it dissolved. *In re Ogden, supra.*

However, in the record no definite evidence, allegation or finding appears to guide the Court to a correct determination of the questions raised, in accord with the principles announced in the decided cases, and the cause is remanded to the Superior Court of Cabarrus County for additional findings and appropriate orders based thereon.

The dismissal of the petitioner's petition by Judge Alley in April, 1947, for want of service of notice would not constitute a final determination of the matter, or alone prevent the court, upon showing of materially changed conditions, from reconsidering the order entered in 1944. *Clegg v. Clegg,* 187 N. C., 730, 122 S. E., 756; *In re TenHoopen,* 202 N. C., 223 (227), 162 S. E., 619.

Remanded.

NELLIE BASS GRANT, BY AND THROUGH HER NEXT FRIEND, MRS. M. W. BASS, v. FRED A. McGRAW, WEATHERS BROTHERS TRANSFER COMPANY, INCORPORATED, CLIFFORD GRANT AND H. E. GRANT.

(Filed 7 April, 1948.)

Pleadings § 19b—

A passenger in a car sued the operator and owner of a truck involved in the collision with the car. Upon motion of defendants, the driver and owner of the car were joined upon averment that their negligence was the sole proximate cause of the accident. The additional parties defendant filed cross complaint against the original defendants to recover for personal injuries and damages arising out of the same collision. *Held:* The demurrer of the original defendants for misjoinder was properly overruled, the additional defendants having been joined at their request in order that the entire controversy be settled in one action. Further, if the demurrer were allowed, the several causes would be subject to consolidation for trial.

APPEAL by defendants McGraw and Weathers Brothers Transfer Company from *Nettles, J.,* November Term, 1947, IREDELL. Affirmed.

Civil action to recover compensation for personal injuries resulting from an automobile-truck collision, heard on demurrer.

Plaintiff was a passenger on a Ford automobile which belonged to defendant H. E. Grant and which was being operated at the time by

Clifford Grant. The automobile and a truck operated by defendant McGraw and belonging to the corporate defendant collided. As a result plaintiff sustained certain personal injuries. She instituted this action against McGraw and the corporate defendant to recover compensation for her injuries. Defendants filed separate answers in which they each deny any negligence on the part of McGraw and allege that the negligence of Clifford Grant was the sole intervening proximate cause of the collision.

Thereafter, the defendants filed a motion that Clifford Grant and H. E. Grant be made parties defendant "to the end that the entire action (controversy) may be settled and disposed of in one action." In support of the motion they aver that the negligence of Clifford Grant was the sole proximate cause of the collision and that at the time he was operating the Ford, property of H. E. Grant, as a family car. The motion was allowed and process was issued and served on the defendant Grant.

Thereupon the new parties filed separate answers. Clifford Grant denied any negligence on his part and pleaded a cross action against the original defendants for personal injuries. H. E. Grant likewise pleaded a cross action for damages to his automobile.

The original defendants then appeared and demurred to said cross actions for misjoinder of parties and for that the causes of action set up by the new parties are not triable in this action.

The plaintiff does not object to the answers filed by the new parties. Instead she files brief in support of the order entered thereon.

The demurrer was overruled and said defendants appealed.

Burke & Burke for plaintiff appellee.

Scott & Collier for defendants Fred A. McGraw and Weathers Transfer Company, Incorporated, appellants.

John G. Lewis for defendant appellees H. E. and Clifford Grant.

BARNHILL, J. The question the appellants seek to present for decision on this appeal has already been decided by this Court. *Powell v. Smith,* 216 N. C., 242, 4 S. E. (2d), 524. That case controls decision here.

The new parties were brought in at the instance of the appellants "in order that the entire controversy can be settled in one action." They have filed answers which raise issues, the answers to which will tend to settle the whole controversy. This is in conformity with the express desire of the original defendants which was made the basis of their original motion. They are not now in position to object. They will not be permitted to blow hot and cold in the same action. They brought the new parties in and must abide the consequences.

Furthermore the several causes of action alleged by plaintiff and the new parties all grew out of the same collision. They are against the same defendants. The original plaintiff seeks no relief against the new parties, who are, in effect, additional parties plaintiff. Should we order a severance and require Clifford Grant and H. E. Grant to institute independent actions, the court below would have authority to, and probably would, order a consolidation for trial. *Peeples v. R. R., ante,* p. 590. Why march up the hill just to march down again?

Montgomery v. Blades, 217 N. C., 654, 9 S. E. (2d), 397, relied on by appellant, *Burleson v. Burleson,* 217 N. C., 336, 7 S. E. (2d), 706, *Schnepp v. Richardson,* 222 N. C., 228, 22 S. E. (2d), 555, and like cases are distinguishable.

The judgment below is

Affirmed.

SAM T. ROACH v. C. C. PRITCHETT, CRAVEN COUNTY TAX COLLECTOR.

(Filed 7 April, 1948.)

1. Appeal and Error § 40d—

Where the evidence is not in the record it will be assumed that there was evidence sustaining the findings of the trial court.

2. Appeal and Error § 40a—

A sole exception to the judgment presents a single question whether the court correctly applied the law to the facts found, and does not present for review the findings of fact or the evidence upon which they are based.

3. Taxation § 39—

Assets of a corporation which are sold to an innocent purchaser for value are not subject to levy to satisfy taxes due by the corporation. G. S., 105-385 (c) (5).

APPEAL by defendant from *Harris, J.,* November Term, 1947, CRAVEN. Affirmed.

Civil action to enjoin levy on and sale of personal property to satisfy taxes.

The record does not disclose a temporary restraining order, but the judgment entered decrees "that the restraining order be continued and the same is made permanent; . . ." And so, apparently a temporary restraining order was issued and then the cause came on for final hearing.

At the hearing counsel agreed "that jury might be waived and the Judge hear the evidence and render judgment out of term and out of the District." The court found the facts from which it appears that in

February 1933 a corporation was chartered to take over the automobile supply business theretofore operated by plaintiff. It thereafter operated the business in its corporate name until 1939, when it was dissolved. Plaintiff purchased a part of its stock in trade and thereafter continued the business, adopting the old corporate name as a trade name. The corporation paid all taxes assessed against it except for the years 1937 and 1938. For these years the sum of $356.14 in taxes, penalties and costs is still due and unpaid. Plaintiff has paid all taxes assessed against him personally.

On 13 December 1945 plaintiff sold his automobile supply business for value to innocent third parties.

On 28 December 1945 defendant, acting under the provisions of G. S. 105-385, served notice of levy on said stock of merchandise and also levied upon one 1941 Lincoln automobile belonging to plaintiff to satisfy taxes levied against the corporation for the years 1937 and 1938. Thereupon, plaintiff instituted this action to enjoin sale under said levy.

The court, having found the facts, entered judgment 6 January 1948, *nunc pro tunc,* permanently enjoining defendant from proceeding further under said levy and defendant appealed.

Guion & Rodman for plaintiff appellee.

R. A. Nunn for defendant appellant.

BARNHILL, J. While the facts alleged permit the inferences that the corporation in whose name the property was listed for taxation was a mere dummy; that it never in good faith acquired the automobile supply business of plaintiff; and that he was at all times the true owner thereof, operating the same as his own, the court below reached a contrary conclusion. The testimony offered is not contained in the record. It must be assumed, therefore, that the evidence sustains the findings. Indeed, this is conceded by failure to except thereto.

Furthermore, the only exception in the record is to the judgment entered. This presents the single question, whether the facts found and admitted are sufficient to support the judgment, that is, whether the court correctly applied the law to the facts found. It is insufficient to bring up for review the findings of fact or the evidence upon which they are based. *Rader v. Coach Co.,* 225 N. C., 537, 35 S. E. (2d), 609, and cited cases; *Fox v. Mills, Inc.,* 225 N. C., 580, 35 S. E. (2d), 869; *Lee v. Board of Adjustment,* 226 N. C., 107, 37 S. E. (2d), 128; *King v. Rudd,* 226 N. C., 156, 37 S. E. (2d), 116; *Redwine v. Clodfelter,* 226 N. C., 366, 38 S. E. (2d), 203; *Smith v. Smith,* 226 N. C., 506, 39 S. E. (2d), 391; *Swink v. Horn,* 226 N. C., 713, 40 S. E. (2d), 353; *Brown v. Truck Lines,* 227 N. C., 65, 40 S. E. (2d), 476.

When the judgment entered is supported by the findings of fact, the judgment will be affirmed. *Rader v. Coach Co., supra; Manning v. Insurance Co.,* 227 N. C., 251, 41 S. E. (2d), 767; *Hylton v. Mount Airy,* 227 N. C., 622, 44 S. E. (2d), 51; *In re Collins,* 226 N. C., 412, 38 S. E. (2d), 160.

Levy on the property of plaintiff to satisfy taxes due by the corporation was without warrant in law. The assets plaintiff acquired from the corporation were exempt from levy after the sale to innocent purchasers for value. G. S. 105-385 (c) (5).

The judgment below is

Affirmed.

MARTHA H. BOLLING (MRS. LOUIS H. CROWELL), ET AL., v. BELK-WHITE CO., ET AL.

(Filed 7 April, 1948.)

1. Master and Servant § 40c—

Evidence tending to show that deceased came to his death as a result of a pistol wound while at a place where he had a right to be in the course of his employment, without evidence that he was authorized to keep a pistol or use it in the business of the employer, is insufficient to support an award of compensation on the ground that in the absence of a showing of suicide it will be presumed that the death resulted from an accident, since, even so, there is neither presumption nor evidence to support the necessary basis for compensation that the accident arose out of the employment.

2. Master and Servant § 40a—

An injury to an employee must result from an accident arising out of and in the course of employment in order to be compensable under the Workmen's Compensation Act.

3. Master and Servant § 40c—

An accident "arises out of" the employment if it results from a risk involved therein or incident thereto, or to conditions under which the work is required to be performed, so that there is a causal connection between the employment and the injury.

APPEAL by defendants from *Alley, J.,* at September Term, 1947, of WATAUGA.

Proceeding under Workmen's Compensation Act to determine liability of defendants to widow and two minor children of Louis H. Crowell, deceased employee.

Louis H. Crowell was manager of Belk's Department Store in Boone, Watauga County. On the morning of 7 February, 1945, between 2:30

and 3:00 a.m., his lifeless body was found in the basement of the store building with a .32 caliber pistol lying nearby. The circumstances suggested suicide. A coroner's jury concluded that "the deceased came to his death by a pistol shot in his own hands, either accidentally or intentionally inflicted."

The Industrial Commission found that "the deceased came to his death by violence on the premises of the defendant employer, and at a place where the claimant (deceased), had a right to be, and in the course of his employment." Hence, in the absence of a showing of suicide, the Commission concluded that a presumption of accident would prevail under the decision in *McGill v. Lumberton*, 215 N. C., 752, 3 S. E. (2d), 324; *S. c.*, 218 N. C., 586, 11 S. E. (2d), 873. Compensation was thereupon awarded on authority of that case.

On appeal to the Superior Court the award of the Commission was upheld. From this latter ruling, the defendants appeal, assigning errors.

Trivette, Holshouser & Mitchell and Wade E. Brown for plaintiffs, appellees.

Helms & Mulliss and James B. McMillan for defendants, appellants.

STACY, C. J. The claimants frankly concede that the award, if sustained, must be made to rest on presumptions. The hiatus in the case arises from the fact that while there may be a presumption of injury by accident, which occurred in the course of the employment, there is neither presumption nor evidence to support the conclusion that the injury arose out of the employment. *Taylor v. Wake Forest, ante,* 346; *Rewis v. Ins. Co.*, 226 N. C., 325, 38 S. E. (2d), 97; Anno. 120 A. L. R., 683. This defeats the award.

There is no suggestion that the deceased was authorized to keep a pistol or to use it in the business of the employer. The causal connection between the injury and the employment is not apparent as was the case in *McGill v. Lumberton*, 218 N. C., 586, 11 S. E. (2d), 873; *S. c.*, 215 N. C., 752, 3 S. E. (2d), 324.

The occurrence to an employee of an injury, (1) by accident (2) arising out of and (3) in the course of the employment, is the *sine qua non* to compensation under the North Carolina Workmen's Compensation Act. G. S., Ch. 97. "Arising out of" has been defined to mean as coming from the work the employee is to do, or out of the services he is to perform, and as a natural result of one of the risks of the employment. The injury must spring from the employment or have its origin therein. *Ashley v. Chevrolet Co.*, 222 N. C., 25, 21 S. E. (2d), 834; *Bryan v. Loving Co.*, 222 N. C., 724, 24 S. E. (2d), 751; *Hunt v. State*, 201 N. C., 707, 161 S. E., 203; *Conrad v. Foundry Co.*, 198 N. C., 723, 153 S. E.,

266. The accident "arises out of" the employment when it occurs in the course of the employment and is the result of a risk involved therein or incident thereto, or to the conditions under which it is required to be performed. *Taylor v. Wake Forest, supra.* There must be some causal connection between the employment and the injury. *Canter v. Board of Education,* 201 N. C., 836, 160 S. E., 924; *Chambers v. Oil Co.,* 199 N. C., 28, 153 S. E., 594; *Plemmons v. White's Service,* 213 N. C., 148, 195 S. E., 370; *Ridout v. Rose's Stores, Inc.,* 205 N. C., 423, 17 S. E. (2d), 642; *Harden v. Furniture Co.,* 199 N. C., 733, 155 S. E., 728; *Brown v. Aluminum Co.,* 224 N. C., 766, 32 S. E. (2d), 320; *Wilson v. Mooresville,* 222 N. C., 283, 22 S. E. (2d), 907; *Robbins v. Hosiery Mills,* 220 N. C., 246, 17 S. E. (2d), 20.

The record fails to sustain the award of the Industrial Commission. Hence, the judgment below should have been for the appellants.

Reversed.

STATE v. MARTIN LUTHER BARRIER.

(Filed 7 April, 1948.)

1. Criminal Law § 51—

The trial court has discretionary power to withdraw a juror and order a mistrial and continue the case.

2. Automobiles § 34b: Criminal Law § 60b—

Where, in a prosecution for driving while under the influence of intoxicants, the court withdraws a juror and orders a mistrial and continues the case, the court is without authority to order that defendant's right to drive an automobile upon the highways be revoked for the period of continuance.

APPEAL by defendant from *Pittman, J.,* at October Term, 1947, of CABARRUS.

Criminal prosecution begun in County Recorder's Court of Cabarrus County charging defendant with the offense of operating a motor vehicle upon a public highway while under the influence of intoxicating liquor in violation of C. S., 4506, heard in Superior Court on appeal thereto from judgment of Recorder's Court.

In the course of the trial in the Superior Court the trial judge entered a judgment in which, after making certain findings, it is ordered that "in the interest of public safety . . . a juror be withdrawn, a mistrial ordered, and this case be continued for a period of two years, and that the defendant, Martin Luther Barrier, not to be allowed to drive an automobile on the highways of the State of North Carolina or on the streets

of any town or city in the State of North Carolina for a period of two years; that an automobile license not be issued to him for the ownership of a car, and that after this two years expires, that before the State Highway and Public Works Commission and the Motor Vehicle Bureau issue any license or permit to drive after the period of two years has expired, they shall have a certificate from the Chief Surgeon or doctor in charge of the mental department of the mental hospital of the Veterans Administration stating that this defendant, Martin Luther Barrier, has fully recovered and is able to walk in a normal manner; that he is not incapacitated in any way; that he does not have fits or seizures of any type, and that he is well and able to drive an automobile as well as any normal person."

Defendant excepted to the order and appeals to the Supreme Court, and assigns error.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.

E. T. Bost, Jr., for defendant, appellant.

PER CURIAM. While so much of the judgment, from which the appeal is taken, as withdraws a juror, orders a mistrial and continues the case, is within the legal authority of the trial judge, the remaining part of it which follows is in excess of his legal authority, and is hereby stricken out. The Attorney-General for the State concedes error.

The cause is remanded to the Superior Court of Cabarrus County for further proceedings.

Error and remanded.

STATE v. LEMUEL PARROTT.

(Filed 7 April, 1948.)

Criminal Law § 76a—

Certiorari will not be granted on the ground that due to illness and a misunderstanding on the part of the court reporter she was unable to prepare a proper transcript within the time allowed for service of statement of case on appeal, since there is a failure to show merit or to negative laches. Further, if allowed, the writ would not accomplish the result desired since time for serving the case on appeal has expired, and further, it appeared that the order allowing the appeal *in forma pauperis* was not supported by the affidavit as required by G. S., 15-181.

STATE *v.* PARROTT.

PETITION for *certiorari* to have case brought up from Lenoir Superior Court and heard on appeal. No objection is interposed to the petition.

Guy Elliott for the petitioner.

STACY, C. J. At the September Mixed Term, 1947, Lenoir Superior Court, presided over by Hamilton, Special Judge, the petitioner, Lemuel Parrott, was tried upon indictment charging him and another with the murder of one Kenneth Taylor, which resulted in conviction of the petitioner of murder in the first degree and sentence of death as the law commands in such case. G. S., 14-17.

From the judgment thus entered, the petitioner gave notice of appeal to the Supreme Court, and was granted the privilege of appealing *in forma pauperis,* without giving security for costs, albeit the record shows no supporting affidavit as required by G. S., 15-181.

By consent, the petitioner was allowed ninety days from the adjournment of the September Term of court to make up and serve statement of case on appeal, and the solicitor was allowed thirty days thereafter to prepare and serve exceptions or countercase.

It is alleged in the petition that due to illness and a misunderstanding on the part of the court reporter "she was unable to prepare a proper transcript of the evidence and the charge of the court within the time allowed this defendant to prepare and serve statement of case on appeal."

It is apparent from the foregoing that the petitioner fails to show merit or to negative laches. *S. v. Lampkin,* 227 N. C., 620, 44 S. E. (2d), 30; *S. v. Wescott,* 220 N. C., 439, 17 S. E. (2d), 507. Nor does it appear that the writ, if allowed, would accomplish the result desired by the petitioner. The time for serving his statement of case on appeal has expired. *S. v. Moore,* 210 N. C., 686, 188 S. E., 421. And the order allowing him to appeal *in forma pauperis* appears to have been entered without supporting affidavit. *S. v. Stafford,* 203 N. C., 601, 166 S. E., 734.

For the reasons stated and on what was said in *S. v. Lampkin, supra,* and *S. v. Wescott, supra,* the petition for *certiorari* will be denied.

This leaves the appeal still pending, subject to dismissal on motion.

Certiorari denied.

STATE v. LEMUEL PARROTT.

(Filed 14 April, 1948.)

MOTION by State to docket case, affirm judgment and dismiss appeal.

Attorney-General McMullan and Assistant Attorney-General Moody for the State.

STACY, C. J. Following denial of application for *certiorari,* and on the record proper already filed herein, the Attorney-General moves to docket the case, affirm the judgment and dismiss the appeal. For the reasons stated in denying defendant's application for *certiorari,* the present motion will be allowed.

Judgment affirmed;

Appeal dismissed.

MARK ARTIS, INCOMPETENT, BY HIS GUARDIAN, RUFUS W. SANDERS, v. IDA ARTIS.

(Filed 14 April, 1948.)

1. Appeal and Error § 40a—

A sole exception to the judgment presents only whether the findings are sufficient to support the judgment.

2. Deeds § 13a—

Ordinarily, the premises and granting clauses designate grantee and the thing granted, and the *habendum* relates to the *quantum* of the estate, the granting clause being the very essence of the contract.

3. Same—

Where the granting clause and the *habendum* convey the entire estate in fee simple, and the warranty is in harmony therewith, a clause in any other part of the instrument which undertakes to divest or limit the fee simple title will be rejected as repugnant to the estate and interest conveyed.

4. Same—

The decisions construing G. S., 31-38, pertaining to the construction of wills, are pertinent in construing G. S., 39-1, pertaining to the construction of deeds, since the statutes are similar in wording and effect.

5. Dower § 7—

The widow is entitled to dower in one-third in value of all lands, tenements and hereditaments whereof her husband was seized and possessed at any time during coverture, the dower to include the dwelling house in which the husband usually resided. G. S., 30-4; G. S., 30-5.

6. Same—

Alienation by the husband alone passes his interest in the estate but does not affect the wife's dower right except in respect to mortgages or deeds of trust to secure purchase money, G. S., 30-6, and where the husband has conveyed the home site without joinder of the wife, the conveyance does not deprive her of her dower, either inchoate or consummate, and the grantee takes title subject to the dower right of the wife therein should she survive the husband. G. S., 30-8.

7. Same—

The husband, without joinder of his wife, conveyed the home site to his wife and one of his sons. In special proceedings for partition instituted after the husband's death, it was determined that the wife was entitled to dower in all of his lands but no dower was actually allotted to her, and the lands other than the home site were partitioned among all the children. It was found as a fact that the value of the home site did not exceed the value of one-third interest in all the lands of which the husband died seized. *Held:* The allotment to the wife of a life estate in the home site as and for the value of her dower is without error, since the grantees in the deed took subject to dower.

8. Dower § 8a—

The equitable jurisdiction of the Superior Court over dower has not been taken away by giving cognizance of such matters to the Clerk of the Superior Court.

9. Same: Courts § 4c—

Where, in a special proceeding for partition of lands as between the widow and one of the children to whom the husband had conveyed the premises, the question of dower right arises and the other heirs are made parties, the Superior Court on appeal from the order of the Clerk that petitioner was entitled to actual partition, has jurisdiction to adjudicate the right to dower, since once having obtained jurisdiction of the cause, the Superior Court will administer all necessary incidental matters in connection with the litigation.

APPEAL by petitioner Mark Artis, individually, and with others, as heirs at law of Archie C. Artis, deceased, from *Morris, J.*, at November Term, 1947, of JOHNSTON.

Special Proceeding, No. 1525, instituted 3 January, 1944, upon petition for actual partition of certain tract of land in Johnston County.

The petitioner Mark Artis, through his guardian, alleges in his petition that he and defendant, Ida Artis, are tenants in common, in and to a certain tract of land, containing thirty acres, more or less, "allotted to Ida Artis and Mark Artis by deed dated December 15, 1928, and recorded in Register of Deeds of Johnston County in Book 211, page 568"; that petitioner is owner of one-half interest, and respondent Ida Artis owns a life estate in and to one-half interest in said tract of land; and that they desire to hold their interests in severalty in order that the

petitioner may receive the rents and profits from said land as Ida Artis has received the rents and profits for said land for several years and has not accounted to the petitioner or his guardian therefor, etc.

The respondent, Ida Artis, answering, denies in the main the allegations of the petition, and for further defense she avers in substance: That she is the widow of the Archie Artis who was father of petitioner, Mark Artis; that when she married Archie Artis he was involved in debt; that there were mortgages and liens of record covering his other lands, including the *locus in quo,* and she had paid off and discharged various of said liens out of her personal estate; that in consideration thereof Archie Artis executed and delivered to defendant and Mark Artis a deed conveying a tract of 30 acres of land which includes the home site, by the terms of which she acquired an undivided one-half interest in fee simple,—not just a life estate, as alleged in the petition; that she did not join in said deed conveying said tract of land, or any part thereof, nor has she conveyed, or consented to the conveyance by Archie Artis of the home site; and that in the administration of the estate of her deceased husband, Archie Artis, no dower has ever been set apart to her, and the value of the possession of this entire tract of 30 acres is not worth more than what would have been the reasonable value of her dower in the lands of Archie Artis if her dower had been actually set apart and allotted to her: Upon these averments she prays "that it be adjudged by the court that she is the lawful owner of and entitled to the actual possession of all of said 30 acres of land, and that she is the lawful owner in fee simple of a one-half thereof, and for such other and further relief," etc.

Petitioner, replying to the further answer of defendant, denies the material parts thereof, and alleges that defendant Ida Artis could not take dower in this land, but that she is entitled to a life estate in one-half interest in said 30-acre tract; that she is estopped to claim dower; that she entered into a contract with Archie Artis and his heirs that she would take a deed which conveys a life estate in a one-half interest in said 30 acres; that she agreed also to pay her part of the encumbrance and taxes on said land, and Mark Artis, who owns one-half interest in and to said land, could have a home there in his old home; and that she is estopped to have dower allotted or that she take any other estate therein except a life estate in one-half interest in the same.

Thereafter the Clerk of Superior Court of Johnston County, after hearing upon the "prayer for partition," the parties being represented by their respective counsel, and it being admitted that the real estate described in the original petition had been conveyed to the parties hereto, by a deed from Archie C. Artis, father of plaintiff, and husband of defendant, registered in Book 211 at page 568 of Registry of Johnston County, and after reciting the contentions of the parties respectively,

entered a judgment under date of 18 July, 1944, in which it is held that plaintiff is entitled to the relief he seeks in this proceeding, that is, that "he is entitled to have this proceeding go forward to the end that he may have his share in this real estate actually partitioned and assigned to him by metes and bounds by a committee duly appointed by the court, and in accordance therewith orders that a partition of the land be made," etc. The defendant appealed from this order to the Superior Court.

The parties stipulate that thereafter the heirs at law of Archie Artis, deceased, naming them, were made parties to this proceeding and served with summonses; that the minor defendants were properly represented by guardian *ad litem,* named and duly appointed and served; that Ida Artis took possession of the 30 acres of land in question after the execution and recording of the said deed; that Ida Artis has paid more than $1,000 for mortgages on 102 acres of land due by Archie Artis and Virginia Artis, former wife of said Archie Artis and had had said mortgages transferred to her and the deed for the 30 acres to her and Mark Artis was the consideration to her for the payments of the said $1,000 and the 30 acres were a part of the 102 acres; that the administration of the estate of Archie Artis had been closed and the estate fully settled prior to the institution of the action; that the land described in the deed in question embraces the home site of Archie Artis, deceased, the grantor in the deed. See Book 211, page 568 of Registry of Johnston County.

The answer of the guardian *ad litem* admits the allegations of the petition, and of the reply to the answer of defendant, and concurs in the prayer for relief as set out in the petition.

The record on this appeal contains as Exhibit A what purports to be the record in a partition proceeding entitled "Wade Artis, *et al.,* and Ida L. Artis, widow, heirs at law of Archie Artis, deceased, *Ex Parte,*" the petition in which purports to have been verified 6 January, 1938, the substance of which appears in the finding of the judge hereinafter set out; and as Exhibit B, what purports to be the deed dated 15 December, 1928, from Archie C. Artis to Ida L. Artis and Mark Artis, duly acknowledged and probated, and registered in the office of the Register of Deeds for Johnston County in Book 211 at page 568, on 12 June, 1930, in which (1) the parties are "Archie C. Artis . . . of the first part," and "Ida L. Artis and Mark Artis . . . of the second part"; (2) the consideration is "One Thousand Dollars . . . paid by Ida L. Artis and Mark Artis"; (3) the granting clause is: "has bargained and sold, and by these presents doth grant, bargain, sell and convey to said Ida L. Artis and Mark Artis their heirs and assigns"; (4) there follows the description this language: "At the death of Ida L. Artis, if no bodily heirs by Archie C. Artis, then the above lands or her part of same shall be divided between the Archie C. Artis heirs also Archie C. Artis holds

his lifetime right to the above described property"; (5) the *habendum* is: "To have and to hold the aforesaid tract or parcel of land . . . to the said Ida L. Artis and Mark Artis, their heirs and assigns, to their only use and behoof forever"; and (6) the covenantees in the warranty of seizin in fee, of right to convey in fee simple, of freedom from encumbrances, and of general warranty are "said Ida L. Artis and Mark Artis' heirs and assigns." These exhibits apparently were in evidence before the judge on hearing in Superior Court.

When the cause came on for hearing before judge of Superior Court, presiding at November Term, 1947, the parties consented that the issues raised are matters of law rather than issues of fact, and all of the evidence consists of records, and a jury trial being waived by the attorneys for both petitioner and the defendant, and it being agreed that the judge consider the record evidence, the judge made the findings substantially as follows (numbering being inserted):

1. That it appearing to the court that this is a special proceeding brought by petitioner for partition of lands of both petitioner and defendant, Ida Artis, it being thirty acres in Ingram's Township, Johnston County, conveyed to petitioner and Ida Artis by Archie Artis, by deed dated 15 December, 1928, registered in Book 211 at page 568, registry of said county;

2. That it further appearing to the court that Archie Artis died intestate and left him surviving Ida Artis, as his widow, and the following children: Mark Artis, Ed Artis, Wade Artis, Milton Artis, and Inez Evans; that on 6 January, 1938, said children as his heirs at law, and Ida Artis, widow, instituted a special proceeding No. 1113 in Superior Court of Johnston County for the purpose of partitioning the entire body of 102 acres of land owned by Archie Artis at the time of his death, among said five children; that in the petition therein it is alleged, among other things, that "the petitioner, Ida L. Artis, widow, is entitled to dower in the following described lands"; and then follows a description of the entire 102 acres by metes and bounds,—it being further alleged in said petition that there is expressly excepted from the partition of said lands the tract of 30 acres which had been conveyed theretofore by Archie Artis to Ida Artis and Mark Artis, as above set forth; and that it appears from the entire record in said "S. P. 1113" that no dower was in fact set apart and allotted by the commissioners to Ida Artis, the widow, although as such she was entitled to have dower formally set apart to her; and that this proceeding went to final judgment 10 January, 1939; (A reading of the Commissioner's report indicates that the commissioners delineated and set apart to Ida Artis and Mark Artis the 30 acres above referred to, and partitioned the remainder among the five children);

4. That it further appearing that the present special proceeding, it being "S. P. 1535," was instituted 3 January, 1943, and thereafter the living brothers and sisters of Mark Artis, together with the children and the widow of Milton Artis, who has died since the institution of the first special proceeding No. 1113, and all parties in interest herein have been regularly made parties and are represented before the court by their attorneys and by the duly appointed guardian *ad litem* for the infant parties;

5. That it further appearing to the court that the 30 acres referred to in S. P. No. 1113 and in the deed from Archie Artis to Ida Artis and Mark Artis, dated 15 December, 1928, and registered in Book 211 at page 568, constituted and was a part of the home site, and the buildings are in poor condition and the entire 30 acres is not worth more than would be the value of the dower estate in said 102 acres of land, if same had ever in fact been allotted to the widow;

Upon these findings the judge ordered, adjudged and decreed that Ida Artis, as the widow of Archie Artis, is entitled (1) to the possession of the entire tract of 30 acres for and during the term of her natural life as and for the value of her dower estate; and (2) in addition thereto to a one-half undivided interest in the said 30-acre tract in fee simple.

And, thereupon, the judge concluded that it is now proper that the cause be remanded to the clerk of Superior Court for further proceedings therein, "looking to the actual partition of this 30-acre tract between Ida Artis and Mark Artis, and the allotment in severalty to each of them a one-half interest in said land; the one-half interest and the possession of Mark Artis, and his heirs and assigns thereto being subject at all times to the life estate owned by Ida Artis in the entire 30-acre tract"; and ordered that the cause be remanded to the clerk of Superior Court with directions for the appointment of commissioners "to partition the said lands between the petitioner, Mark Artis, and the defendant, Ida Artis, each getting an equal share in fee simple," and for further proceedings as the law may direct.

Petitioner and defendants, other than Ida Artis, appeal therefrom to Supreme Court and assign error.

O. L. Duncan and Leon G. Stevens for appellants.

Lyon & Lyon for appellee.

WINBORNE, J. The record on this appeal shows that there is no exception to any finding of fact made by the judge. The only exception taken is to the signing of the judgment. This exception to the signing of the judgment raises only the question as to whether the facts as found by the court are sufficient to support the judgment. That is, such exception challenges only the conclusions of law upon the facts so found.

Smith v. Davis, ante, 172, 45 S. E. (2d), 51, and cases there cited directly and by reference.

Accordingly two questions of law, on which the correctness of the judgment depends, are presented for decision:

I. Did Ida L. Artis acquire, under the terms of the deed from Archie C. Artis to Mark Artis and Ida L. Artis, as set out hereinabove, an undivided one-half interest in and to the thirty acre tract of land conveyed by said deed and here involved, in fee simple? The court below held that she did take such interest, and the statute G. S., 39-1, relating to construction of deeds, and decisions of this Court, particularly *Blackwell v. Blackwell,* 124 N. C., 269, 32 S. E., 676; *Wilkins v. Norman,* 139 N. C., 40, 51 S. E., 797; *Bryant v. Shields,* 220 N. C., 628, 18 S. E. (2d), 157, and *McNeill v. Blevins,* 222 N. C., 170, 22 S. E. (2d), 268, furnish approval.

The statute G. S., 39-1, provides that "when real estate is conveyed to any person, the same shall be held and construed to be a conveyance in fee, whether the word 'heir' is used or not, unless such conveyance in plain and express words shows, or it is plainly intended by the conveyance or some part thereof, that the grantor meant to convey an estate of less dignity."

Applying this rule to the deed in question the conveyance does not in plain and express words show, nor is it plainly intended by the conveyance or some part of it, that the grantor meant to convey an estate of less dignity than a fee simple.

The words used (1) in the granting clause, "to Ida L. Artis and Mark Artis their heirs and assigns," (2) in the *habendum* "to the said Ida L. Artis and Mark Artis, their heirs and assigns, to their only use and behoof forever," and (3) in the warranty "said Ida L. Artis and Mark Artis heirs and assigns," clearly and unqualifiedly convey, and relate to a conveyance of, a fee simple estate. Standing alone, these operative clauses of the deed constitute an unrestricted conveyance of the land, that is, a conveyance in fee simple. *Whitley v. Arenson,* 219 N. C., 121, 12 S. E. (2d), 906. Ordinarily the premises and granting clauses designate the grantee and the thing granted,—while the *habendum* clause relates to the *quantum* of the estate. "The granting clause is the very essence of the contract." 16 Am. Jur., 567. *Bryant v. Shields, supra.* And the *habendum,* in the present case, is in harmony with the granting clause. Therefore, the clause undertaking to divest or limit the fee simple title which had been conveyed unqualifiedly to Ida L. Artis and Mark Artis is repugnant to both the granting clause and the *habendum.* Hence the granting clause will prevail and the repugnant clause will be rejected. *Blackwell v. Blackwell, supra; Wilkins v. Norman, supra; Bryant v. Shields, supra,* as cases cited; *McNeill v. Blevins, supra.*

In *Wilkins v. Norman, supra,* a case somewhat similar to the one in hand, in the granting clause, and in the *habendum* the conveyance is to "Berrick Norman, to him and his heirs and assigns forever." And following the usual covenant of warranty are words undertaking to limit the estate to the life of the grantee and his wife, with remainder to three of "their heirs," naming them. This last clause was held to be repugnant to the estate already conveyed, and therefore void.

And in the *McNeill case,* also similar to the present one, the granting clause is "to the said Chas. L. McNeal his heirs and assigns," and the *habendum* is "to the said Chas. L. McNeal, his heirs and assigns, to their only use and behoof forever." But after the description, and between the granting clause and the *habendum,* are words undertaking to limit "to Chas. L. McNeal and his children only" the estate conveyed. This Court, in opinion by *Devin, J.,* said: "We do not think that . . . the expression that . . . the land should belong to Chas. L. McNeal and his children should be held to express the intention on the part of the grantors to divest or limit the fee simple title which they had definitely conveyed, both in the premises and in the *habendum,* in both the preceding and subsequent clauses of the deed, to Chas. L. McNeal and his heirs."

Hence it may be stated as a rule of law that where the entire estate in fee simple, in unmistakable terms, is given the grantee in a deed, both in the granting clause and *habendum,* the warranty being in harmony therewith, other clauses in the deed, repugnant to the estate and interest conveyed, will be rejected.

Indeed, since the statute G. S., 39-1, which pertains to the construction of deeds is similar in wording and in effect to the statute G. S., 31-38, formerly Rev., 3138, and later C. S., 4162, which pertains to the construction of wills, what has been held in applying the rule of construction as to wills is pertinent in applying the rule of construction as to deeds.

Accordingly, the rule as to the construing of wills is clearly stated by *Walker, J.,* in *Carroll v. Herring,* 180 N. C., 369, 104 S. E., 892. "If one devise in fee simple he cannot make a limitation over by way of executory devise without cutting down the fee, in order to make room for the second; for, after giving a fee simple absolutely, there is no part of the estate or interest left in him." And the opinion continues: "Where real estate is given absolutely to one person, with a gift over to another of such portion as may remain undisposed of by the first taker at his death, the gift over is void, as repugnant to the absolute property first given; and it is also established law that where an estate is given to a person generally or indefinitely with a power of disposition, or to him, his heirs and assigns forever, it carries a fee, and *any limitation over or qualifying expression of less import is void* for repugnancy. The only

exception to such rule is where the testator gives to the first taker an estate for life only, by *certain and express terms,* and annexes to it the power of disposition." To like effect are these cases: *Roane v. Robinson,* 189 N. C., 628, 127 S. E., 626; *Daniel v. Bass,* 193 N. C., 294, 136 S. E., 733; *Barbee v. Thompson,* 194 N. C., 411, 139 S. E., 838; *Lineberger v. Phillips,* 198 N. C., 661, 153 S. E., 118; *Hambright v. Carroll,* 204 N. C., 496, 168 S. E., 817; *Barco v. Owens,* 212 N. C., 30, 192 S. E., 862; *Peyton v. Smith,* 213 N. C., 155, 195 S. E., 379; *Brinn v. Brinn,* 213 N. C., 282, 195 S. E., 793; *Heefner v. Thornton,* 216 N. C., 702, 6 S. E. (2d), 506; *Smith v. Mears,* 218 N. C., 193, 10 S. E. (2d), 659; *Early v. Tayloe,* 219 N. C., 363, 13 S. E. (2d), 609; *Croom v. Cornelius,* 219 N. C., 761, 14 S. E. (2d), 799; *Elder v. Johnston,* 227 N. C., 592, 42 S. E. (2d), 904; *Hardee v. Rivers, ante,* 66, 44 S. E. (2d), 476; *Taylor v. Taylor, ante,* 275, 45 S. E. (2d), 368. Compare *Jefferson v. Jefferson,* 219 N. C., 333, 13 S. E. (2d), 745.

In *Hambright v. Carroll, supra,* the Court said: "In considering the contention that the plaintiff acquired a defeasible fee, we must keep in mind two clearly established principles: (1) A fee may be limited after a fee by way of executory devise; but 'if one devises in fee simple, he cannot make a limitation over by way of executory devise without cutting down the first fee, in order to make room for the second,' *McDaniel v. McDaniel,* 58 N. C., 351. (2) No remainder can be limited after the grant of an estate in fee simple."

And in *Barco v. Owens, supra,* it is stated: "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 . . . Conditions subsequent, in the absence of compelling language to the contrary, are usually construed against divestment . . . The absolute devise is permitted to stand, while the subsequent clause is generally regarded as precatory only . . . This rule is not at variance with the cardinal principle in the interpretation of wills, which is to discover and effectuate the intent of the testator, looking at the instrument from its four corners, but is in fact in aid of such discovery and effectuation."

II. The court having found substantially these facts: (1) That Archie C. Artis, without the joinder of his wife, Ida L. Artis, conveyed to Mark Artis and Ida L. Artis the 30 acre tract in question, which was a part of the home site of Archie C. Artis, and died seized of 72 acres of other land; (2) that, though the 72 acres have been divided between the five children of Archie C. Artis, including Mark Artis, plaintiff, no dower has been allotted to Ida L. Artis, as widow of Archie C. Artis; and (3) that the value of the entire 30 acres is not worth more than the

value of the dower estate of Ida L. Artis, as such widow, in the whole 102 acres of land, if same had been allotted to her, is Ida L. Artis entitled to the possession of the entire tract of 30 acres for and during the term of her natural life as and for the value of her dower estate? If so, all the parties in interest being in court, has the Superior Court jurisdiction on appeal thereto to so adjudge?

The statutes of this State and decisions of this Court answer each question in the affirmative.

The statutes pertaining to dower provide that "Every married woman, upon the death of her husband intestate, or in case she shall dissent from his will, shall be entitled to an estate for her life in one-third in value of all the lands, tenements and hereditaments whereof her husband was seized and possessed at any time during the coverture, in which third part shall be included the dwelling house in which her husband usually resided"; G. S., 30-4; G. S., 30-5; and that "no alienation of the husband alone, with or without covenants of warranty, shall have any other or further effect than to pass his interest in such estate, subject to the dower right of the wife," except in respect to mortgages or deeds of trust to secure purchase money. G. S., 30-6.

Hence, Ida L. Artis, upon the death of her husband, Archie C. Artis, became entitled to dower in all the lands of which he was seized and possessed at any time during coverture,—the dower to include the dwelling house in which he usually resided.

Moreover, ordinarily "no deed or other conveyance, except to secure purchase money, made by the owner of a home site, which shall include the residence and other buildings together with the particular lot or tract of land upon which the residence is situated, whether actually occupied by said owner or not, shall be valid to pass possession or title during the lifetime of the wife" unless she joins with her husband in the execution of such deed or conveyance in the manner provided by statute. G. S., 30-8, and amendment thereto. Session Laws 1945, Chapter 73, Sec. 2.

This Court, considering the statute G. S., 30-8, in connection with dower, in the case of *Boyd v. Brooks*, 197 N. C., 644, 150 S. E., 178, held that a conveyance by the husband, of his home site, without the joinder of his wife, does not deprive her of her right of dower, either inchoate or consummate, and that at his death, she, surviving him, is entitled to dower in the home site, after the conveyance, just as she was before the conveyance. Moreover, the Court further held that the title conveyed by such conveyance, with the right of possession under such title, passes to the grantee upon the death of the husband, subject only to the dower right of the wife, if she survive her husband.

In the light of the statute, as so applied by the Court, the title to an undivided half interest in the home site, acquired by Mark Artis, under

the deed from Archie C. Artis, passed to him subject to the dower right of Ida L. Artis, as widow of Archie C. Artis.

Furthermore, the equitable jurisdiction of the Superior Court over dower, *Campbell v. Murphy,* 55 N. C., 357, has not been taken away by giving cognizance of such matters to the Clerk of Superior Court. *Pollard v. Slaughter,* 92 N. C., 72. See also *Efland v. Efland,* 96 N. C., 488, 1 S. E., 858; *Sparger v. Moore,* 117 N. C., 449, 23 S. E., 359; *Trust Co. v. Watkins,* 215 N. C., 292, 1 S. E. (2d), 853.

And when the Superior Court once acquires jurisdiction of a case, it will administer all necessary incidental matters connected with the litigation. *Sparger v. Moore, supra.* See also *Brake v. Brake, ante,* 609.

Thus, after careful consideration of all matters of law presented on this appeal, we conclude that the judgment below is correct.

Affirmed.

GARROU KNITTING MILLS v. EDWIN GILL, COMMISSIONER OF REVENUE.

(Filed 14 April, 1948.)

1. Taxation § 29—

The three year limitation from the time of filing original income tax returns during which the Commissioner of Revenue may review returns and make additional assessments is not strictly a statute of limitations and does not affect the right to additional tax but applies solely to administrative procedure by which the tax is assessed.

2. Statutes § 5—

Administrative interpretation of a statute, acquiesced in over a long period of time, is properly considered in the construction of the statute by the courts.

3. Taxation § 29—

G. S., 105-160, considered *in pari materia* with the other pertinent provisions of the Revenue Act prior to the amendment of Chap. 501, sec. 4, Session Laws of 1947, does not preclude the Commissioner of Revenue from making additional assessments or refunds of income taxes after the expiration of three years from the filing of the original returns where the taxpayer has been required to make changes in his Federal income tax return and pay an additional assessment of Federal income taxes, and has failed to notify the Commissioner of Revenue of such changes and file an additional return under oath as required by G. S., 105-159.

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

DEFENDANT'S appeal from *Gwyn, J.,* September-October Term, 1947, BURKE Superior Court.

The plaintiff filed its State income tax return for the calendar year 1940 prior to 15 March, 1941, and paid the tax upon the net income manifested. In ascertaining the taxable net income the taxpayer took certain credit for depreciation of machinery for the tax year. On 20 October, 1944, notice was given the plaintiff by the Commissioner of Internal Revenue that its 1940 taxable net income as shown in the Federal return had been changed and corrected by disallowance of a portion of the deduction claimed for depreciation of machinery, and that an additional assessment was being made. The plaintiff made no report to the North Carolina Department of Revenue of this change and correction in its 1940 income and additional assessment thereupon. Upon advice from the Federal department that such change had been made, notice was given to the plaintiff by the defendant Commissioner that an assessment of additional State income tax for the year had been made because of disallowance of a portion of the deduction claimed by it for depreciation of machinery. The plaintiff, denying the authority of the Commissioner to make additional assessment after the expiration of three years from the filing of the original return (G. S., 105-160), paid the tax under protest and sued for its recovery.

At the hearing before Gwyn, J., at September-October Term of Burke Superior Court, it appearing that the plaintiff's pleading sufficiently set forth the above facts, the defendant demurred and moved to dismiss the action. Judge Gwyn, being of the opinion that the power to make additional assessment was barred by the cited statute, overruled the demurrer and defendant appealed.

Attorney-General McMullan and Assistant Attorneys-General Tucker and Abbott for the State.

J. E. Butler for plaintiff, appellee.

SEAWELL, J. The only question raised on this appeal is whether, on the above stated facts, G. S., 105-160, read *in pari materia* with other pertinent provisions of the Revenue Act, operates to deny the Commissioner of Revenue authority to make additional assessments or refunds after the expiration of three years from the filing of the original return in the special instance of changes made in the taxpayer's liability on returns made by it to the Federal taxing department.

For a long period during which the General Assembly enacted its tax income laws biennially or at each regular session, and since the enactment of the permanent Revenue Act in 1939, it has been the policy of the State, as reflected in these statutes, to require the taxpayer to notify the Commissioner of Revenue and file an additional return under oath when any change or correction affecting the taxable net income has been made

by the Federal authority, and on such change authority is given the Commissioner to make additional assessments or refunds on "such evidence as may be brought to his attention" or he "shall otherwise acquire." G. S., 105-159. Whether this provision was inspired by a desire for uniformity, since both Federal and State governments resort to the same source for income tax, or a desire to make available the superior facilities of the Federal department in checking returns, we need not inquire. Neither the validity nor the propriety of the provision is questioned: The point is that the statute imposed on the plaintiff a positive duty with respect to its income tax liability beyond that required in G. S., 105-152, respecting its original return; it was its duty not only to report the change made by the Federal department but to file another return under oath reflecting it, and this the plaintiff failed to do. The reason assigned for that failure is that three years had already elapsed after the filing of the original return before the plaintiff received notice of the change made by the Federal department, and as appellee contends, the statute of limitations provided by Section 105-160 had already applied, and relieved it of the duty. This brings up for review pertinent provisions of the income taxing sections of the Revenue Act as affecting the limitation relied on by the plaintiff.

It is well to observe here that the provision found in Section 105-160 is not, strictly speaking, a statute of limitations like those addressed to the limitations of actions. The section defines the time within which the authority given the Commissioner to review returns and make assessments may be exercised. Limitations of both classes are equally fatal to further procedure where they apply. But in the one case the limitation would directly affect the right to the tax, and in the other apply to the administrative procedure by which the tax is assessed. And in the latter case,—and it is this with which we deal,—it becomes a question whether, in the special instance of change made in the taxpayer's liability by the Federal taxing department, the statute does not justify and contemplate the exercise of the power to assess additional tax in case of deficiency, or make refunds for overpayment, regardless of the three-year limitation provided in Section 105-160.

The power to make additional assessments or make refunds, predicated on changes made in the taxpayer's liability to the Federal authority, is based on a distinctly new condition not contemplated in G. S., 105-158, respecting the original returns; and the power exercised in the particular instance could only by implication be brought within the scope of the limitation provided in G. S., 105-160, so as to construe this latter section as an over-all or all-inclusive limitation. The statute taken as a whole seems to deal with this incident as an independent situation, inseparable in administrative procedure as well as in fact, since it requires a new

return under oath, under all the sanctions provided for the original return; and it does not necessarily, at least, fall within the suggested limitation.

In recognizing and adopting, to this extent, Federal revision as an aid to local taxation the legislative body was in the field of remedial legislation, and is presumed to have had a knowledge of the new conditions upon which administrative action must depend. It is pointed out that the Legislature must have known that only a small proportion of the Federal corrections mentioned in the statute actually occur during the three-year period, and that under the construction contended for by the appellee the remedy provided would be inadequate. The Federal income tax law has a provision similar to ours limiting the authority of the taxing unit to deal with original returns and make corrections. However, in Federal practice, when the taxpayer, with his return, files a waiver of this limitation the authority of the department to make corrections is continued without limitation of time. Hence a large proportion of the corrections is made beyond the period limited by our statute in G. S., 105-160.

As we have pointed out, the requirement that a taxpayer within 30 days after receiving notice of the correction of the Federal taxing authority shall file with the State Commissioner of Revenue a return reflecting such change, under oath, is positive, mandatory, and separately implemented with heavy penalties for failure to do so, and makes no reference to the three-year statute of limitations provided in Section 105-160, or any other deadline on the Commissioner's authority; but it does impose duties upon him when the return is filed. (We are referring to the statute before the 1937 amendment.) The authority of the Commissioner must be presumed to be coextensive with the duties imposed. If, as suggested, he had no authority to deal with the return when made, as the law directs, the Legislature did nothing more than make a futile gesture.

It is pointed out by the appellant that the latter construction of the statute has been uniform for many years in administrative practice and acquiesced in by the General Assembly for a long period of time, and is entitled to the weight accorded administrative interpretation by the cited precedents; *Cannon v. Maxwell,* 205 N. C., 420, 171 S. E., 624; *Powell v. Maxwell,* 210 N. C., 211, 186 S. E., 326; *Valentine v. Gill,* 223 N. C., 396, 27 S. E. (2d), 2; that it has had the consistent approval of the Attorney-General both before and after the 1937 amendment to the statute. See P-H, State and Local Tax Service, North Carolina, paragraphs 11,320, 13,012, 13,154, 13,158, 13,161, 13,163, 13,202; *Hannah v. Commissioners,* 176 N. C., 395, 97 S. E., 160.

Decision might well rest on these principles, but not necessarily so. The General Assembly of 1937 amended the pertinent sections of the

existing law, now G. S., 105-159, 105-160, clarifying both sections by expressly excepting the special instance of assessment or refund made upon notice of Federal correction or revision of the taxpayer's liability—*where the taxpayer has failed to notify the Commissioner of such additional assessment* (Chapter 127, Public Laws 1937, Secs. 334, 335)—from the operation of the three-year limitation, and provided no limitation on his continued authority; and this was carried forward in the 1939 Revenue Act, Chapter 158, Public Laws 1939, Secs. 334, 335; and there were no material changes in 1941, 1943 and 1945. And that is the law applicable to plaintiff's case.

In 1947 the Legislature amended Section 105-159 of the General Statutes so as to substitute for the clauses expressly rendering the suggested statute of limitations inapplicable, a provision fixing a limitation of five years on the authority of the Commissioner to make assessments or refunds upon changes made by the Federal taxing authority, Session Laws 1947, Chapter 501, sec. 4, pp. 624, 625. The amendment in its setting and history is merely cited to confirm the position taken by appellant that theretofore no time limit had been set for the exercise of the Commissioner's authority in this special instance. It is to be noted that under the amendment to this statute the defendant Commissioner would be well within his authority in making the additional assessment.

For the reasons stated, the judgment overruling the demurrer and declining the nonsuit must be reversed. It is so ordered.

Reversed.

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

BURKE TRANSIT COMPANY v. QUEEN CITY COACH COMPANY, HARRY HOWARD, JOE RILEY, FRED HARRISON AND HOWARD HICE.

(Filed 14 April, 1948.)

1. Injunctions §§ 2, 4i—

Equity may enjoin libelous or slanderous statements affecting plaintiff's business, even where no breach of trust or contract is involved, when irreparable and continuing injury is alleged and it appears that injunction pending final determination of the action is necessary for protection of plaintiff's business or property rights.

2. Injunctions § 4g, 4i—

The fact that the unfair practices complained of are made criminal offenses by statute, G. S., 75-1; G. S., 75-5, does not preclude a common carrier whose franchise rights have been injured and threatened by the

wrongful acts, from instituting civil action for damages and obtaining injunctive relief to prevent irreparable injury pending final determination of the action.

3. Injunctions § 2: Utilities Commission § 2—Injunction will lie where adequate remedy is not obtainable through administrative agency.

Plaintiff instituted this action for damages to recover for alleged wrongful acts of defendants in making slanderous statements affecting plaintiff's business as a common carrier, in operating unscheduled buses over common routes, and in transporting passengers at less than the established rates or free of charge, pursuant to a conspiracy to injure and destroy plaintiff's business. *Plaintiff sought injunctive relief pending determination* of the action upon allegations of irreparable injury. *Held:* The temporary restraining order was properly continued to the hearing in so far as it related to the circulation of false statements, since the Utilities Commission is without authority to grant adequate relief in regard thereto, but plaintiff's remedy relating to operating schedules and fares is peculiarly within the power of the Utilities Commission and is not subject to injunctive relief by the courts.

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

APPEAL by defendants from *Warlick, J.,* 6 December, 1947. From BURKE. Modified and affirmed.

This was a suit to restrain certain acts on the part of the defendants which it was alleged were being committed and threatened with wrongful purpose of injuring and destroying plaintiff's business. It was heard below pursuant to an order to show cause why a restraining order should not issue pending the action.

It was alleged in the complaint that the plaintiff has been since 1941 and is now engaged in operating motor buses for the transportation of passengers over eighteen regular routes in Burke and Avery Counties. The operation over twelve of these routes is under franchise certificates from the North Carolina Utilities Commission, one under contract with Atlantic Greyhound Corporation, and five under contract with the corporate defendant, approved by the Utilities Commission. Plaintiff's operations under these contracts extend over a portion of U. S. Highway 70 and North Carolina Highway 114. Plaintiff is also the owner of franchises from Morganton, Glen Alpine, Drexel and Valdese. Plaintiff's business serves local transportation needs within the territory reached by these routes, and affords to the general public means of transportation by convenient and regular schedules to and from manufacturing plants, stores and schools. Essential to this service is permission to engage in the transportation of passengers over a portion of Highway 70, between Rutherford College Road on the east and Tip Top Service Station on the west, and over Highway 114. It is also essential to plaintiff's success and to the continuance of the public service it renders that

patrons should have faith in the permanence of the service now being rendered.

The corporate defendant is engaged as a motor carrier of passengers under intrastate and interstate franchises on various highways in this and other states, but holds no franchise covering any of plaintiff's routes except over Highways 70 and 114. The other defendants are associated with the corporate defendant in the operation of buses over its routes.

It was alleged that the defendants have conspired together to injure and destroy the plaintiff's business and have undertaken to carry out their design of driving plaintiff out of the business of transporting passengers in order to gain a monopoly of transportation in the communities served by plaintiff, and for the purpose of enabling defendants to charge exorbitant prices for transportation when plaintiff shall have been eliminated. Pursuant to this design defendants have persistently and systematically sought to persuade and induce patrons of plaintiff and the public in this territory to refrain from patronizing plaintiff by making and circulating false statements to the effect that plaintiff is unreliable, is in failing financial condition, and intends to go out of business; that the corporate defendant is going to "bust" the plaintiff and drive it out of business, even if it has to operate at a loss in Burke County, and that defendant will take over the transportation of industrial workers, shoppers and school children now riding on plaintiff's buses. It was further alleged that defendants have undertaken to destroy plaintiff's business by operating buses on portions of No. 70 and No. 114 immediately ahead of plaintiff's buses which operate on well-known and regular schedules, and by soliciting persons awaiting transportation by plaintiff at plaintiff's regular stops to ride on defendants' buses, either on tickets purchased from plaintiff or at rates below the established tariffs of plaintiff and defendant, or free of charge; and that defendant is operating many buses upon unscheduled runs over portions of the highways mentioned and soliciting persons awaiting transportation by plaintiff at regular stops. It is alleged that these acts were done with intent to injure and destroy plaintiff's business and not for any legitimate purpose of defendants, and that thereby defendants have injured and damaged plaintiff's property rights, and have caused loss in patronage and increased expense, and that plaintiff has been damaged thereby in the sum of $15,000. It is also alleged that defendants are intending and threatening to induce plaintiff's patrons and the public in Burke and Avery Counties to boycott plaintiff's business. It is further alleged that defendants have, in pursuance of this unlawful purpose, injured plaintiff's business by operating buses upon routes over which plaintiff holds exclusive franchise from the N. C. Utilities Commission, to wit, route over Highway No. 181.

It is alleged that by these acts done and threatened defendants will thereby irreparably injure and destroy plaintiff's business and the value

of its corporate rights and its franchise and contract rights, unless restrained.

At the hearing before the judge below the plaintiff offered affidavits in support of the allegations of the complaint, which was used as an affidavit, and defendants also offered affidavits *contra,* and in denial of any conspiracy or wrongful acts to the injury of plaintiff.

The restraining order as modified was continued to the final hearing, restraining the defendants from doing the following acts:

"(1) Making and circulating statements to the effect that the plaintiff is an unreliable concern, or to the effect that the plaintiff is in failing financial circumstances, or statements to the effect that the plaintiff intends to go out of business, or statements to the effect that the defendant Queen City Coach Company is going to 'bust' the plaintiff and drive the plaintiff out of business, even if the defendant Queen City Coach Company has to operate at a loss in Burke County, or statements to the effect that the defendant Queen City Coach Company is going to take over all of the franchises and franchise certificates of the plaintiff, or statements to the effect that the defendant Queen City Coach Company is going to transport all of the industrial workers, shoppers, school children, and other persons now riding upon the motor buses of the plaintiff the Burke Transit Company.

"(2) Operating motor buses belonging to the defendant the Queen City Coach Company upon the portions of U. S. Highway #70, between the junction of said highway with the Rutherford College Road on the east and Tip Top Service Station on the west, and upon State Highway #114, upon unscheduled runs: Provided, however, that nothing contained in this section shall be construed to prohibit the defendants from operating special charter buses upon said portions of said highways, or from operating more than one bus upon scheduled runs.

"(3) Transporting or soliciting persons for transportation at rates below the established rates of the defendant Queen City Coach Company, or free of charge, upon the portions of U. S. Highway #70 between the junction of said highway with the Rutherford College Road on the east and Tip Top Service Station on the west, and upon State Highway #114: Provided, however, that nothing contained herein shall be construed to prohibit the transportation of persons upon passes duly and regularly issued in accordance with the regulations of the North Carolina Utilities Commission; Provided, further, that nothing herein contained shall be construed to apply to special charter trips.

"(4) From transporting, or soliciting for transportation, any intrastate passengers at any point on State Highway #181 between the Town of Morganton, in Burke County, and the Town of Pineola, in Avery County."

Defendants excepted and appealed.

J. E. Butler for plaintiff, appellee.

Shearon Harris, Frank C. Patton, and Robinson & Jones for defendants, appellants.

DEVIN, J. The defendants' appeal presents the question of the sufficiency of the evidence offered to justify the issuance of a temporary restraining order pending the trial of the action.

The defendants base their objection to the order entered below principally on three grounds which we will consider *seriatim*.

1. It is contended that the equitable remedy by injunction should not be invoked to restrain alleged slanderous statements affecting plaintiff's business, but that plaintiff should be left to its remedy at law. Undoubtedly the general rule is that where no breach of trust or contract appears equity will not enjoin libelous or slanderous statements even when injurious to complainant's business or property. But where it appears necessary for the protection of plaintiff's business and property rights, and it is alleged that the systematic circulation of false statements seriously affecting these rights will work irreparable and continuing injury, injunction relief may be granted pending final determination of the action. *Lawrence Trust Co. v. Sun-Am. Pub. Co.*, 245 Mass., 262; 28 A. J., 312; 43 C. J. S., 681.

2. It is argued by defendant that the complaint in effect charges the criminal offense denounced by the statute, G. S., 75-1, for that it is alleged that defendants have conspired to injure and destroy plaintiff's competitive business, with the purpose of attempting to fix the price after competition is removed, in violation of G. S., 75-5, and that equity will not enjoin the commission of a crime, since the remedy is by indictment.

It was declared in *Hargett v. Bell*, 134 N. C., 394, 46 S. E., 749, that "there is no equitable jurisdiction to enjoin the commission of a crime," but this was said with reference to a suit in equity to enjoin the sale of spirituous liquors. It was also said in that case that injunction is "confined to cases where some private right is a subject of controversy." *Patterson v. Hubbs*, 65 N. C., 119; *Motor Service v. R. R.*, 210 N. C., 36, 185 S. E., 479. Wrongful acts, which may also be criminal, but which threaten injury to private property rights may invoke the aid of equity to prevent irreparable loss. The power of the courts to enjoin wrongful and injurious acts is not divested because such acts may also be in violation of the criminal law. "Injunction will issue to inhibit a criminal act when the act invades civil or property rights and where there is no other adequate remedy available." 43 C. J. S., 762; 28 A. J.,

339. Particularly is this so where a public service is involved. McIntosh, 978. When the enforcement of criminal law is merely incidental to the general relief sought in equity it is well settled that a court of equity may grant relief by injunction. *Barrett v. Fritz,* 316 Ill. App., 217. While conspiracies in restraint of trade, and undertakings to destroy or injure the business of a competitor, with purpose of attempting to fix the price when competition is removed, are made unlawful (G. S., 75-5 (3)), these provisions do not prevent one whose business as a common carrier has been injured and threatened by any of the acts thus denounced from pursuing a remedy by civil action for damages and seeking the interposition of equity, if necessary to restrain wrongful acts which threaten irreparable loss. Said *Justice Brown* in *Town of Roper v. Leary,* 171 N. C., 35, 87 S. E., 945, "Both remedies may be available." See also *Orloff v. Los Angeles Turf Club,* 171 A. L. R., 913.

3. Can the plaintiff have adequate and complete remedy from the North Carolina Utilities Commission?

Under the statutes the North Carolina Utilities Commission is vested with power and authority to supervise and regulate motor vehicle carriers (G. S., 62-109), and to grant franchise certificates, and to make and enforce regulations and restrictions as to fares, schedules, speed, and the ordinary transactions between carriers as to territory. *Utilities Com. v. Trucking Co.,* 223 N. C., 687, 28 S. E. (2d), 201; *Utilities Com. v. Coach Co.,* 224 N. C., 390, 30 S. E. (2d), 328. It is also made the duty of the Commission to investigate any complaint that any licensed operator is engaged in violating provisions of the act or any rule or regulation prescribed by the Commission or the laws of the State with respect to rights, duties and privileges of carriers. G. S., 62-110. And if a franchise carrier is engaged in practices violative of the terms of the franchise or the rules and regulations the Commission may order suspension of such practices. G. S., 62-110. And the franchise certificate may be canceled "for failure to observe and comply with schedules and tariffs approved by the Commission." G. S., 62-111 (7).

The present action, in so far as its purpose is to recover damages for injuries sustained and to restrain continuation of the wrongful acts alleged in respect to the making and circulating of false statements as to plaintiff's business, undoubtedly presents matters beyond the power or jurisdiction of the Utilities Commission to afford adequate remedy. However, in view of the comprehensive nature of the statutes creating and empowering the Utilities Commission, particularly in respect to the schedules and operation of motor buses on the highways and the fares charged for transportation of passengers, it would seem the plaintiff has ample remedy for its protection in those respects by complaint to the agency which the State has created for that purpose.

It would seem therefore that the matters complained of relating to operating schedules and fares charged by the defendant for transportation on its buses are peculiarly within the power of the Utilities Commission to remedy, upon complaint made, and are not properly subjects which would call for the interposition of a court of equity, or invoke its equitable jurisdiction. *Coach Co. v. Transit Co.*, 227 N. C., 391, 42 S. E. (2d), 398; *Motor Service Co. v. R. R.*, 210 N. C., 36, 185 S. E., 479.

Hence the order issued below should be modified by removing from the restraint thereby enjoined matters relating to schedules and fares on the highways over which the defendants hold franchise certificates.

As thus modified the order appealed from is affirmed.

Modified and affirmed.

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

CHARLIE RIGGS v. GULF OIL CORPORATION AND JOHN THOMAS MATTHEWS.

(Filed 14 April, 1948.)

Automobiles § 18h (3)—Plaintiff's evidence disclosing he could not stop within range of headlights held to warrant nonsuit for contributory negligence.

Testimony by plaintiff disclosing that he was traveling 25 miles per hour along a highway within the residential district of a municipality on a dark, foggy night, and that he hit the rear of defendant's truck which was parked without lights on its right-hand side of the highway, G. S., 20-161, that there was no other traffic at the scene at the time, that he could have stopped his car in four or five feet but that his lights were dimmed and shone under the truck so that he did not see the truck in time to stop before hitting it, *is held* to disclose contributory negligence as a matter of law in traveling at a speed at which, under the circumstances, plaintiff could not stop within the range of his headlights, which constituted at least one of the proximate causes of the injury.

APPEAL by plaintiff from *Stevens, J.*, at November Term, 1947, of LENOIR.

Civil action to recover for personal injury and property damages alleged to have been sustained by the plaintiff, in a collision of plaintiff's automobile with an oil truck owned by the corporate defendant and operated by its servant.

The plaintiff alleges that John Thomas Matthews was operating the truck owned by the defendant corporation, about 5:15 a.m., on 26 January, 1945, on Vernon Avenue, in the City of Kinston; that the driver of said truck parked the same on the right-hand side of the paved and traveled portion of said street, without lights on said truck and without flares or any other warning signal, warning the public generally, and particularly the plaintiff, of the presence of the truck upon said street. It is alleged there was a heavy fog or mist in the area, lessening the visibility of objects on or near the paved portion of the street; and that while plaintiff was driving his automobile in a lawful and prudent manner along said street, it collided with the rear end of the truck of the corporate defendant, resulting in serious physical injuries to the plaintiff and substantial damage to his automobile.

The defendant, Gulf Oil Corporation, filed an answer, admitting ownership of the truck and that John Thomas Matthews was driving it on 26 January, 1945. All other material allegations of the complaint are denied, but the corporate defendant alleges that if the defendants were guilty of negligence, the plaintiff was guilty of contributory negligence.

The plaintiff testified that he had been employed at the Post Office in Kinston for about 17 years; that he went on duty at five o'clock in the morning; that he lived about a mile and a half from the Post Office, and about five o'clock on the morning of 26 January, 1945, he was driving his car along Vernon Avenue in the City of Kinston, which Street is a part of the U. S. Highway No. 70; that he was traveling "not exceeding 25 miles an hour" after he got in town; that he did not meet any other vehicles on the trip; that the truck of the Gulf Oil Corporation was parked directly on the highway, which had his half of the highway completely blocked; the truck had no lights on it. The weather was foggy, with rain and mist, and low-hanging fog. Under the conditions existing that morning, he could have seen an object right down the highway for about 200 feet. "What happened, my lights—the beams were shining down and under the truck and it prevented me from seeing it until I saw the bulk of the truck. I was too close to attempt to put on brakes. It was parked in the dark and fog. I didn't have time to pick my feet up and put them on the brakes, let alone put on the brakes. I could have seen a light on the highway that morning, a long ways for that matter, five or six hundred yards, if there had been a light to see. I don't know the color of the truck; I didn't have time to see that. I seen it and the next instant I hit it. I struck the rear end, I guess; I was traveling on my right-hand side of the road. I was knocked unconscious by the impact." On cross-examination, the plaintiff further testified: "I could not see very high up in the fog and darkness. The tanker was parked up

there in the dark without any lights . . . at all. I could see at least 200 feet up ahead, 2 feet from the ground. I could not see that far, 5 feet up. I could not have seen 5 feet ahead of me 5 feet above the ground, as dark as it was and the mist. I could see to the front of my car, but my lights were dimmed down. I could see better that way than up. I could see practically nothing right in front of me beyond 200 feet. I doubt if I could have seen 200 feet four feet above the ground. It was foggy and pretty dark. . . . I could have stopped the car in from 4 to 5 feet; I had perfect brakes. If I had seen the truck 4 or 5 feet before I got there I could have stopped. It had not been raining that night; I didn't notice any water on the highway."

E. H. Tyndale testified the collision occurred in front of his home. He was awakened by the collision. He was sleeping in a room about 20 feet from where the truck was parked. When he first looked towards the street he could only see the bulk of the truck, but before he got off the bed the lights were switched on.

At the close of plaintiff's evidence, the corporate defendant moved for judgment as of nonsuit. The motion was allowed, and the plaintiff appealed, assigning error.

J. A. Jones for plaintiff.

Thos. J. White and H. Frank Owens, Jr., for Gulf Oil Corporation, defendant.

DENNY, J. The provisions of our statute making it unlawful for any person to park or leave standing any vehicle, whether attended or unattended, upon any highway, is subject to certain exceptions. G. S., 20-161, subsection (c).

Whether the corporate defendant's truck was temporarily disabled and came within the above exception, is not disclosed. However, the corporate defendant alleges in its answer, that at the time of the collision, its truck was properly lighted and was proceeding eastwardly on Vernon Avenue, in the City of Kinston, at a speed between 10 and 15 miles per hour. No evidence was offered in support of these allegations, since the motion for judgment of nonsuit was granted at the close of plaintiff's evidence. Nevertheless, if it be conceded the defendants were guilty of negligence, we think the plaintiff's evidence established contributory negligence as a matter of law.

The appellant is relying on the case of *Cummins v. Fruit Co.*, 225 N. C., 625, 36 S. E. (2d), 11. We do not think that case is controlling on the record before us. There the defendant's truck had been parked on a highway, outside of a business or residential district, without lights of any kind, in violation of G. S., 20-161. The weather was misty, foggy

and drizzling rain. And at the time the plaintiff was approaching the parked vehicle, he was meeting an automobile which necessitated the dimming of his lights, and the headlights of the oncoming car temporarily blinded him until it was too late to stop his car before colliding with the rear end of defendant's truck. Here the plaintiff met no other vehicle, but was driving his automobile with dimmed lights, along a street in the City of Kinston, at 5:00 o'clock in the morning, through fog and mist that was so heavy his headlights would not give him visibility for a distance of five feet, five feet above the ground. Even so, he proceeded to drive his car under such conditions, at a rate of speed of 25 miles per hour. He also testified that "under the conditions existing that morning, he could have seen an object right down the highway for about 200 feet," but explained that what happened he had dimmed his lights and they were shining down under the truck and that prevented him from seeing it until he was too close to it to attempt to stop before colliding with it. He testified that if he had seen the truck 4 or 5 feet before he collided with it, he could have stopped. Yet he collided with the rear end of defendant's truck with such force as to sustain serious physical injuries and damaged his car, he alleges, to the extent of $320.00.

The evidence discloses a failure on the part of the plaintiff to exercise reasonable care for his own safety. He was operating his car in such manner and at such speed as to make it impossible for him to stop within the range of his lights. As a matter of fact, according to the plaintiff's own testimony, when he came sufficiently close to the corporate defendant's parked truck for it to be within the range of his headlights, he was too close to it to even attempt to stop. His negligence was at least one of the proximate causes of his injury, and that is sufficient to defeat a recovery. *Weston v. R. R.*, 194 N. C., 210, 139 S. E., 237; *Stallings v. Transport Co.*, 210 N. C., 201, 185 S. E., 643; *Lee v. R. R.*, 212 N. C., 340, 193 S. E., 395; *Powers v. Sternberg*, 213 N. C., 41, 195 S. E., 88; *Beck v. Hooks*, 218 N. C., 105, 10 S. E. (2d), 608; *Godwin v. R. R.*, 220 N. C., 281, 17 S. E. (2d), 137; *Peoples v. Fulk*, 220 N. C., 635, 18 S. E. (2d), 203; *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; *McKinnon v. Motor Lines, ante*, 132, 44 S. E. (2d), 735; *Tyson v. Ford, post*, 778.

The judgment of the court below is

Affirmed.

WARREN GUY TYSON, JR., v. C. J. FORD, ET AL.,
and
CARRIE T. TYSON v. C. J. FORD, ET AL.

(Filed 14 April, 1948.)

1. Automobiles § 18h (3)—Plaintiff's evidence disclosing failure of proper lookout and inability to stop within range of lights held to warrant nonsuit for contributory negligence.

Plaintiff's evidence tended to show that he was traveling 40 to 45 miles per hour on a highway on a clear night, and collided with the rear of a truck parked on the right side of the highway without lights, that plaintiff was traveling over the crest of a hill and did not see the truck at the speed he was traveling in time to stop or turn to the left before striking it. There was no traffic approaching from the opposite direction. *Held:* Nonsuit on the ground of contributory negligence was proper, since plaintiff's evidence discloses that he "outran his headlights" and failed to exercise proper care for the safety of himself and the occupants of his car.

2. Automobiles §§ 8a, 12a—

While a motorist is not under duty to anticipate that an unlighted vehicle will be left standing on the traveled portion of the highway ahead of him, without flares or other signs of danger, this does not relieve him of the duty of keeping a proper lookout and proceeding as a reasonably prudent person would under the circumstances.

3. Negligence §§ 1, 11—

Negligence, primary or contributory, is the failure to use the care and prevision which a reasonably prudent person would employ in the circumstances, the rule being consistent, while the degree of care varies with the exigencies of the occasion.

4. Automobiles § 12a—

A motorist must take into consideration curves and hills in determining what speed is reasonable and prudent, G. S., 20-141 (5) (c), and in observing the rule that he must not exceed a speed at which he can stop within the radius of his lights.

5. Automobiles § 18h (3)—

Whether a motorist colliding with a vehicle standing on the traveled portion of a highway will be held guilty of contributory negligence as a matter of law presents a difficult question which must be determined upon the facts and circumstances of each particular case, since, while in every instance he is required to exercise the care and prevision of a reasonably prudent person in like circumstances, the degree of care varies with the exigencies of the occasion.

6. Negligence § 11—

Contributory negligence *ex vi termini* signifies contribution rather than independent or sole cause, and bars recovery if it contributes to the injury as a proximate cause or one of them.

APPEAL by plaintiffs from *Grady, Emergency Judge,* at January Term, 1948, of WAKE.

Civil actions by Carrie T. Tyson and Warren Guy Tyson, Jr., mother and son, for damages to the mother's automobile and for personal injuries to the son when the mother's car, driven at the time by the son on Highway No. 64 in Wake County, ran into the rear of a truck owned by the defendants and operated at the time by an employee, Shirley Poole, it being alleged that the damages in both instances were caused by the negligence or default of the defendants. As both actions arose out of the same circumstances and rest upon the same evidence, by consent, they were consolidated and tried as one case.

Around midnight of 14 December, 1946, Warren Guy Tyson, Jr., was driving his mother's automobile from Wendell to Raleigh on Highway No. 64, in company with two companions, Dorothy Kiely and Percy Stott, when the collision here under investigation occurred.

Young Tyson says he and his friends had been to Wendell to attend a wedding rehearsal. "When we left there, Percy Stott, Miss Kiely and I were together in the Mercury car which I was driving. Miss Kiely was between me and Percy on the front seat. . . . I had traveled this road many, many times, and was thoroughly familiar with it. . . . My mother's car, which I was driving with her knowledge and permission, was in good condition. . . . The lights were in good shape. . . . After we passed Hodge's Service Station, there is a long curve . . . and as we rounded one curve and hit a small hill, then went over the hill, I suddenly saw a truck in the road ahead of me. Miss Kiely hollered 'look out Guy there is a truck,' and I threw on the brakes at once. . . . We were too close when I saw it to put on my brakes and keep from hitting it, so I ran into it. . . . The truck was standing dead still in the road on the right-hand side as if it were going towards Raleigh, but it was not moving at all. Absolutely no sign of a light on it. . . . After I saw the truck, I did everything that I could to stop the car. In spite of my putting on brakes, I ran into the back end of the truck. . . . It was a cold, clear night. . . . The truck was on the other side of the knoll or little rise. . . . I was driving between 40 and 45 miles an hour when I hit the truck. . . . If I had seen it in time, I could have turned to the left and avoided striking it. . . . The truck was on its right-hand side of the road. . . . No car coming from the opposite direction. . . . Q. The thing that kept you from either stopping or turning to the left was the speed you were driving when you saw him and there wasn't distance enough for you to stop or turn to the left, is that right? A. That is correct. . . . Q. Whatever the distance was at the time you did see it and at the speed you were going, you just couldn't stop before you hit it? A. That is right. . . . To tell the truth, the first thing I knew was when I saw that truck up in front of me."

Miss Dorothy Kiely testified that when she saw the truck she called to Guy, "There is a truck"; that he immediately slammed on the brakes, and the car struck the rear of the truck. "I don't know how close we were to the truck at the time I saw the truck and Mr. Tyson put on his brakes. It seemed to me it loomed right up in front of us."

Percy Stott testified that he was fagged out, and asleep at the time of the accident.

Fred Taylor arrived at the scene of the accident soon after it happened, and stopped to render assistance. The truck was loaded with cabbage. No lights were on the truck at that time. "Cabbages had been piled all up on the hood, . . . one bag almost in the windshield laying up in a pile."

At the close of plaintiffs' evidence, nonsuits were predicated on the contributory negligence of the driver of the Tyson car. From these rulings, the plaintiffs appeal, assigning errors.

J. B. Bilisoly, E. R. Sykes, Jr., and Murray Allen for plaintiffs, appellants.

J. M. Broughton and C. Woodrow Teague for defendants, appellees.

STACY, C. J. The question for decision is whether the evidence suffices to carry the cases to the jury in the face of the demurrers. The trial court answered in the negative, and we approve.

Conceding the negligence of the defendants, which is denied in the answer but made manifest on the record, the cases were made to turn in the court below on the contributory negligence of the driver of the Tyson car. From his own testimony, it would seem that he was clearly and unmistakably "out-running his headlights" at the time of the collision. *Weston v. R. R.*, 194 N. C., 210, 139 S. E., 237; *Allen v. Bottling Co.*, 223 N. C., 118, 25 S. E. (2d), 388; *Caulder v. Gresham*, 224 N. C., 402, 30 S. E. (2d), 312. The tragic fact is, that when young Tyson first saw the truck he was too near it, at the speed he was going, to stop or to turn to the left before striking it. He so testifies. This certainly contributed to his misfortune, and was such conduct on his part as bars recovery to him and to his mother, the owner of the car. *Penland v. Southern Ry. Co., ante,* 528, 46 S. E. (2d), 303; *McKinnon v. Motor Lines, ante,* 132, 44 S. E. (2d), 735; *Riggs v. Gulf Oil Corp., ante,* 774.

It is true that the driver of the Tyson car was not bound to foresee or to anticipate that an unlighted truck would be left standing on the traveled portion of the highway ahead of him without flares or other signs of danger, but this did not relieve him of the necessity of keeping a proper lookout and proceeding as a reasonably prudent person under the circumstances. "While the plaintiff had the right to assume that

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

The test of liability for negligence, primary or contributory, is the departure from the normal conduct of the reasonably prudent man, or the care and prevision which a reasonably prudent person would employ in the circumstances. The rule is constant, while the degree of care which a reasonably prudent person is required to exercise varies with the exigencies of the occasion. *Diamond v. Service Stores,* 211 N. C., 632, 191 S. E., 355. For this reason, no factual formula can be laid down which will determine in every instance the person legally responsible for a rear-end collision on a highway at night between a standing vehicle and one that is moving. "Practically every case must 'stand on its own bottom.'" *Cole v. Koonce,* 214 N. C., 188, 198 S. E., 637.

Curves and hills in the road are conditions a motorist is required to take into consideration in regulating his speed "as may be necessary to avoid colliding with any person, vehicle, or other conveyance." G. S., 20-141, Subsec. 5 (c). "He must operate his automobile at night in such manner and at such speed as will enable him to stop within the radius of his lights," if occasion should so require. *Allen v. Bottling Co., supra.* The present case, however, is not predicated on this circumstance alone. Annotations: 44 A. L. R., 1403; 58 A. L. R., 1493; 87 A. L. R., 900. It is obvious that the driver of plaintiff's car was inattentive to the duty required of him for his own safety and that of his companions when he rounded the curve and topped the hill at a high-rate of speed; and, "To tell the truth," he says, "the first thing I knew was when I saw that truck up in front of me." It is generally held for law that "a motorist who fails to exercise a degree of care commensurate with the surrounding hazards, and collides with an automobile standing without lights, will be precluded from recovery." 5 Am. Jur., 748; Anno. 62 A. L. R., 970.

There are two lines of decisions in our Reports involving highway accidents which turn on the question of contributory negligence. *Hayes v. Telegraph Co.,* 211 N. C., 192, 189 S. E., 499. In this, as in other matters where a line must be drawn, there will be cases very near each other on opposite sides. Indeed, the line of demarcation may be difficult to plot in some instances. While simple enough in statement, its application is the place of the rub. *Sibbitt v. Transit Co.,* 220 N. C., 702, 18 S. E. (2d), 203. "A serious and troublesome question is continually arising as to how far a court will declare certain conduct of a defendant negligence, and certain conduct of a plaintiff contributory negligence, and take away the question of negligence and contributory negligence from the jury." *Moseley v. R. R.,* 197 N. C., 628, 150 S. E., 184.

The first line, in which contributory negligence has been held as a matter of law to bar recovery, is represented, among others, by the following decisions: *Weston v. R. R., supra; McKinnon v. Motor Lines, supra; Riggs v. Gulf Oil Corp., supra; Atkins v. Transportation Co.,* 224 N. C., 688, 32 S. E. (2d), 209; *Austin v. Overton,* 222 N. C., 89, 21 S. E. (2d), 887; *Pike v. Seymour,* 222 N. C., 42, 21 S. E. (2d), 884; *Dillon v. Winston-Salem,* 221 N. C., 512, 20 S. E. (2d), 845; *Sibbitt v. Transit Co., supra; Peoples v. Fulk,* 220 N. C., 635, 18 S. E. (2d), 147; *Beck v. Hooks,* 218 N. C., 105, 10 S. E. (2d), 608; *Powers v. Sternberg,* 213 N. C., 41, 195 S. E., 88; *Lee v. R. R.,* 212 N. C., 340, 193 S. E., 395; *Smith v. Sink,* 211 N. C., 725, 192 S. E., 108.

The second line, in which contributory negligence has been held to be an issue of fact for the jury, is represented, among others, by the following decisions: *Hobbs v. Drewer,* 226 N. C., 146, 37 S. E. (2d), 121; *Cummins v. Fruit Co.,* 225 N. C., 625, 36 S. E. (2d), 11; *Page v. McLamb,* 215 N. C., 789, 3 S. E. (2d), 275; *Clarke v. Martin,* 215 N. C., 405, 2 S. E. (2d), 10; *Cole v. Koonce, supra; Exum v. Baumrind,* 210 N. C., 650, 188 S. E., 200; *Pender v. Trucking Co.,* 206 N. C., 266, 173 S. E., 336; *Lambert v. Caronna,* 206 N. C., 616, 175 S. E., 303; *Williams v. Express Lines,* 198 N. C., 193, 151 S. E., 197.

We think the facts of the instant case bring it within the first line of decisions as above designated. It is conceded, however, that very near it on the other side of the fence is the last-cited case of *Williams v. Express Lines.*

Young Tyson's negligence need not have been the sole proximate cause of the injury to bar recovery, for "contributory negligence" *ex vi termini* signifies contribution rather than independent or sole cause. *Absher v. Raleigh,* 211 N. C., 567, 190 S. E., 897. It is enough if it contribute to the injury as a proximate cause, or one of them. *Tarrant v. Bottling Co.,* 221 N. C., 390, 20 S. E. (2d), 565; *Godwin v. R. R.,* 220 N. C., 281, 17 S. E. (2d), 137. The plaintiff may not recover in an action like the present, when his negligence concurs with the negligence of the defendant in proximately producing the result. *Wright v. Grocery Co.,* 210 N. C., 462, 187 S. E., 564.

A careful perusal of the record leaves us with the impression that the judgment of nonsuit should be sustained.

Affirmed.

GUS RUSSOS v. GEORGE R. BAILEY.

(Filed 14 April, 1948.)

1. Appeal and Error § 10a—

No case on appeal is required when the exceptions relied on by appellant are presented by the record proper.

2. Same—

The sole statutory means of vesting the Supreme Court with jurisdiction to review exceptions relating to alleged errors occurring during the progress of the trial in which oral testimony is offered is by "a case on appeal" or "case agreed," G. S., 1-282; G. S., 1-283, and unless so presented such exceptions are mere surplusage and must be treated as a nullity.

3. Appeal and Error § 10d—

An agreement as to the case on appeal must be signed by the parties or their counsel and appear of record. Rule of Practice in the Supreme Court, No. 32.

4. Appeal and Error § 10e—

A recitation by the court in the entries of appeal that the evidence should be included in the case on appeal is insufficient as a settlement of case on appeal where oral evidence has been offered, since such anticipatory order cannot settle or determine what evidence was adduced at the hearing.

5. Same—

The trial court is without authority to settle case on appeal until and unless there is a disagreement of counsel. G. S., 1-283.

6. Appeal and Error § 40a—

Where there is no case on appeal, exceptions relating to the oral testimony must be treated as a nullity, leaving only the exception to the judgment, which presents the sole question whether upon the facts found and admitted the court correctly applied the law.

7. Same—

A sole exception to the judgment cannot be sustained when the judgment is supported by the findings of fact.

8. Specific Performance § 4—

Where the facts found support the court's conclusions that there was a written memorandum of the contract of purchase and sale of lands within the contemplation of G. S., 22-2, and that it contained a sufficient description to admit of parol evidence which fully identified the land, the conclusions support decree for specific performance.

APPEAL by defendant from *Grady, Emergency Judge,* November Civil Term, 1947, WAKE.

Civil action to enforce specific performance of a contract of purchase and sale of real property.

Defendant, through an auction sales company, offered for sale at public auction certain lots in Raleigh, N. C. Plaintiff appeared at the sale and bid in three store lots and paid the required down payment of $3,000. Sometime thereafter defendant declined to make deed. Thereupon, plaintiff instituted this action to compel specific performance. Defendant, answering the complaint, pleads the statute of frauds.

When the cause came on for hearing in the court below, the parties waived trial by jury and agreed that the court might "hear the evidence, find the facts, and render judgment thereon, either in or out of Term, and out of the County, to have the same effect as if entered during the term." The court then proceeded to hear the evidence offered.

The court below found the facts and, upon the facts found, made certain conclusions of law. It, thereupon, on 4 January 1948, signed judgment, *nunc pro tunc,* decreeing specific performance of the contract. Defendant excepted and appealed.

R. Roy Carter for plaintiff appellee.

J. L. Emanuel and Stanley Seligson for defendant appellant.

BARNHILL, J. While the record before us contains what purports to be the testimony offered at the hearing, together with certain exceptions thereto, this is not a proper part of the record. The assignments of error based on exceptions therein contained are not before us for consideration.

When the errors relied on by the appellant are presented by the record proper, no case on appeal is required. *Cressler v. Asheville,* 138 N. C., 482; *Peebles v. Braswell,* 107 N. C., 68; *Duckworth v. Duckworth,* 144 N. C., 620; *Privette v. Allen,* 227 N. C., 164, 41 S. E. (2d), 364, and cited cases.

On the other hand, exceptions which point out alleged errors occurring during the progress of a trial in which oral testimony is offered can be presented only through a "case on appeal" or "case agreed." *Cressler v. Asheville, supra.* This is the sole statutory means of vesting this Court with jurisdiction to hear the appeal. G. S., 1-282, 283; *Carter v. Bryant,* 199 N. C., 704, 155 S. E., 602. Unless so presented, they are mere surplusage without force or effect, *Cressler v. Asheville, supra; Manufacturing Co. v. Simmons,* 97 N. C., 89; *Peebles v. Braswell, supra; Howell v. Jones,* 109 N. C., 102; *Parker Co. v. Bank,* 200 N. C., 441, 157 S. E., 419; *Rogers v. Asheville,* 182 N. C., 596, 109 S. E., 865, and "must be treated as a nullity." *Howell v. Jones, supra.*

"The Court will not recognize any agreement of counsel in any case unless the same shall appear in the record, or in writing, filed in the cause in this Court." Rule 32, Rules of Practice in the Supreme Court, 221 N. C., 565; *Manufacturing Co. v. Simmons, supra; S. v. Price,* 110 N. C., 599. When such agreement undertakes to settle the case on appeal or to state a case agreed, it must be signed by the parties or their counsel and appear of record.

It is true the judge, in the entries of appeal, undertook to settle the case on appeal and in so doing directed that "the evidence taken shall also be included." This is not sufficient, for neither he nor counsel has settled or determined what evidence was adduced at the hearing.

When oral evidence is offered, the judge cannot settle the case on appeal by an anticipatory order. Indeed, in such case, he has no authority to settle the case on appeal until and unless there is a disagreement of counsel. G. S., 1-283.

"As the record contains no statement of case on appeal, we are limited to the question whether there is error in the judgment . . ." *Parker Co. v. Bank, supra,* and cited cases; *Casualty Co. v. Green,* 200 N. C., 535, 157 S. E., 797; *Winchester v. Brotherhood of R. R. Trainmen,* 203 N. C., 735, 167 S. E., 49; *Dixon v. Osborne,* 201 N. C., 489, 160 S. E., 579.

The exception to the judgment "presents the single question whether the facts found and admitted are sufficient to support the judgment, that is, whether the court correctly applied the law to the facts found. It is insufficient to bring up for review the findings of fact or the evidence upon which they are based." *Roach v. Pritchett, ante,* p. 747, and cases cited.

When the judgment entered is supported by the findings of fact, the judgment will be affirmed. *Rader v. Coach Co.,* 225 N. C., 537, 35 S. E. (2d), 609; *Roach v. Pritchett, supra.*

The court below concluded that there was a written memorandum of the contract of purchase and sale within the contemplation of the statute, G. S., 22-2; that it contains a description of the land sufficient "to admit of oral evidence to explain just what lands were intended to be sold;" and that the same has been fully identified. The facts found support these conclusions and the conclusions support the judgment entered.

As no error appears on the face of the record, the judgment below must be

Affirmed.

R. W. WINSTON, JR., v. THE WILLIAMS & McKEITHAN LUMBER COMPANY OF VIRGINIA AND J. H. HOLLINGSWORTH.

(Filed 14 April, 1948.)

Contracts § 26: Pleadings § 31—Allegations held relevant and material and were erroneously stricken on motion.

Plaintiff alleged that defendants wrongfully and maliciously induced vendors to breach their registered contract to sell timber to plaintiff. Defendants alleged that the land was subject to deed of trust and the timber could not be sold without approval of the *cestui*, that the plaintiff was advised that the *cestui* would not release the timber, that the *cestui* called for bids, and that defendants became the last and highest bidder for the timber with the approval of the *cestui*. *Held:* The averments were relevant to show that defendants were acting in the legitimate exercise of their own rights without design to injure plaintiff or gain an improper advantage at his expense, and it was error for the court to grant plaintiff's motion to strike.

APPEAL by defendants from *Hamilton, Special Judge,* January Term, 1948, of WAKE. Reversed.

Plaintiff's motion to strike certain portions of defendants' answer was allowed and defendants appealed.

Harris & Poe for plaintiff, appellee.

Wellons, Martin & Wellons and Wilson & Bickett for defendants, appellants.

DEVIN, J. The plaintiff alleged that after he had entered into a contract with W. P. Stallings and wife for the purchase of the timber on described lands, the defendants wrongfully, unlawfully and maliciously persuaded Stallings and wife to breach their contract and to sell the timber to the defendants. The defendants first demurred to the complaint, but their demurrer was overruled, and on appeal we affirmed. *Winston v. Lumber Co.*, 227 N. C., 339, 42 S. E. (2d), 218. The defendants then answered and denied the material allegations of the complaint. Further answering, the defendants alleged that the plaintiff's contract, dated 22 March, 1944, was unenforceable for the reason that the land was subject to a deed of trust to the United States to secure the purchase price, and that by the terms of the deed of trust Stallings had no right to convey the timber without the consent and approval of the Government, and that Stallings' contract with plaintiff was conditioned upon securing a release of the timber. It was further alleged that plaintiff was notified that the Government would not release the timber and that no deed therefor could be delivered to him; that further bids were called for by the Government through the agency of Stallings and wife, and

that thereafter defendants became the last and highest bidder for the timber and purchased it 5 February, 1945, with the consent and approval of the Government. Under authority so granted the defendants have cut and removed the timber. On plaintiff's motion these allegations were ordered stricken from the answer, and the defendants excepted and appealed.

The plaintiff's position is that notwithstanding the provision in the contract which might have afforded ground for noncompliance as between the contracting parties, this would not protect a malicious intermeddler who with knowledge of the contract wrongfully induced a breach, nor constitute a defense to an action on that ground, citing *Haskins v. Royster,* 70 N. C., 601. For distinction between invalidity and unenforceability of the contract where recovery is sought for wrongful interference, see Annotation in 84 A. L. R., 48. See also *Ringler v. Ruby,* 244 Pac., 509; 46 A. L. R., 245.

However, we think the defendants here were entitled to plead the facts set up in their further answer in reply to plaintiff's allegation that they had wrongfully, unlawfully and maliciously induced breach of the contract, and for the purpose of showing that the defendants, in bidding upon and purchasing the timber under the circumstances, were acting in the legitimate exercise of their own rights, and with no design to injure the plaintiff or to gain an improper advantage at his expense. *Coleman v. Whisnant,* 225 N. C., 494 (506), 35 S. E. (2d), 647; *Bruton v. Smith,* 225 N. C., 584, 36 S. E. (2d), 9; *Winston v. Lumber Co., supra.* The averments complained of, if established, would seem to be relevant and material. *Williams v. Thompson,* 227 N. C., 166, 41 S. E. (2d), 359. There was error in striking these allegations, and the order to that effect is

Reversed.

ROBBIE S. WHITEHURST AND H. P. WHITEHURST; BESSIE L. ENGLISH AND J. L. ENGLISH; E. E. SAMS AND BONITA S. OSBORNE v. JOHN W. ANDERSON, JOHN ROBERT ANDERSON; NETTIE R. ANDERSON, MAY SAMS GOODNER, MAE SAMS MERRITT, CATHERINE SAMS EDWARDS AND ROY EDWARDS; BESSIE SAMS CASAS AND O. R. CASAS; H. J. ANDERSON AND WIFE, LAVINIA ANDERSON.

(Filed 8 October, 1947.)

Appeal and Error § 38—

Where the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed without becoming a precedent.

APPEAL by defendants John W. Anderson and John Robert Anderson *et ux.* from *Nettles, J.,* April Term, 1947, of MADISON.

Civil action heard on motion, made on special appearance, to dismiss for want of proper service of process.

The court below permitted plaintiffs to amend the order extending the time to file the complaint, served together with the summons, to show the nature and purpose of the suit as required by G. S. 1-121, and denied the motion. The movents appealed.

Geo. M. Pritchard and Geo. Greene for plaintiff appellees.

Calvin R. Edney, J. M. Baley, Jr., and J. H. McElroy for defendant appellants.

PER CURIAM. The question posed for decision is this: Where a summons in proper form, together with an order extending the time for filing complaint, is served on the defendants, but such order does not state the nature and purpose of the suit as provided by G. S. 1-121, is the service fatally defective and therefore insufficient to bring the defendants into court, or is such defect a mere irregularity subject to correction by amendment?

The Court, one member not sitting, being evenly divided in opinion as to the correct answer, the judgment of the Superior Court is affirmed, accordant with the usual practice in such cases, and stands as the decision in this case, without becoming a precedent. *Toxey v. Meggs,* 216 N. C., 798, 4 S. E. (2d), 513; *Howard v. Coach Co.,* 216 N. C., 799, 4 S. E. (2d), 616.

Affirmed.

STATE v. ADAM DICKEY AND BRITT LOGAN.

(Filed 8 October, 1947.)

APPEAL by defendants from *Pless, J.,* at May Term, 1947. of RUTHERFORD.

Criminal prosecution upon two indictments charging that defendants "did unlawfully, willfully and feloniously assault" two certain female persons and "did feloniously attempt to ravish and carnally know, forcibly and against her will," etc.

Upon the trial in Superior Court at the close of the State's evidence each of defendants moved for judgment as of nonsuit. As to defendant Adam Dickey, motion is denied. As to defendant Britt Logan, motion is allowed as to the charge of assault with intent to commit rape, but is denied upon the charge of an assault on a female.

Thereupon, defendants offered evidence, and each of them renewed motion for judgment as of nonsuit at the close of all the evidence. Motions were denied, and each defendant excepts.

Verdict: As to Adam Dickey—Guilty of assault with intent to commit rape. As to Britt Logan—Guilty of an assault on a female.

Judgment: As to each defendant—Imprisonment as specified respectively.

Defendants each appeal therefrom to Supreme Court and assign error.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes and Moody for the State.

Hamrick & Hamrick for defendants, appellants.

PER CURIAM. The only error assigned on this appeal is refusal of the court to grant motions of defendants for judgments as of nonsuit.

In this connection, no useful purpose will be served by a recitation of the evidence. However, after careful consideration of all the evidence offered on the trial below, as shown in the case on appeal, we are of opinion that the evidence is of sufficient import to take the case to the jury, and to support the verdicts rendered. Hence, in the judgments below we find

No error.

J. L. GREENLEE, ADMINISTRATOR OF THE ESTATE OF BILL WILLIAMS, DECEASED, V. CLINCHFIELD RAILROAD COMPANY AND M. R. BIDDIX.

(Filed 19 November, 1947.)

PLAINTIFF'S appeal from *Sink, J.*, April Term, 1947, MITCHELL Superior Court.

McBee & McBee and Watson, Fouts & Watson for plaintiff, appellant.

James J. McLaughlin, J. W. Pless, Proctor & Dameron, and W. C. Berry for defendant, appellee.

PER CURIAM. This case was brought by the administrator of the deceased Williams against the defendant to recover for an alleged negligent injury resulting in death. Williams was killed by a scheduled train running over the tracks of the defendant, near a tunnel, allegedly while prostrate upon the tracks in a drunken condition. On defendant's demurrer to the evidence the court below entered judgment as of nonsuit.

The case involves no novel features which would justify extended discussion.

On a careful examination of the record the Court is of the opinion that the judgment of nonsuit should be affirmed, and it is so ordered.

Affirmed.

MAE H. BARRINGER v. C. P. BARRINGER.

(Filed 7 April, 1948.)

APPEAL by defendant from *Nettles, J.*, September Term, 1947, of ROWAN.

Civil action for absolute divorce on the ground of two years separation.

Plaintiff and defendant were married 30 July, 1931. One child was born to the marriage, 14 February, 1933, now fifteen years of age. Plaintiff says she and the defendant separated on the morning of 29 December, 1944. The defendant says the separation occurred on or about "January 2 or 3, 1945," albeit the answer admitted the date as alleged in the complaint.

The summons in this action was issued 31 December, 1946, and served 5 January, 1947.

On the issues thus joined, there was a verdict and judgment for the plaintiff, from which the defendant appeals, assigning as errors (1) the refusal of the court to dismiss the action as in case of nonsuit, and (2) failure to instruct the jury as required by G. S., 1-180.

Roy L. Deal and Fred S. Hutchins for plaintiff, appellee.

C. P. Barringer in propria persona, defendant, appellant.

PER CURIAM. The demurrer to the evidence was properly overruled.

The jury has found with the plaintiff, both in respect of the date of the separation and its character.

The objection to the charge is feckless. It is without merit and non-exceptive.

The verdict and judgment will be upheld.

No error.

CASE DISPOSED OF WITHOUT WRITTEN OPINION

S. v. Pool. From Mecklenburg. Affirmed 19 November, 1947, without written opinion.

AMENDMENT TO RULES OF THE NORTH CAROLINA STATE BAR

To the Supreme Court of the State of North Carolina:

The following amendment to the Rules and Regulations of the Board of Law Examiners and the Rules and Regulations of The North Carolina State Bar was duly adopted at a regular meeting of the Council of The North Carolina State Bar October 23, 1947:

> "Add to Rule 4 a new paragraph to be designated as Section A to read as follows:
>
> "'A. Applicants for the March examination to be given during the years 1947, 1948, 1949, 1950 and 1951 shall file their applications with the Secretary on or before January 15 of the year in which the applicant applies to take the examination.'"

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 and Regulations of The North Carolina State Bar was duly adopted by The North Carolina State Bar in that the said Council did by resolution at a regular meeting held on October 23, 1947, unanimously adopt said amendment to said Rules and Regulations.

Given under my hand and the seal of The North Carolina State Bar, this the 18th day of December, 1947.

(SEAL) EDWARD L. CANNON, *Secretary,*
The North Carolina State Bar.

After examining the foregoing amendment to the Rules and Regulations 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.

This the 18th day of December, 1947.

WALTER P. STACY, *Chief Justice.*

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of The North Carolina State Bar be spread upon the minutes of the Supreme Court and that it 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 December, 1947.

DENNY, J., For the Court.

WORD AND PHRASE INDEX.

Abandonment—Of wife as grounds for divorce, *Barwick v. Barwick*, 109; *Eggleston v. Eggleston*, 668; as criminal offense, *S. v. Carson*, 151.

A.B.C. Stores—Validity of statute setting up A.B.C. Store cannot be attacked by proceedings to abate, *Amick v. Lancaster*, 157.

Abortion—*S. v. Choate*, 491.

Absentee Ballots—*Owens v. Chaplin*, 705.

Accidental Death—Presumption of, *Bolling v. Belk-White Co.*, 749.

Accretion—*Davis v. Morgan*, 78.

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ANALYTICAL INDEX.

ABORTION.

§ 9a. Relevancy and Competency of Evidence in General.

The general rule that evidence of defendant's guilt of crimes other than the one charged is incompetent, applies to prosecutions for abortion, and the exception to this rule is under some circumstances applicable in such prosecutions. *S. v. Choate*, 491.

Where defendant's defense to a charge of criminal abortion is that the operation was necessary to save the life of the mother, evidence that defendant had committed previous abortions is competent to show *animus;* but where defendant denies he performed the operation charged, evidence of previous abortions committed by him is incompetent. *Ibid.*

§ 10. Sufficiency of Evidence and Nonsuit.

Evidence of defendant's guilt of criminal abortion *held* sufficient to overrule motions to nonsuit. G. S., 14-45. *S. v. Choate*, 491.

ACTIONS.

§ 3d. Agreements Not to Sue.

Allegations that defendant made substantial contributions to settlement of claims arising out of collision in reliance upon representation by attorneys that they would recommend that action to recover for death of driver of other vehicle would not be instituted, *held* not to show contract not to institute the suit or that attorneys' representations were not made in good faith. *Penny v. Stone*, 295.

§ 8. Method of Commencement of Actions.

An action is begun by the issuance of summons, but there must be a complaint filed in which the cause of action is stated. *Webb v. Eggleston*, 574.

§ 9. Time from Which Action Is Pending.

Where an amendment to a complaint, or an amended complaint, introduces a cause of action or new matter not stated in the original complaint, it has the same force and effect as if the amendment were a new and independent cause. *Webb v. Eggleston*, 574.

ADVERSE POSSESSION.

§ 13c. Time Necessary to Ripen Title Under Color of Title.

Where a trustee's deed under a foreclosure had more than seven years prior to the institution of the action is asserted as color of title, but it appears that the deed was not executed until less than four years prior to the institution of the action, claim of adverse possession under color of title must fail. G. S., 1-38. *Layden v. Layden*, 5.

Seven years' adverse possession, under color of title, is a bar to an action in ejectment as to all parties not under disability. G. S., 1-38. *Hughes v. Oliver*, 680

ANIMALS.

§ 2. Liability for Damages Caused by Domestic Animals.

Upon evidence disclosing that upon his return home about sundown, defendant found that two of his horses had broken out of his stable or lot for the

ANIMALS—*Continued.*

first time, that defendant and members of his family searched for them a half hour in the rain and then returned home and went to bed, and that thereafter during the night one of the horses ran into the side of plaintiff's automobile on the highway, causing damage, *is held* insufficient to be submitted to the jury on the issue of negligence, since defendant had no reason to believe that injury was likely to result to anyone from the animals being at large during the night. *Bethune v. Bridges*, 623.

The liability of the owner of domestic animals for damages caused by them is predicated upon the law of negligence rather than that of suretyship. *Ibid.*

APPEAL AND ERROR.

§ 2. Judgments Appealable—Premature Appeals.

The court, being of opinion that plaintiff's proof failed to correspond in some respects with her complaint, ordered a mistrial. Defendants appealed for failure of the court to rule on their motions to nonsuit, and plaintiff appealed on account of the statement of the court that the complaint needed amendmen to conform to the proof. *Held:* Both appeals are premature and are dismissed. *McKinney v. Dill*, 539.

§ 6c (3). Exceptions to Findings of Fact.

Where a jury trial is waived and the parties agree that the court find the facts, exceptions to the admission of evidence are ineffectual when there are no exceptions to the findings of fact. *Smith v. Davis*, 172.

Where there are no exceptions to the findings of fact, exceptions to admission of evidence are ineffectual. *Mfg. Co. v. Arnold*, 375.

§ 6c (6). Requirement That Misstatement of Evidence or Contentions Be Brought to Trial Court's Attention.

In the court's summation of the evidence, inaccurate statements of facts in evidence, as distinguished from a statement of facts not shown in the evidence, must be brought to the court's attention in apt time in order for an exception thereto to be considered. *Steelman v. Benfield*, 651.

§ 10a. Necessity for "Case on Appeal."

No case on appeal is required when the exceptions relied on by appellant are presented by the record proper. *Russos v. Bailey*, 783.

The sole statutory means of vesting the Supreme Court with jurisdiction to review exceptions relating to alleged errors occurring during the progress of the trial in which oral testimony is offered is by "a case on appeal" or "case agreed," G. S., 1-282; G. S., 1-283, and unless so presented such exceptions are mere surplusage and must be treated as a nullity. *Ibid.*

§ 10b. Motion to Strike Case on Appeal for Failure to File Statement Within Time.

Where appellant fails to serve case on appeal within the time allowed, appellee's motion to strike the case on appeal from the files is made as a matter of right and must be allowed. *Hall v. Robinson*, 44.

§ 10d. Agreed Case.

An agreement as to the case on appeal must be signed by the parties or their counsel and appear of record. *Russos v. Bailey*, 783.

APPEAL AND ERROR—*Continued.*

§ 10e. Settlement of Case on Appeal.

A recitation by the court in the entries of appeal that the evidence should be included in the case on appeal is insufficient as a settlement of case on appeal where oral evidence has been offered, since such anticipatory order cannot settle or determine what evidence was adduced at the hearing. *Russos v. Bailey*, 783.

The trial court is without authority to settle case on appeal until and unless there is a disagreement of counsel. *Ibid.*

§ 14. Jurisdiction of and Proceedings in Lower Court After Appeal.

An appeal from an interlocutory order stays all further proceedings in the lower court in regard to matters relating to the specific order appealed from, but the action remains in the lower court and it may proceed upon any other matter included in the action upon which action was reserved or which was not affected by the judgment appealed from. G. S., 1-294. *Mfg. Co. v. Arnold*, 375.

Judgment was entered denying the appointment of a receiver upon the filing of the bond as provided by G. S., 1-503. Plaintiffs appealed. *Held:* Pending the appeal the lower court was *functus officio*, and an order entered pending the appeal appointing a permanent receiver upon application of parties who were permitted to come in and make themselves parties plaintiff, is void and of no effect. *Sinclair v. R. R.*, 389.

The Superior Court, upon supporting findings of fact, has the power to adjudge that an appeal has been abandoned, and having so adjudged, has jurisdiction to proceed as though no appeal had been taken. *Ibid.*

Where court adjudges that appeal had been abandoned, it may ratify prior orders entered while appeal was pending. *Ibid.*

§ 23. Form and Requisites of Assignments of Error.

Where sole exception is to judgment, separate assignment of error is not necessary. *Hall v. Robinson*, 44.

While the form of the assignments of error must depend largely upon the circumstances of each case, they should clearly present the error relied upon without the necessity of going beyond the assignment itself to learn what the question is. *Steelman v. Benfield*, 651.

§ 28. Form and Requisites of Briefs.

The brief should succinctly state the questions of law arising upon the exceptions which appellant desires to have discussed and decided so as to enable the court, as well as counsel, to obtain an immediate grasp of the nature of the controversy. *Steelman v. Benfield*, 651.

§ 29. Abandonment of Exceptions by Failure to Discuss Same in the Brief.

Where an exception is not argued in the brief it is taken as abandoned. *Randle v. Grady*, 159; *Penny v. Stone*, 295.

§ 31b. Dismissal for Failure to Make Out and Serve Statement of Case on Appeal.

Absence of case on appeal is not ground for dismissal of the appeal, but the Supreme Court will review the record proper. However, if no error appears therein the judgment of the lower court must be affirmed. *Hall v. Robinson*, 44.

APPEAL AND ERROR—*Continued*

§ 31g. Dismissal for Insufficiency of Record.

Where the sole exception is to the judgment as it appears in the record a separate assignment of error is not necessary, and motion to dismiss for failure of appellant to make such assignment of error is without merit. *Hall v. Robinson*, 44.

§ 31j. Dismissal for Want of Jurisdiction.

Where the Superior Court has no jurisdiction, the Supreme Court can acquire none by appeal, and when lack of jurisdiction is apparent, the appeal will be dismissed on plea, suggestion, motion, or *ex mero motu*. *S. v. Peterson*, 736.

§ 38. Presumptions and Burden of Showing Error.

The burden is on appellant not only to show error but also that it was material and prejudicial. *Sisson v. Royster*, 298.

It is incumbent upon a party appealing from a discretionary order consolidating actions for trial to show injury or prejudice arising therefrom in order for his exception thereto to be sustained. *Peebles v. R. R.*, 590.

Where the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed without becoming a precedent. *Whitehurst v. Anderson*, 787.

§ 39b. Error Cured by Verdict.

Appellants' exception to the portion of the charge relating to appellee's contention of additional payments is rendered immaterial by a verdict which does not include such additional payments in the recovery. *Randle v. Grady*, 159.

Where in a caveat proceeding there is no reversible error relating to the jury's finding of mental incapacity, exceptions relating solely to the issue of undue influence become immaterial and need not be considered. *In re Will of Kestler*, 215.

§ 39e. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

The admission of testimony over objection cannot be held prejudicial when testimony of the same import is theretofore or thereafter admitted without objection. *Davis v. Davis*, 48; *In re Will of Kestler*, 215.

Where defendants' contention that the collision forming the basis of the action was due to the negligence of the driver of plaintiffs' truck is presented to the jury in the pleadings, the testimony of one of the defendants and the charge of the court, an exception to the admission in evidence of a letter written by the defendant which stated that the accident was the result of the negligence of plaintiffs' driver cannot be sustained on the ground that it was a self-serving declaration, since, even so, its admission could not have been prejudicial. *Sisson v. Royster*, 298.

§ 39f. Harmless and Prejudicial Error in Instructions Generally. [See, also, Criminal Law § 81c (2).]

Party may not complain of instruction given in compliance with his request. *Davis v. Morgan*, 78.

In a civil action, defendant's evidence of good character relates only to his credibility as a witness, and an instruction that it might also be considered as substantive evidence for defendant must *be held* for prejudicial error when

APPEAL AND ERROR—*Continued.*

it appears that it may have influenced the verdict of the jury. *Morgan v. Coach Co.*, 280.

A charge will not be held for error as containing an expression of opinion on the facts involved when, construed contextually, the jury could not have been misled or improperly influenced thereby. *Caudle v. Benbow*, 282.

Exceptions to the charge will not be sustained when the charge read contextually fails to disclose error which is prejudicial. *Humphries v. Coach Co.*, 399; *Wells v. Burton Lines*, 422; *Tuttle v. Building Corp.*, 507; *Steelman v. Benfield*, 651.

§ 40a. Review of Exceptions to Judgment or to Signing of Judgment.

An exception to the signing of the judgment raises the question whether there is error in the conclusions of law upon the facts found. *Smith v. Davis*, 172.

Where there is no case on appeal, exceptions relating to the oral testimony must be treated as a nullity, leaving only the exception to the judgment, which presents the sole question whether upon the facts found and admittd the court correctly applied the law. *Russos v. Bailey*, 783.

The question of the sufficiency of the evidence must be presented by motion to nonsuit or by prayer for instructions or by objections to the submission of the issues, and an exception to the judgment on the ground that there was no sufficient evidence to sustain the verdict, is too late to raise the question. *Lea v. Bridgeman*, 565.

A sole exception to the judgment cannot be sustained when the judgment is supported by the findings of fact. *Russos v. Bailey*, 783.

An exception to the judgment presents only the question of whether error appears on the face of the record, and if the judgment is supported by the verdict the exception must fail. *Lea v. Bridgeman*, 565.

Where there are no exceptions to the court's findings of fact, and the findings are sufficient to support the judgment entered, the judgment will be upheld. *Hughes v. Oliver*, 680.

A sole exception to the judgment presents a single question whether the court correctly applied the law to the facts found, and does not present for review the findings of fact or the evidence upon which they are based. *Roach v. Pritchett*, 747.

A sole exception to the judgment presents only whether the findings are sufficient to support the judgment. *Artis v. Artis*, 754.

§ 40b. Review of Discretionary Orders.

The exercise of a discretionary power by the trial court is not reviewable on appeal unless there has been a palpable abuse of discretion. *Hughes v. Oliver*, 680.

§ 40d. Review of Findings of Fact.

Upon motion to set aside a judgment under the Soldiers' and Sailors' Civil Relief Act, findings, supported by evidence, that defendant has no meritorious defense, is binding on appeal. *Lightner v. Boone*, 199.

Findings of fact of the trial court when supported by competent evidence, even though there be evidence *contra*, are binding on appeal. *Owsley v. Henderson*, 224; *Bryant v. Bryant*, 287; *Owens v. Chaplin*, 705.

APPEAL AND ERROR—*Continued.*

In proceedings for the appointment of a receiver the findings of fact by the lower court are not binding on appeal, since the proceeding is in equity. *Sinclair v. R. R.*, 389.

The identity of the trustees entitled to possession and control of trust funds is a question of law to be determined by a proper construction of the will creating the trust, and is not a question of fact as to which the appellate court is bound by the finding of the trial court. *McKay v. Presbyterian Foundation*, 309.

Where the evidence is not in the record it will be presumed that findings were supported by evidence. *Hughes v. Oliver*, 680; *Roach v. Pritchett*, 747.

§ 401. Review of Constitutional Questions.

The Supreme Court will not determine a constitutional question, even when properly presented, if there be also present some other ground on which the case may be made to turn. *Amick v. Lancaster*, 157.

§ 50. Remand.

Where appellee suggests it is willing to waive recovery of the particular element of damages upon which error was committed in the instructions, the cause will be remanded in order that the recovery be modified by such waiver, or, in the absence of waiver, for a new trial on the issue of damages. *Bottling Co. v. Casualty Co.*, 411.

§ 51c. Interpretation of Decisions of Supreme Court.

Expressions in opinions of the Supreme Court must be considered with a view to the circumstances of their use in order to be correctly understood. *Jamerson v. Logan*, 540.

§ 52. Jurisdiction of, and Proceedings in Lower Court After Remand.

The decision on a former appeal becomes the law of the case, and a holding on the former appeal that the evidence was sufficient to make out a cause of action, is conclusive in the second trial upon substantially the same evidence. *Randle v. Grady*, 159.

The decision on a former appeal is the law of the case, and the court properly refuses to sign judgment tendered which is in conflict with the former decision. *Ibid.*

ARBITRATION AND AWARD.

§ 2. Operation and Effect of Agreements to Arbitrate.

The contract provided that defendant was to provide home for plaintiff, manage plaintiff's business and account for profits, etc., in consideration of plaintiff executing deed to property to take effect after his death. The agreement provided for arbitration in the event the parties decided to terminate the contract. *Held:* The provision for arbitration relates to settlement of differences in the event of termination of the contract by mutual consent, and does empower either party acting alone to terminate the contract and force settlement of all differences by arbitration. *Cox v. Hinshaw*, 102.

Where the parties by consent judgment stipulate that the amount of commissions due defendant should be determined by a referee and that the amount so found should be binding and conclusive on the parties, the amount found by the referee in accordance with the agreement is conclusive, and the trial court properly declines to entertain exceptions to the referee's report. *Ferrell v. Worthington*, 118.

ARREST AND BAIL.

§ 7. Requisites and Sufficiency of Bail Bonds.

"Bail" is security for defendant's appearance in court to answer a criminal charge there pending, and is ordinarily evidenced by a bond of recognizance which becomes a record of the court. *In re Wright*, 484.

§ 8. Liability on Bail Bonds.

On appeal from conviction in Recorder's Court defendant gave appearance bond. Upon failure of defendant to appear in the Superior Court judgment *nisi* was entered and *scire facias* and capias ordered issued and the action continued. Later, motion to strike out *sci. fa.* during pendency of defendant's military service was allowed. *Held:* The *sci. fa.* having been stricken out, judgment absolute on the bond before issuance and service of another *sci. fa.* is premature. Whether the judgment *nisi* should be made absolute or stricken out upon the subsequent hearing rests in the sound discretion of the trial court. G. S., 15-116. *S. v. Wiggins*, 76.

Forfeiture of bail or a recognizance must be pursuant to a judgment of forfeiture entered in a pending cause by the judicial officer having jurisdiction thereof for nonappearance of defendant in answer to a call, proven by an entry on the minutes of the court and returned as a part of the proceeding. *In re Wright*, 584.

ARSON.

§ 7. Sufficiency of Evidence and Nonsuit.

Evidence tending to show that a dwelling house was willfully and maliciously burned by the criminal agency of some responsible person and that such person was the defendant, is sufficient to overrule nonsuit in a prosecution for arson. *S. v. Anderson*, 720.

§ 8. Verdict and Judgment.

Sentence of death is mandatory upon verdict of guilty of arson without recommendation in respect to punishment. *S. v. Anderson*, 720.

ASSAULT.

§ 8d. Assault with Deadly Weapon with Intent to Kill.

The deadly character of a weapon used in an assault may be inferred by the jury from the manner of its use and the injury inflicted, and evidence of slashes with a knife across the upper arm and lower back along the belt line, producing cuts requiring 16 stitches to close, is sufficient for the jury to infer that the knife was a deadly weapon. *S. v. Randolph*, 228.

§ 9a. Self-Defense.

The surrounding facts and circumstances, and not defendant's belief, constitute the determinative factors as to whether defendant acted on the defensive and not as an aggressor. *S. v. Randolph*, 228.

A person is an aggressor if he enters the fight willingly in the sense of voluntarily and without lawful excuse. *Ibid.*

§ 10. Indictment and Warrant.

"A certain knife" is a sufficient description of the weapon in an indictment for assault with a deadly weapon with intent to kill. G. S., 14-32. *S. v. Randolph*, 228.

ASSAULT—*Continued.*

§ 12. Relevancy and Competency of Evidence.

The introduction in evidence of the weapon used is not requisite to the admission of testimony as to the manner of its use and the injuries inflicted in establishing the character of the weapon as deadly. *S. v. Randolph*, 228.

§ 13. Sufficiency of Evidence and Nonsuit.

Evidence *held* sufficient to show that defendant aided and abetted in assault with deadly weapon with intent to kill after full knowledge of felonious character of the assault, and court properly refused motion for directed verdict of not guilty on this charge. *S. v. Forshee*, 268.

§ 14b. Instructions on Right of Self-Defense.

Where the court charges the law on defendant's right of defense of himself or any member of his family against unprovoked assault, defendant cannot complain of a subsequent correct instruction, supported by the State's evidence, on the right of self-defense if it should be found by the jury that defendant provoked or willingly entered into the affray. *S. v. DeBerry*, 147.

A charge that in order to return a verdict of guilty of assault with a deadly weapon, the jury must find beyond a reasonable doubt not only that defendant committed an assault with a deadly weapon but also that he committed it under facts and circumstances in which he was not entitled to defend himself, is favorable to defendant and his exception thereto cannot be sustained. *Ibid.*

The facts and circumstances surrounding the assault in this case, with defendant's testimony that as prosecuting witness opened the door of his cab and attempted to come on him with a tire tool, defendant pulled out his knife, opened it, and jumped out of his truck and met prosecuting witness in the street, *is held* to show that defendant entered the fight voluntarily and without lawful excuse, and therefore there was no error in the refusal of the trial judge to submit to the jury defendant's plea of self-defense. *S. v. Randolph*, 228.

§ 14c. Instructions on Less Degree of Crime.

Where evidence tends to show defendant aided and abetted assault with deadly weapon with intent to kill after full knowledge of felonious character of assault, the court correctly refuses to submit to the jury the question of defendant's guilt of simple assault. *S. v. Forshee*, 268.

ATTORNEY AND CLIENT.

§ 6. Scope of Authority.

Mere representations by attorneys, in consideration of defendant's contributions in aid of settling claims arising out of collision, that they would recommend that action to recover for death of employee of their clients would not be instituted, does not preclude institution of such action, since such representations do not amount to contract not to sure, nor did it appear that attorneys did not in fact make the representations as promised. *Penny v. Stone*, 295.

AUTOMOBILES.

§ 7. Violation of Safety Statutes in General.

Even though the violation of a traffic statute may be negligence *per se*, such negligence is not actionable unless there is a causal relation between the violation of the statute and the injury. *Beaman v. Duncan*, 600.

AUTOMOBILES—*Continued.*

Violation of safety statutes, alone, is insufficient to constitute culpable negligence. *S. v. Wooten*, 628.

§ 8a. Due Care in General.

The operator of a motor vehicle is under duty to exercise that care which an ordinarily prudent person would exercise under the same circumstances for his own safety and the safety of others, but he is not under duty to anticipate negligence on the part of others, in the absence of anything which gives or should give notice to the contrary, and is entitled to assume, and act on the assumption, that others will exercise ordinary care for their own safety. *Hill v. Lopez*, 433.

While a motorist is not under duty to anticipate that an unlighted vehicle will be left standing on the traveled portion of the highway ahead of him, without flares or other signs of danger, this does not relieve him of the duty of keeping a proper lookout and proceeding as a reasonably prudent person would under the circumstances. *Tyson v. Ford*, 778.

§ 8c. Turning.

Evidence *held* to show that driver "cut the corner" in violation of G. S., 20-153 (a), in making a left turn at a street intersection. *Ward v. Bowles*, 273.

§ 8d. Stopping, Parking and Parking Lights.

The parking of an automobile on its left side of the highway completely off the traveled portion thereof under the circumstances of this case was not in violation of statute. *Webb v. Hutchins*, 1.

The stopping of a bus on the right side of the highway on the hard surface to permit a waiting passenger to board the bus is not negligence. *Morgan v. Coach Co.*, 280.

§ 8i. Intersections.

The fact that a motorist has the green light in traversing an intersection does not relieve him of the duty to exercise proper care for the safety of a pedestrian who has lawfully entered the intersection and is standing in the center of the street. *Ward v. Bowles*, 273.

The failure of a motorist traveling upon a servient highway to stop in obedience to a sign before entering an intersection with a dominant highway is not negligence *per se* and is insufficient alone to make out a *prima facie* case of negligence, but is only evidence of negligence to be considered along with other facts and circumstances adduced by the evidence, and an instruction that failure to stop in obedience to the sign is negligence, must be held for reversible error. *Hill v. Lopez*, 433.

The failure of the driver traveling along a servient highway to stop before entering an intersection with a dominant highway in obedience to signs of the State Highway Commission, is not negligence *per se* but is evidence of negligence to be considered with other facts in the case in determining the question of proximate cause. G. S., 20-158. *Nichols v. Goldston*, 514.

Respective duties of motorists and pedestrians at intersection of highways. *Gaskins v. Kelly*, 697.

§ 8j. Sudden Emergency.

The rule that a driver confronted with a sudden emergency is not held to the same degree of care as in ordinary circumstances but only to that degree

AUTOMOBILES—*Continued.*

of care which an ordinarily prudent person would use under similar circumstances, is not available to one who by his own negligence has brought about or contributed to the emergency. *Sparks v. Willis*, 26.

§ 8k. Legal Age and Driving License.

The evidence disclosed that the driver of the car in which intestates were riding was eighteen years of age and had no driver's license. The accident in suit occurred as the driver of the car, after slowing to ten miles an hour, was attempting to make a right turn off the highway into a private driveway. *Held:* The evidence fails to show any causal connection between the driver's failure to have a driver's license and the accident in suit. *Beaman v. Duncan*, 600.

§ 9. Condition of, and Defects in Vehicles.

The evidence disclosed that the driver of the car in which intestates were riding slowed down to about ten miles per hour to make a right turn from the highway into a private driveway, and was hit by defendant's truck, which was following the car, as the car was making the turn. *Held:* The evidence fails to show any causal connection between alleged defective brakes on the car and the accident in suit. *Beaman v. Duncan*, 600.

§ 11a. Right to Use of Highways in General.

All portions of a public way, from side to side and end to end, are for public use in the appropriate and proper method. *Wood v. Tel. Co.*, 605.

§ 11c. Obstructions on or Near Highway.

Injury to motorist from contact with telephone pole maintained six inches from hard surface *held* not foreseeable. *Wood v. Tel. Co.*, 605.

§ 12a. Speed in General.

The driver of a vehicle is under duty not to exceed a speed which is reasonable and prudent under the circumstances and to decrease speed when special hazards exist in regard to pedestrians or traffic. G. S., 20-141 (a); G. S., 20-141 (c). *Baker v. Perrott*, 558.

Evidence of speed greater than is reasonable and prudent under the conditions then existing and, in any event, in excess of 45 miles per hour, is evidence of negligence under the provisions of G. S., 20-141, prior to the amendment of Ch. 1067, sec. 17, Session Laws 1947. *Steelman v. Benfield*, 651.

A motorist must take into consideration curves and hills in determining what speed is reasonable and prudent, G. S., 20-141 (5) (c), and in observing the rule that he must not exceed a speed at which he can stop within the radius of his lights. *Tyson v. Ford*, 778.

Motorist is under duty not to exceed speed which is reasonable and prudent under the circumstances. *Riggs v. Oil Co.*, 774; *Tyson v. Ford*, 778.

§ 13. Right Side of Road and Passing Vehicles Traveling in Opposite Direction.

The rule that a motorist traveling on his right or seasonably turning thereto has the right to assume that a car approaching from the opposite direction will comply with G. S., 20-148, and turn to its right in time to avoid a collision, does not exculpate a motorist who runs completely off the road to his right, loses control, and hits a car standing still completely off the hard surface on its left side of the highway with its lights on, since the rule merely absolves

AUTOMOBILES—*Continued.*

a motorist from blame if he continues at a reasonable rate of speed in his line of travel in reliance on the assumption, but does not relieve him from the duty of knowing the position of his car on the highway from his own observation. *Webb v. Hutchins*, 1.

§ 15. Bicycles.

Evidence that cyclists were traveling on right side of road and that person riding cross-bar of leading bicycle carried lighted flashlight, when they were struck by truck traveling in opposite direction which had turned to its left of highway to pass car traveling in same direction, *held* to take case to jury on issue of negligence and contributory negligence. *Cowper v. Brown*, 213.

Evidence *held* to show contributory negligence as matter of law on part of boy cyclist injured while making U-turn on highway. *Tony v. Henderson*, 253.

§ 16. Pedestrians in General.

Pedestrian who starts across intersection with green light and is caught by changing lights cannot be held contributorily negligent as matter of law in standing in center of street. *Ward v. Bowles*, 273.

G. S., 20-174 (a), does not apply to an unmarked cross-walk at an intersection of highways, and an instruction placing the duty upon a pedestrian to yield the right-of-way to vehicles in traversing a highway at such intersection must be held for error. *Gaskins v. Kelly*, 697.

A pedestrian is required to use due care for his own safety in attempting to cross a highway at an intersection of highways, and a motorist is under duty to approach the intersection in the manner required by statute and to observe due care to avoid injury to pedestrians in the intersection. *Ibid.*

§ 17. Duties and Liabilities in Regard to Children on or Near Highway.

The driver of a motor vehicle who sees, or by the exercise of due care should see, a child on or near the traveled portion of a street, is under duty to use proper care in respect to the speed and control of his vehicle and maintain a vigilant lookout and give timely warning to avoid injury, recognizing the likelihood of the child's running into the street in obedience to childish impulse. *Sparks v. Willis*, 25; *Morgan v. Coach Co.*, 280.

§ 18g (2). Evidence as to Speed.

A patrolman not present at the time of the accident is not competent to give an opinion as to the speed of a car involved in the collision. *Webb v. Hutchins*, 1.

Evidence that a truck traveling on a highway stopped within six or eight feet from the point of impact negates an inference that it was traveling at excessive speed. Sometimes physical facts speak louder than words. *Tony v. Henderson*, 253.

§ 18h (2). Sufficiency of Evidence and Nonsuit on Issue of Negligence.

Whether driver failed to keep proper lookout and control of car in vicinity of child *held* for jury. *Sparks v. Willis*, 25.

The evidence tended to show that defendant driver turned to his left to pass two cars traveling in the same direction and struck two bicycles traveling in single file in the opposite direction on their right side of the highway. Defendants' evidence was that the collision occurred on the paved portion of the highway and that the bicycles were without lights; plaintiffs' evidence was to the effect that the bicycles had turned off the highway to their right and were

AUTOMOBILES—*Continued.*

traveling on the shoulder, and that the person riding on the cross-bar of the lead bicycle was holding a lighted flashlight. Defendant driver testified that he did not see the lead bicycle at all and did not see the second bicycle until he was within five yards of it although his lights were in fair condition. *Held:* Defendants' motions to nonsuit should have been overruled both in respect to the issue of negligence and the issue of contributory negligence. *Cowper v. Brown*, 213.

Evidence that when a pedestrian had traversed about half of an intersection in the pedestrian lane on a green light, the light changed, and the pedestrian stopped in the center of the street, and that the driver of a cab, approaching from the pedestrian's right in the left-turn lane, cut to his left and struck the pedestrian when about half of the front of the cab was to the left of the center line of the street, *is held* sufficient to be submitted to the jury on the issue of negligence, since the driver of the cab could have seen the pedestrian in ample time to have avoided a collision had he been keeping a proper lookout, and since the evidence discloses that the driver "cut the corner" in violation of G. S., 20-153 (a), without giving any signal or warning of his approach. *Ward v. Brown*, 273.

Plaintiffs' truck and defendants' truck, traveling in opposite directions, collided on the highway. There was evidence on the part of each party in support of his contention that the truck of the other party was over the center line of the highway when the collision occurred. *Held:* The conflicting evidence presents questions of fact for the jury, and the denial of plaintiffs' motion to nonsuit defendants' counterclaim was proper. *Sisson v. Royster*, 298.

Where defendant's own testimony is to the effect that he did not see a parked truck on his side of the highway until he was within approximately thirty feet of it, that he applied his brakes and turned cross-ways of the road and came to a stop on his left side of the highway directly in the path of another car traveling on its right side in the opposite direction, is sufficient evidence of defendant's negligence to be submitted to the jury in an action by the driver and by the occupant of such other car. *Wells v. Burton Lines*, 422.

Plaintiffs' evidence tending to show that defendant's tractor with trailer was being driven at a speed of 35 miles per hour and entered an intersection with another highway without slackening speed or giving signal or warning, and collided with the truck in which plaintiffs' intestates were riding, which had already entered the intersection, *is held* sufficient to overrule defendant's motions as of nonsuit on the issue of negligence notwithstanding that defendant's vehicle was being operated upon the dominant highway. G. S., 20-141 (b) (3); G. S., 20-141 (c). *Nichols v. Goldston*, 514.

Evidence of excessive speed and want of due care *held* to take issue of negligence to jury in action to recover for injuries to pedestrian standing on side of road near vehicles standing with burning lights after they had collided. *Baker v. Perrott*, 558.

Two cars, traveling in opposite directions, collided on the highway. There was conflicting evidence for plaintiffs and for defendants tending to show, respectively, that the other car was being operated on its left side of the highway. *Held:* The conflicting evidence raises questions of fact for the determination of the jury. *Steelman v. Benfield*, 651.

§ 18h (3). Nonsuit on Issue of Contributory Negligence.

Testimony of plaintiff that he was completely blinded by lights of approaching cars but nevertheless continued to drive three or four seconds at speed of

AUTOMOBILES—*Continued.*

35 miles per hour and for a distance of 100 feet, and collided with the rear of defendant's parked truck, *is held* to disclose contributory negligence as a matter of law barring recovery, notwithstanding evidence of negligence on part of defendant in failing to have rear lights burning on truck. *McKinnon v. Motor Lines*, 132.

Evidence *held* sufficient for jury on issue of negligence and not to disclose contributory negligence as matter of law on part of cyclist hit by truck. *Cowper v. Brown*, 213.

Plaintiff's evidence tended to show the following circumstances: Plaintiff, approximately twelve years old, was riding his bicycle on the left shoulder of the highway some 150 to 300 feet beyond a highway intersection. A car passed traveling in the opposite direction. Plaintiff then made a U-turn and fell between the front and rear wheels of a truck traveling in the same direction as plaintiff had been going. The truck had entered the highway from the intersection and was traveling on its right side with its right wheels on the shoulder. Plaintiff testified he did not see the truck, although his vision was unobstructed except for the car which had passed. *Held:* Plaintiff's evidence discloses contributory negligence barring recovery as a matter of law. *Tony v. Henderson*, 253.

A pedestrian who starts across an intersection with the green light and is caught by the changing lights cannot be held guilty of contributory negligence as a matter of law in standing in the center of the street. *Ward v. Bowles*, 273.

A 13-year-old girl alighted from a school bus on a dirt road some 25 feet to the north of its intersection with a highway. A bus of a common carrier, headed west, was standing, with its motor running, on the hard surface on the north side of the highway. In attempting to cross the highway the girl ran back of the bus, and was struck by a car traveling east. Her vision of the car was obstructed by the bus. *Held:* The 13-year-old child was not guilty of contributory negligence as a matter of law. *Morgan v. Coach Co.*, 280.

Plaintiffs' evidence tended to show that their intestates, operating a truck along a servient highway, reduced speed from 30 to 20 miles per hour but failed to stop in obedience to highway signs before entering an intersection with a dominant highway, and that defendant's truck, traveling along the dominant highway at a speed of 35 miles per hour, entered the intersection without slackening speed or giving warning, and that the vehicle in which intestates were riding had already entered the intersection when it was struck by defendant's vehicle. *Held:* The granting of defendant's motion to nonsuit cannot be sustained on the theory of contributory negligence, since the question of proximate cause is one for the jury upon the evidence. *Nichols v. Goldston*, 514.

Whether pedestrian was guilty of contributory negligence *held* for jury on conflicting evidence as to whether he was standing on shoulder or hard-surface. *Baker v. Perrott*, 558.

Plaintiff's evidence disclosing he could not stop within range of headlights *held* to warrant nonsuit for contributory negligence. *Tyson v. Ford*, 778; *Riggs v. Oil Co.*, 774.

Whether a motorist colliding with a vehicle standing on the traveled portion of a highway will be held guilty of contributory negligence as a matter of law presents a difficult question which must be determined upon the facts and circumstances of each particular case, since, while in every instance he is required to exercise the care and prevision of a reasonably prudent person in

AUTOMOBILES—*Continued.*

like circumstances, the degree of care varies with the exigencies of the occasion. *Tyson v. Ford*, 778.

§ 18h (4). Nonsuit on Ground of Intervening Negligence.

Plaintiffs' intestates were passengers in a car. The car slowed to 10 miles per hour to turn off the highway into a private driveway. It was hit by a following truck. There was conflict in the evidence as to whether the driver of the car crossed the center line of the highway, as to warning given by the truck driver, and as to whether the car's right front wheels was off the hard-surface at the time of the impact. *Held:* The conflicting evidence raised issues of fact for the jury, and defendants' motions to nonsuit on the ground that the evidence disclosed intervening negligence on the part of the driver of the car constituting the sole proximate cause of the accident, were properly refused. *Beaman v. Duncan*, 600.

§ 18h (5). Nonsuit of Co-defendant.

Where one defendant contends that the collision in suit was due solely to the negligence of plaintiff, he is in no position to press his exception to the granting of his co-defendant's motion to nonsuit. *Wells v. Burton Lines*, 422.

§ 18i. Instructions in Auto Accident Cases.

Where plaintiff's evidence tends to show that the driver was operating defendant's bus at a rate of 40 to 50 miles an hour in heavy traffic around a curve on an upgrade, an instruction that a speed of 45 miles per hour, rather than a charge that a speed in excess of 45 miles per hour, is *prima facie* evidence that the speed is unlawful, *is held* not prejudicial in view of the statutory requirement to reduce speed below the *prima facie* limits prescribed in traversing a curve or when special hazards exist with respect to other traffic. G. S., 20-141, prior to amendment by Chap. 1067, Sec. 12, Session Laws of 1947. *Garvey v. Greyhound Corp.*, 166.

Charge *held* for error in presenting inferences favorable to motorist without charge on inferences favorable to pedestrian, which arose on evidence. *Gaskins v. Kelly*, 697.

§ 20a. Contributory Negligence of Guest or Passenger.

A guest in an automobile will not be held contributorily negligent as a matter of law on the ground that he knew the propensity of the driver for speeding and failure to keep a proper lookout when the evidence shows that the driver slowed down before entering an intersection with another highway and was traveling at a speed of 35 miles an hour, notwithstanding evidence that the driver did not see the truck approaching along the intersecting highway until it was called to his attention by the guest immediately before the collision. *Hill v. Lopez*, 433.

§ 21. Liability of Parties to Guests or Passengers.

Plaintiffs were guests in an automobile which had stopped on its left side of the highway completely off the hard surface in order for them to alight. The car was struck by defendant's car approaching from the opposite direction. *Held:* Even conceding that defendant's evidence disclosed negligence on the part of the driver of the car in which plaintiffs were riding in having his lights focused down the highway so bright as to blind defendant, such negligence would not preclude recovery by plaintiffs unless the sole proximate cause of the injury. *Webb v. Hutchins*, 1.

AUTOMOBILES—*Continued.*

§ 28a. Culpable Negligence in Operation of Automobiles.

The violation of a safety statute regulating the use of highways does not constitute culpable negligence unless such violation is intentionable, willful or wanton, or unless the violation, though unintentional, is accompanied by recklessness or is under circumstances from which probable death or injury to others might have been reasonably anticipated. *S. v. Wooten*, 628.

§ 28d. Homicide and Assault Prosecutions—Competency of Evidence.

Testimony of witnesses to the effect that defendant was intoxicated, based upon their observation, some about three hours prior, others about fifteen minutes prior, others immediately after and others up to three hours after the automobile accident in question, tends to show that defendant was continuously under the influence of intoxicants, and none of the evidence is incompetent as being too remote in point of time. *S. v. Dawson*, 85.

In a prosecution for manslaughter, the admission of testimony that defendant "was drinking" when taken in charge at the scene of the wreck cannot be held for prejudicial error because of want of evidence that defendant was intoxicated, when there is ample evidence, including the physical facts, of wanton recklessness, the prosecution not being for drunken driving but for culpable negligence in the operation of an automobile. *S. v. McMahan*, 293.

§ 28e. Homicide and Assault Prosecutions—Sufficiency of Evidence and Nonsuit.

The evidence tended to show that two cars, traveling in opposite directions, collided head-on in the middle of the highway, disclosing a violation by each driver of the statutory requirement that each driver, under such circumstances, should yield to the other at least one-half of the main traveled portion of the highway as nearly as possible. G. S., 20-148. The collision resulted in the death of several passengers. There was evidence that even if the violation of the statute were unintentional, each defendant was driving his automobile carelessly and heedlessly, without due caution and circumspection under circumstances from which probable death or injury to others should have been anticipated with reasonable prevision. *Held:* The evidence was sufficient to support the verdict of guilty of manslaughter as to each defendant. *S. v. Wooten*, 628.

§ 28f. Instructions in Homicide and Assault Prosecutions.

The court's definition of "involuntary manslaughter" and its distinction between civil and criminal negligence in the operation of an automobile, *held* without error. G. S., 1-180. *S. v. McMahan*, 293.

§ 29b. Prosecutions for Reckless Driving.

An instruction that if the jury is satisfied beyond a reasonable doubt that defendant is guilty of reckless driving to convict him, otherwise to acquit him, is insufficient in a prosecution under G. S., 20-140, to meet the requirements of G. S., 1-180, since it fails to explain the law or apply the law to the facts as the jury should find them to be. *S. v. Flinchum*, 149.

Evidence tending to show that on a clear day, defendant, in overtaking another automobile proceeding in the same direction on its right side of the highway at a speed of 45 to 50 miles per hour, crashed into the rear of the other automobile with such force as to cause extensive damage, and that there were no other cars in sight on the highway at the time, *is held* sufficient to be submitted to the jury in a prosecution for reckless driving. *S. v. Holbrook*, 620.

AUTOMOBILES—*Continued.*

The evidence tended to show that defendant's car was following two trucks traveling east, approaching an intersection in a municipality, that the trucks intended to make a left turn at the intersection and stopped momentarily for a westbound vehicle, that then the second truck had moved foward two truck lengths at a rate of 10 to 15 miles per hour, traveling on its right side of the highway, when it was struck from the rear by defendant's car with such force that the steel frame bed of the truck was driven into the cab, mashing it in three or four inches, and the truck knocked forward some two or three truck lengths. There was evidence that defendant had slid one wheel of his car 20 feet before the impact. The statutory speed limit in force at the scene was 25 miles per hour. *Held:* The evidence was sufficient to overrule nonsuit in a prosecution for reckless driving. *S. v. Steelman*, 634.

§ 30d. Prosecutions for Drunken Driving.

Testimony of witnesses to the effect that while defendant was unconscious from a blow on the head received in the collision they smelled the odor of alcohol on his breath, with testimony of the opinion of one of them from such observation that defendant was under the influence of some intoxicant, *is held* no substantial evidence that defendant was under the influence of intoxicants as defined by the statute while driving prior to the accident, and defendant's motion to nonsuit in a prosecution under G. S., 20-138, should have been allowed. *S. v. Flinchem*, 149.

Testimony to the effect that defendant was under the influence of intoxicating liquor immediately after the accident, with testimony by defendant himself that he had drunk intoxicating liquor and was "feeling it a little," is ample evidence of intoxication to be submitted to the jury on the charge of operating a motor vehicle while under the influence of intoxicating liquor. *S. v. Holbrook*, 620.

§ 34b. Procedure to Revoke or Suspend Driver's License.

Upon a receipt of notification from the highway department of another state that a resident of this State had there been convicted of drunken driving, the Department of Motor Vehicles has the right to suspend the driving license of such person. *In re Wright*, 301.

Notice of conviction in another state upon which the Department of Motor Vehicles may act is not limited to notice from a judicial tribunal or other official agency but the Department may act on notice from whatever source obtained. *In re Wright*, 584.

G. S., 20-16 (7), gives the Department of Motor Vehicles discretionary power to suspend the license of an operator who has committed an offense in another state which would be grounds for suspension if committed here, and G. S., 20-23, prescribes that notice of conviction of such person in another state is sufficient evidence for action by the Department of Motor Vehicles, and adds the power of revocation. *Ibid.*

Discretionary suspensions and revocations of licenses by the Department of Motor Vehicles are reviewable under G. S., 20-25; mandatory revocations under G. S., 20-17, are not so reviewable. *Ibid.*

The failure of G. S., 20-25, to provide standards for the courts on appeals by licensees whose driving licenses have been suspended or revoked by discretionary action of the Department of Motor Vehicles, does not invalidate the statute or negate the jurisdiction, since established rules of procedure of the courts give assurance against any unbridled exercise of discretionary power. *Ibid.*

AUTOMOBILES—*Continued.*

Upon the filing of a petition for review by a person whose license to drive an automobile has been suspended or revoked by the Department of Motor Vehicles, the hearing in the Superior Court is *de novo*, and the Superior Court is not bound by the findings of fact or the conclusions of law made by the Department. G. S., 20-25. *In re Wright*, 301.

Petitioner was arrested in South Carolina charged with operating a motor vehicle while under the influence of intoxicants. He gave bond for appearance, but no warrant was served on him, no trial had, and his bond forfeited. His license was suspended by the Department of Motor Vehicles upon information of the Highway Department of South Carolina that he had been found guilty of driving while intoxicated. Upon review the Superior Court found, in addition, that the suspension was based upon misinformation and further that petitioner in fact is not guilty. *Held:* The findings support the court's order directing the respondent to cancel the suspension and to restore license to petitioner. *Ibid.*

The statute, G. S., 20-16 (8) (b), provides for a hearing by the Department of Motor Vehicles upon application of a licensee whose license has been suspended, and this procedure should be followed and should be made to appear in the petition before review by the Superior Court. *Ibid.*

All suspensions, cancellations and revocations of driving licenses made in the discretion of the Department of Motor Vehicles, whether under G. S., 20-16, G. S., 20-23, or any other provision of the statute, are reviewable by trial *de novo*. *In re Wright*, 584.

In reviewing the suspension or revocation of a driving license by the Department of Motor Vehicles in the exercise of its discretion, no discretionary power is conferred upon the Superior Court, and the court may determine only if, upon the facts, petitioner is subject to suspension or revocation under the provisions of the statute. *Ibid.*

A license to operate a motor vehicle is a privilege in the nature of a right of which the license cannot be deprived save in the manner and upon the conditions prescribed by statute. *Ibid.*

Where, in a prosecution for driving while under the influence of intoxicants, the court withdraws a juror and orders a mistrial and continues the case, the court is without authority to order that defendant's right to drive an automobile upon the highways be revoked for the period of continuance. *S. v. Barrier*, 751.

BARBERS.

§ 1. Licensing.

The validity of the statute providing for the licensing of barbers and the control and regulation of the trade having been judicially determined, the validity of the act may not be attacked in a subsequent suit. *Motley v. Board of Barber Examiners*, 337.

The provisions of Chap. 941, Session Laws of 1947, that veterans of World War I or World War II who have practiced barbering for three or more years prior to application, are eligible for license without standing the examination required by the general law, G. S., Chap. 86, prescribes a reasonable classification and is valid. *Ibid.*

BASTARDS.

§ 1. Elements of the Offense.

The offense defined by G. S., 49-2, is not bastardy, but the willful neglect or refusal of a parent to support his or her illegitimate child, and neither the

BASTARDS—*Continued.*

begetting of the child nor the failure to provide medical expenses for the mother and expenses incident to the birth of the child, are offenses under the statute. *S. v. Stiles*, 137.

§ 6. Sufficiency of Evidence and Nonsuit.

Testimony of prosecutrix that defendant is the father of her illegitimate child, together with evidence tending to show that defendant was apprised of her condition and advised of a request to provide for the child, and that defendant thereupon denied paternity and stated he would pay nothing, *is held* sufficient to overrule defendant's motion to nonsuit under G. S., 49-2. *S. v. Stiles*, 137.

§ 6½. Instructions.

In a prosecution under G. S., 49-2, it is reversible error for the court to instruct the jury that defendant is charged with bastardy or being the father of an illegitimate child. *S. v. Stiles*, 137.

In a prosecution under G. S., 49-2, an instruction to the effect that the willful failure to provide medical expenses for the mother and to pay expenses incident to the birth of the child violates the statute, is error, since willful failure to provide payment for such items is not a criminal offense although the court may require provision therefor upon conviction. *Ibid.*

BILLS AND NOTES.

§ 26b. Agreements for Payment Out of Particular Funds.

As between the parties, it is competent for the maker to show that it was agreed at the time of the execution of the note that it was to be paid out of the profits of a partnership in which the maker and payee were then engaged, even though the agreement rests in parol. *Carroll v. Brown*, 636.

§ 36. Actions on Notes—Judgment on Pleadings.

Where, in an action on a note, defendants deny plaintiff's allegations that the note was to draw interest from maturity at the rate of 6% per annum, the note not having been set out in the complaint, judgment on the pleadings in plaintiff's favor is erroneous, since there is a denial of a fact necessary to be established as a basis for the relief prayed. *Carroll v. Brown*, 636.

Judgment on the pleadings in an action on a note is error when defendant interposes a valid defense. *Ibid.*

BOUNDARIES.

§ 2. General and Specific Descriptions.

Ordinarily a particular description in a deed prevails over a general description, and the specific description cannot be enlarged by the general unless the specific description is ambiguous or insufficient, or the reference is to a fuller and more accurate description. *Lewis v. Furr*, 89.

After allotment of a tract of land to his widow as dower, the remaining lands of intestate were allotted to his heirs at law. Thereafter, one heir at law conveyed by deed describing the land allotted to her by specific description followed by the words "the same being my entire interest in and to the real estate" of the ancestor, for an amount exactly the same as the valuation placed upon the land allotted to her. Thereafter the widow died. *Held:* The specific

BOUNDARIES—*Continued.*

description in the deed executed by the heir was not enlarged by the general description, and the deed did not convey the heir's undivided interest in remainder in the lands allotted as dower. *Ibid.*

BROKERS.

§ 9. Actions Against Brokers.

In an action by the purchaser against the real estate brokers to recover earnest money paid on the ground that the purchaser was induced to execute the contract by the brokers' fraudulent misrepresentations as to the property, in which the brokers by cross-action allege breach of the contract of purchase in which they had an interest for the amount of their commission in a sum less than the earnest money paid, with consequent damage to them and the seller, and that they were holding the earnest money to protect their interest and the interest of the seller, *held:* The seller is a necessary party to a complete determination of the controversy, and denial of defendant brokers' motion for his joinder as additional party defendant is reversible error. G. S., 1-73. *Lampros v. Chipley*, 236.

§ 12. Actions for Commissions.

A real estate broker may maintain an action against the purchaser for alleged wrongful breach of the contract of sale even though the contract stipulates that the seller agrees to pay the commission and there is no contractual relationship between the broker and the purchaser, since the broker has a beneficial interest in the contract to the extent of his commissions. *Chipley v. Morrell*, 240.

CANCELLATION OF INSTRUMENTS.

§ 8. Parties Who May Sue.

A grantee who takes the premises subject to a prior recorded lease is not entitled to attack the lease on the ground that it was procured by fraud. *Leno v. Ins. Co.*, 501.

§ 9. Pleadings.

In plaintiffs' action for specific performance of defendant's agreement to sell stock in a close corporation, defendant admitted the allegations of the complaint but alleged in effect that he was induced to sign the contract by false representations as to the value of the stock and threats made by plaintiffs that if he did not sell, plaintiffs, through their majority control, would deprive defendant of future dividends on the stock and the bonus theretofore annually paid to stockholders. *Held:* Defendant's answer alleges fraud, undue influence and coercion practiced by plaintiffs in procuring defendant's execution of the contract, and judgment on the pleadings decreeing specific performance on the ground that the answer was insufficient to allege legal fraud, is reversed. *Pickett v. Overman*, 437.

CARRIERS.

§ 1½. Duty to Operate.

While a public utility such as a railroad retains its franchise, it owes to the State and to the public the duty of continuous operation. *Sinclair v. R. R.*, 389.

Unless obligated to do so by its charter, a railroad should not be forced to continue operations in the public interest by the appointment of an operating receiver when such operation must be at continuing loss or the chance of

profitable operation is nothing more than a gamble, and therefore the court before appointing an operating receiver should determine whether such operation will pay expenses and will tend to conserve rather than dissipate its assets. In the instant case the circumstances are not such as to justify the appointment of a permanent operating receiver. *Ibid.*

Persons asserting unliquidated damages past and prospective resulting to them as consignees and consignors from the abandonment of the operation of a railroad may not in their individual capacities maintain an action to force continuing operation of the railroad by the appointment of a permanent operating receiver, since such damages, though possibly different in degree, are not different in kind than those sustained by the public generally, and since the power to require continuous operation in the public interest of the State is vested exclusively by statute in the Utilities Commission. G. S., 62-46, *et seq.* *Ibid.*

§ 14. Carriage of Goods—Rates and Tariffs.

A carrier is under public duty to collect for intrastate shipments the full amount of the rates fixed in accordance with tariff schedules duly filed and approved by the North Carolina Utilities Commission. G. S., 60-5; 60-6; 60-52; 60-114. *R. R. v. Paving Co.*, 94.

Misquoting the correct charge or omitting a part of the established rate cannot estop a carrier from enforcing full payment of the established and approved rates. *Ibid.*

While the consignor and consignee may agree between themselves as to who shall pay freight charges, such agreement cannot prevent the carrier from collecting the full amount under the applicable tariff schedules from any party legally liable therefor. *Ibid.*

In a carrier's action against the consignees to recover the amount of an undercharge, allegations of the answer as to the contractual liability of the consignor to the consignees and of negligence of the carrier in misquoting the correct charge or in omitting a part of the established rate, as a basis for a plea of estoppel against the carrier, are properly stricken from the answer upon motion. The allegations in the consignees' cross-action against the consignor, joined as a party defendant at instance of the consignees, relating to their respective contractual obligations, are not affected by the allowance of the carrier's motion. *Ibid.*

In an action by a carrier against the consignees to recover an under-charge, the consignees' demurrer for failure of the carrier to make the bills of lading a part of the complaint and for failure to joint the consignor and allege that as between consignees and consignor, consignees were solely or primarily liable, was properly overruled. *Ibid.*

The acceptance of delivery of shipments by the consignees imports liability for the transportation charges. *Ibid.*

§ 21a (1). Carriage of Passengers—Degree of Care Required of Carrier in General.

While a carrier is not an insurer of the safety of passengers whom it undertakes to transport, it does owe them the duty of exercising the highest degree of care for their safety consistent with the practical operation and conduct of its business. *Garvey v. Greyhound Corp.*, 166.

The liability of a carrier for injury to passengers must be based on negligence, since a carrier is not an insurer of their safety; but a carrier is under

duty to exercise the highest degree of care consistent with the practical operation and conduct of its business. *Humphries v. Coach Co.*, 399.

§ 21a (2). Liability of Carrier for Acts of Fellow Passengers or Third Persons.

Ordinarily a carrier is not responsible for injury to a passenger from the acts of another passenger unless the circumstances are such that, in the exercise of ordinary care, the carrier could have anticipated and guarded against it. *Williams v. Coach Co.*, 191.

§ 21b. Injuries by Accident in Transit.

Plaintiff was standing in aisle of bus. The peculiar movements of the bus caused by the driver's pulling to left to pass vehicle and then pulling back to right to get back into line to avoid car approaching from opposite direction, and then turning curve, resulted in plaintiff's fall through door of the moving bus, the door having come open as result of movement of bus and plaintiff's striking allegedly defective control mechanism in fall. *Held:* Defendant's motions to nonsuit were properly refused, there being sufficient evidence of negligence on the part of the carrier to be submitted to the jury and the evidence being insufficient to establish contributory negligence as a matter of law on the part of the passenger. *Garvey v. Greyhound Corp.*, 166.

The duty of caring for small baggage rests primarily upon the passenger to whom it belongs, and a carrier can be held liable for injury caused by baggage falling from the baggage rack only if its employees have actual notice that baggage placed in the rack is placed in such manner or is of such size and shape that it is likely to fall and injure someone, or the conditions creating danger must have existed a sufficient length of time to affect the carrier with constructive notice. *Williams v. Coach Co.*, 191.

A passenger entered a bus with a .22 caliber rifle and placed the rifle in the baggage rack. As the bus was moving slowly back onto the pavement the rifle fell and struck plaintiff passenger on the head, causing serious injury. There was no evidence that the baggage rack was defective nor that it was not of the standard type in general use, nor evidence of any unusual jerk or motion of the bus other than those occasioned in normal operation, nor evidence upon which actual or constructive notice that the baggage was in a precarious position could be imputed to the carrier. There was no allegation or attempt to prove that the rifle was such unusual or dangerous baggage that the driver's attention should have been attracted by it and that he should have ascertained that it was stored in a manner so as not to cause injury to some passenger. *Held:* Defendant carrier's motion to nonsuit should have been allowed. *Ibid.*

When a passenger is injured by machinery and appliances wholly under the carrier's control, this fact is sufficient *prima facie* to show negligence. *Humphries v. Coach Co.*, 399.

§ 21c. Injuries to Passengers in Boarding or Alighting.

A passenger's evidence that as she was alighting from the defendant's bus, her shoe heel caught in a raised piece of steel on the floor of the bus near the steps, causing her to fall to her injury, is sufficient to make out a *prima facie* showing of negligence. *Humphries v. Coach Co.*, 399.

Plaintiff passenger testified that she fell to her injury in alighting from defendant's bus when her shoe caught in a raised piece of steel. *Held:* Defendant's evidence that plaintiff fell, that her shoe heel was knocked off and was found on the floor of the bus, and tending to establish the fact of plain-

CARRIERS—*Continued*

tiff's injury, is properly considered on defendant's motion to nonsuit as tending to corroborate and make clear plaintiff's evidence, and the motion to nonsuit was properly overruled. *Ibid.*

CLERKS OF SUPERIOR COURT.

§ 4. Jurisdiction as Probate Court.

The Clerk of the Superior Court in the exercise of his probate jurisdiction is an independent tribunal of original jurisdiction. *In re Will of Hine*, 405.

Where the Clerk of the Superior Court has admitted to probate in common form a purported will and two purported codicils as the last will and testament of a deceased, and caveat has been properly filed as to the second codicil and the cause transferred to the civil issue docket, the Clerk may not thereafter upon motion expunge from his records the entire probate proceedings and reprobate the purported will and second codicil on the ground that the second codicil revoked the first. *Ibid.*

§ 7. Jurisdiction as Judge of Juvenile Court.

Jurisdiction to determine the right of custody of an infant as between persons with whom the infant had been placed with a view to adoption and welfare officers seeking to place the infant with his family, is within the exclusive jurisdiction of the juvenile court, G. S., 110-21 (3), and writ of *habeas corpus* is inadvisedly issued by the Superior Court, but pending determination of the juvenile court, respondent should not surrender custody to a nonresident and no order should be entered until petitioners have had notice and an opportunity to be heard. *In re Thompson*, 74.

Where the mother of minor children, for the purpose of having their custody given to their paternal grandmother, the father being dead, voluntarily comes before Juvenile Court and signs a paper turning over the custody of her children to the Juvenile Court, the Juvenile Court obtains jurisdiction during such time as the custody and control of the children is necessary, notwithstanding the absence of the statutory requirements in cases where the Juvenile Court proceeds directly, and the mother may not thereafter attack on the ground of want of jurisdiction a subsequent order of the Juvenile Court taking the custody away from the grandmother for change of condition and placing the children in the custody of an institution. *In re Bumgarner*, 639.

COMMON LAW.

The Common Law Rule obtains in this State that where a statute enacted in the public interest commands an act to be done or proscribes the commission of an act, and no penalty is expressly provided for its breach, its violation may be punished as for a misdemeanor. G. S., 4-1. *S. v. Bishop*, 371.

CONSPIRACY.

§ 9. Liability of Conspirator for Offenses Committed by Co-conspirator.

Each conspirator is equally responsible for all acts committed by the others in the execution of the common purpose which are a natural and probable consequence of the unlawful undertaking, even though such acts are not intended or contemplated as a part of the original design. *S. v. Brooks*, 68.

CONSTABLES.

§ 1. Election, Qualification and Tenure.

A constable must be elected in each township of the State, and all constables, before they are qualified, shall take oaths prescribed for public officers as well as an oath of office. G. S., 151-1; G. S., 151-2. *Taylor v. Wake Forest*, 346.

§ 2. Powers and Duties.

Constables have the same power and authority as they were invested with prior to the Constitution of 1819, and their powers and duties are co-extensive with the limits of the county in which they are elected. *Taylor v. Wake Forest*, 346.

CONSTITUTIONAL LAW.

§ 8a. Legislative Power in General.

The question of public policy in the promulgation of regulations in the exercise of the police power for the protection of public health and sanitation, is for the determination of the lawmaking body. *Motley v. Board of Barber Examiners*, 337; *S. v. Whitaker*, 352.

§ 8c. Delegation of Legislative Power.

The failure of G. S., 20-25, to provide standards for the courts on appeals by licensees whose driving licenses have been suspended or revoked by discretionary action of the Department of Motor Vehicles, does not invalidate the statute or negate the jurisdiction, since established rules of procedure of the courts give assurance against any unbridled exercise of discretionary power. *In re Wright*, 584.

§ 10a. Judicial Powers in General.

Courts have inherent authority to review the discretionary action of any administrative agency whenever such action affects personal or property rights, upon a *prima facie* showing, by petition for *certiorari*, that such agency has acted arbitrarily, capriciously or in disregard of law. *In re Wright*, 584.

§ 10b. Power and Duty of Courts to Determine Constitutionality of Statute.

The Supreme Court may not exercise its power to declare a statute unconstitutional and void unless it is clearly so. *Motley v. Board of Barber Examiners*, 337.

In determining the constitutionality of an Act passed in the exercise of the police power, the court may determine solely whether the Act violates any constitutional limitation, the question of public policy being solely within the province of the Legislature. *S. v. Whitaker*, 352.

§ 11. Scope of State Police Power in General.

The police power is reserved to the states under the Tenth Amendment to the Federal Constitution, which power is subject only to the limitations prescribed by the Federal or State Constitutions or those instances where the matter is pre-empted by Federal Law enacted pursuant to constitutionally granted authority. *S. v. Whitaker*, 352.

"Due Process of Law" under the Fourteenth Amendment to the Federal Constitution and "Law of the Land" under sec. 17, Art. I, of the State Constitution, in relation to the exercise of the state police power, impose flexible restraints which are satisfied if the act in question is not unreasonable, arbitrary or capricious and the means selected have a real and substantial relation

to the objects sought to be attained. *Motley v. Board of Barber Examiners*, 337; *S. v. Whitaker*, 352.

In determining whether a statute enacted in the exercise of the State police power is unreasonable, arbitrary or capricious or lacking in real and substantial relationship to the objective sought to be accomplished, it is proper to consider the historical development of the problem and prevailing public opinion in regard to the evils sought to be suppressed. *S. v. Whitaker*, 352.

§ 12. State Police Power—Regulation of Trades and Professions.

The restraints and regulations placed upon the practice of a trade or profession in the interests of sanitation, public health and standards of the trade or profession, are matters of public policy within the control of the Legislature within constitutional limitations. *Motley v. Board of Barber Examiners*, 337.

The Legislature may prescribe classifications for the licensing of persons engaged in particular trades or professions provided the classifications are not arbitrary and have reasonable relation to the end sought. *Ibid.*

The provisions of Chap. 941, Session Laws of 1947, that veterans of World War I or World War II who have practiced barbering for three or more years prior to application, are eligible for license without standing the examination required by the general law, G. S., Chap. 86, prescribes a reasonable classification and is valid. *Ibid.*

Regulation of the relationship of employer and employee comes within the police power. *S. v. Bishop*, 352.

§ 13. State Police Power—Sanitation and Health.

Regulations relating to the importation of cattle into this State, promulgated by the State Board of Health under statutory authority for the purpose of control of brucellosis or Bang's disease, if reasonable in their scope and incidence and not in conflict with federal regulations or statutes already preempting the field, are constitutional and valid. *S. v. Lovelace*, 186.

A person who transports cattle from out the State to a livestock market operated in this State without a health certificate for such animals is guilty of violating the regulations promulgated by the State Board of Health under authority of G. S., 106-307.4, notwithstanding that the animals are to be segregated at the livestock market and sold by the market for slaughtering. The exception to the requirement of health certificates for cattle brought into this State relates solely to cattle transported immediately to a slaughtering house and the exclusion of mediate delivery thereto is reasonable and valid. *Ibid.*

The regulations of the State Board of Health prohibiting the importation of cattle into the State without health certificates unless the cattle are "consigned" to a recognized slaughtering house approved and designated by the State Veterinarian applies whether the cattle are transported into the State by common carrier or brought into the State by the owner in his truck. If the exception relates only to transportation by common carrier, such owner does not come within the exception. *Ibid.*

Statute proscribing emptying substances inimical to fish into streams of State, applicable only to corporations chartered prior to 4 March, 1915, *held* unconstitutional. *S. v. Glidden Co.*, 664.

§ 16½. Right of Free Speech and Assembly.

Chap. 328, Session Laws of 1947, does not infringe the constitutional rights of free speech or assembly, but to the contrary protects the right of employees

to express their individual opinions by refusing to join unions and the right of employers and employees involved in a labor controversy to assemble and publicize their positions. *S. v. Whitaker*, 352.

§ 17. Exclusive Emoluments and Privileges.

Service in the armed forces during war is a public service within the meaning of Art. I, sec. 7, of the Constitution of North Carolina, for which exclusive or separate emoluments or privileges may be granted. *Motley v. Board of Barber Examiners*, 337.

§ 18. Equal Protection, Application and Enforcement of Laws.

The Constitution of North Carolina does not preclude the Legislature from making classifications and distinctions in the application of laws provided the classifications are reasonable and just and are not arbitrary. Constitution of North Carolina, Art. I, sec. 1; Art. I, sec. 7; Art. I, sec. 17. *Motley v. Board of Barber Examiners*, 337.

The rehabilitation of returning soldiers is a matter of public concern, and statutes giving them exclusive benefits or privileges in furtherance of this public policy will be reconciled with constitutional limitations whenever possible. *Ibid.*

The Fourteenth Amendment to the Federal Constitution does not preclude a state from providing preferential treatment in the licensing of veterans to carry on a particular trade or profession upon the payment of the same fees as prescribed for all others engaged in the trade or profession. *Ibid.*

A statute regulating the relationship of employer and employee will not be held unconstitutional as class legislation so long as the act applies alike to all employers and employees coming within its scope. *S. v. Whitaker*, 352.

Chap. 328, Session Laws of 1947, is applicable to all employers and employees within the State, and therefore the fact that persons or groups coming within its scope must perforce be affected in different degrees because of the difference of their economic, social or political positions, does not render the Act unconstitutional as discriminatory. *Ibid.*

Statute proscribing emptying of substances inimical to fish into streams of State, applicable only to corporations chartered subsequent to 4 March, 1915, acquired against the State. *S. v. Glidden Co.*, 664.

§ 20a. Due Process of Law: Law of the Land, in General. (In criminal prosecutions see hereunder § 34.)

"Due Process of Law" under the Fourteenth Amendment to the Federal Constitution and "Law of the Land" under sec. 17, Art. I, of the State Constitution, in relation to the exercise of the state police power, impose flexible restraints which are satisfied if the act in question is not unreasonable, arbitrary or capricious and the means selected have a real and substantial relation to the objects sought to be attained. *S. v. Whitaker*, 352.

§ 23. Substantive Rights and Titles.

The State may prohibit emptying of deleterious and harmful substances into its streams regardless of the length of time any person or corporation has engaged in the practice, since no right of prescription in this regard can be acquired against the State. *S. v. Gildden Co.*, 664.

CONSTITUTIONAL LAW—*Continued.*

§ 28. Full Faith and Credit to Judgments of Other States.

Where the court of another state does not have jurisdiction of the subject matter, its judgment is *coram non judice* and a nullity, and does not come within the protection of the full faith and credit clause of the Federal Constitution. *McRary v. McRary*, 714.

Divorce decree of state having jurisdiction of parties is binding here, but provision of decree awarding title to lands in this State as alimony is a nullity. *Ibid.*

Divorce decree of another state having jurisdiction of parties is binding here, but whether order awarding custody of minor children is binding here depends on residence of children. *In re Biggers*, 743.

§ 31. Acts Constituting Burden on Interstate Commerce.

Regulations relating to the importation of cattle into this State, promulgated by the State Board of Health under statutory authority for he purpose of conrol of brucellosis or Bang's disease, if reasonable in their scope and incidence and not in conflict with federal regulations or statutes already preempting the field, are constitutional and valid. *S. v. Lorclace*, 186.

§ 33. Right to Jury Trial in Criminal Prosecutions.

It is improper for the court to charge the jury that upon defendant's own testimony he is guilty of the offense charged and that the jury must return such verdict, and thereupon to sentence defendant. *S. v. Daniel*, 536.

§ 34a. Due Process in Criminal Prosecutions in General.

The guarantee of the Constitution of North Carolina that no person shall be deprived of life, liberty, or property "but by the law of the land" requires that conviction of crime be had only under the general law in the regular course of the administration of justice through courts of competent jurisdiction and be consonant with fundamental principles of liberty and justice. *S. v. Hedgebeth*, 259.

The Fifth and Sixth Amendments to the Federal Constitution apply only to trials in Federal Courts; the Fourteenth Amendment against denial of due process is applicable to a State's action, in judicial proceedings as well as through other agencies of the State. *Ibid.*

§ 34b. Due Process in Trial—Time Between Arrest, Trial and Conviction.

The fact that defendant was arrested 28 December, tried in Recorder's Court 31 December, and in the Superior Court during the term beginning 6 January of the following year, all in the regular course for the disposition of the case in the courts where it was properly cognizable, does not, without more, induce the legal conclusion that defendant was deprived of due process guaranteed by the Constitution of North Carolina. *S. v. Hedgebeth*, 259.

Expedition in the trial of criminal actions is not to be sought at the expense of rights of the individual guaranteed by the Constitution. *Ibid.*

§ 34d. Right to Be Represented by Counsel.

Ignorance of defendant and his unfamiliarity with legal matters are not alone sufficient to render the appointment of counsel for him mandatory in a prosecution for less than a capital offense. Constitution of North Carolina, Art. I, sec. 11. *S. v. Hedgebeth*, 259.

A defendant has the constitutional right to have counsel and to be represented by counsel, and to have counsel assigned if requested where the cir-

cumstances are such as to show apparent necessity of counsel to protect defendant's rights, but in the absence of request the propriety of providing counsel for a person accused of an offense less than a capital folony rests in the sound discretion of the trial judge. *Ibid.*

The Fourteenth Amendment to the Federal Constitution does not require a state, contrary to its own practice, to furnish counsel for a defendant. *Ibid.*

CONTEMPT OF COURT.

§ 2b. Willful Disobedience of Court Orders.

A court has inherent power, necessary to the maintenance of judicial authority, to punish as for contempt the willful violation of its orders, including temporary restraining orders. *Mfg. Co. v. Arnold*, 375.

In a civil action to restrain unlawful picketing, the court entered a temporary order restraining defendants from interfering with ingress and egress to plaintiff's plant and specifically reserved the right to later limit the number of pickets. Defendants appealed. Thereafter the court entered subsequent orders limiting the number of pickets and making the limitations imposed in the original order and the limitation as to the number of pickets apply alike to the original defendants and to persons made additional parties defendant. *Held:* The appeal did not deprive the court of jurisdiction to adjudge defendants in contempt for willful violation of the injunctive provisions of the interlocutory orders. *Ibid.*

§ 4. Orders to Show Cause Preliminary Proceedings.

Proceedings as for contempt should always be based upon affidavits. *Mfg. Co. v. Arnold*, 375.

A petition in proceedings for contempt which is verified in accordance with the form prescribed by statute, G. S., 1-145, is sufficient to give the court jurisdiction of the persons named when the facts set forth in the petition constituting a sufficient basis for judgment of contempt are stated to be within the knowledge of affiant and not upon information and belief. *Ibid.*

A respondent in contempt, by being sworn at his or her request, and answering the charge of contempt, waives any defects in the verification of the facts constituting the basis of the proceeding. *Ibid.*

§ 5. Hearings and Judgment.

Civil action was instituted alleging that defendants had conspired to prevent persons from entering plaintiff's plant on lawful business by unlawful picketing. Temporary restraining orders were issued in the cause. Later petition was filed alleging violation of the restraining orders. *Held:* Upon the hearing to show cause why named defendants should not be adjudged in contempt, the acts and declarations of each conspirator, done or uttered in furtherance of the common design, are admissible in evidence against all. *Mfg. Co. v. Arnold*, 375.

In contempt proceedings for violating temporary orders against unlawful pocketing, the acts and declarations of each respondent are competent for the purpose of showing *animus* of those in the crowd of which respondents were a part. *Ibid.*

In contempt proceedings against a number of defendants for violating temporary orders against unlawful picketing, the sufficiency of the evidence as to each respondent is not to be determined on the basis of his individual acts and

CONTEMPT OF COURT—*Continued.*

declarations as shown by the evidence, isolated from and disconnected from the evidence as to the acts and declarations of the others, which the evidence discloses was concerted action which violated the orders of the court. *Ibid.*

Judgment in contempt proceedings must be supported by findings of fact, especially findings concerning the purpose and object of the contemnor. *Ibid.*

Where the petition specifically alleges the provisions of injunctive orders with which respondents are charged with violating, findings of the court, supported by evidence, that each respondent had willfully violated the injunctive orders of the court in particulars specified separately as to each defendant, is sufficient to support separate judgment as to each defendant. *Ibid.*

Contempt proceedings may be resorted to in civil or criminal actions, and though contempt is criminal in its nature, respondents therein are not entitled to trial by jury. *Ibid.*

CONTRACTS.

§ 1. Requisites and Validity.

A contract will not be held unenforceable because of uncertainty if the intent of the parties can be ascertained from the language used, construed with reference to the circumstances surrounding the making of the contract, and its terms reduced to certainty under the maxim of *id certum est quod certum reddi potest. Chew v. Leonard*, 181.

§ 7a. Contracts Against Public Policy—Restraint of Trade.

Where the facts are established, the reasonableness of a covenant restraining an employee from working in competition with the employer after termination of the contract, is a matter for the court. *Noe v. McDevitt*, 242.

In a suit for injunction the burden is on plaintiff employer to show that the covenant restraining the employee from entering other employment in competition with the employer in proscribed territory for a stipulated time after termination of the employment, is reasonable. *Ibid.*

A contract of employment of a salesman stipulating that the employee should not work as salesman for a competitor for five years after its termination within the States of North and South Carolina, *is held*, upon evidence tending to show that the employer operated only in eastern North Carolina, too extensive in territory for the reasonable protection of plaintiff's business, and is void as against public policy. *Ibid.*

Where in a covenant in a contract of employment restraining the employee from engaging in employment in competition with his employer for a certain period of time after termination of the employment, the territory proscribed is too extensive for the reasonable protection of the employer, the entire covenant must fail, since the court cannot make a new covenant for the parties by restricting the territory. *Ibid.*

§ 19. Parties Who May Sue.

A real estate broker may maintain an action against the purchaser for alleged wrongful breach of the contract of sale even though the contract stipulates that the seller agrees to pay the commission and there is no contractual relationship between the broker and the purchaser, since the broker has a beneficial interest in the contract to the extent of his commissions. *Chipley v. Morrell*, 240.

CONTRACTS—*Continued.*

§ 21. Pleadings in Actions on Contract.

In an action on contract plaintiff is not required to set out the full contents of the instrument in the complaint or to incorporate same by reference to copy thereof attached as an exhibit. *Wilmington v. Schutt*, 285.

§ 26. Nature and Grounds of Action for Unlawful Interference with Contractual Rights by Third Person.

Plaintiff alleged that defendants wrongfully and maliciously induced vendors to breach their registered contract to sell timber to plaintiff. Defendants alleged that the land was subject to deed of trust and the timber could not be sold without approval of the *cestui*, that the plaintiff was advised that the *cestui* would not release the timber, that the *cestui* called for bids, and that defendants became the last and highest bidder for the timber with the approval of the *cestui*. *Held:* The averments were relevant to show that defendants were acting in the legitimate exercise of their own rights without design to injure plaintiff or gain an improper advantage at his expense, and it was error for the court to grant plaintiff's motion to strike. *Winston v. Lumber Co.*, 786.

CORPORATIONS.

§ 5b. Jurisdiction and Proceedings Where Corporation Is Unable to Elect Officers or Directors.

Where, in a summary proceeding under G. S., 55-114, the court enters judgment continuing corporate officers in their respective offices, such order necessarily carries with it authorization and direction that they should continue to exercise the same functions and receive the same emoluments as prior to controversy, but the corporation as such is not a proper party and the jurisdiction of the Superior Court to grant relief against the wrongful interference with the officers in the performance of their duties or the wrongful refusal of an officer to perform the duties of his office cannot be invoked in such proceeding. *Thomas v. Baker*, 41.

§ 6a (1). Authority and Duties of Directors and Stockholders.

A corporation is bound by the acts of its stockholders and directors only when they act as a body in regular session or under authority conferred at a duly constituted meeting, and they cannot bind the corporation by their separate individual acts or declarations, even though they constitute a majority. *Tuttle v. Building Corp.*, 507.

§ 6a (2). Authority and Duties of President.

In the absence of charter or bylaw provision to the contrary, the president of a corporation is the general manager of its corporate affairs, and his contracts made in the name of the corporation in the general course of business and within the apparent scope of his authority are ordinarily enforceable, but ordinarily he has no power to sell or contract to sell the real or personal property of the corporation without authority from its board of directors. *Tuttle v. Building Corp.*, 507.

§ 8. Meetings of Stockholders and Transaction of Business.

The fact that proceedings at a stockholders' meeting are not recorded is not fatal, and the proceedings may be proved by parol testimony. *Tuttle v. Building Corp.*, 507.

CORPORATIONS—*Continued.*

§ 21. Estoppel and Ratification by Corporation of Acts of Officers and Agents.

Since stockholders and directors cannot bind the corporation by their individual acts and declarations, evidence of declarations made by stockholders and directors is incompetent and ineffectual to show a ratification of an alleged unauthorized act performed in the name of the corporation by its officers. *Tuttle v. Building Corp.*, 507.

§ 22. Property and Conveyances.

Corporate directors are trustees of its property, and usually a corporation may sell, transfer and convey its corporate real estate only when authorized to do so by its board of directors. G. S., 55-48; G. S., 55-26 (10). In the present case the statutory provisions were supplemented by stipulation in defendant's bylaws. *Tuttle v. Building Corp.*, 507.

Where a corporation is authorized to, and does in fact, engage in the business of buying and selling real estate as a part of the corporate stock in trade, the authority of its officers to bind the corporation in respect thereto may be implied from the nature of its business, the duties necessary to be performed by its officers, the relation of the property to the corporate business and to its other property, and the principle that corporate officers, in the absence of express limitations, have implied power to do all acts on behalf of the corporation which are necessary or proper in the performance of their duties. *Ibid.*

Where a corporation authorized by its charter to engage in the business of buying and selling real estate, denies that its officers had authority to sell the real estate in question, evidence tending to show that the corporation had never exercised its corporate authority to deal in real estate, that the *locus* was the only real property it ever owned, and that it was organized primarily for the purpose of acquiring and holding the *locus*, is competent to repel any inference of implied authority on the part of its officers to make the conveyance. *Ibid.*

A deed in proper form, executed in the name of a corporation by its president, or in his absence by its vice-president, attested by its secretary, to which the corporate seal is affixed, is *prima facie* valid. *Ibid.*

Evidence on the part of plaintiff tending to show that deed in proper form executed for defendant corporation by its officers, had the corporate seal affixed and was deposited in escrow, makes out a *prima facie* case that the corporate officers had authority to execute the deed, entitling plaintiff to the submission of appropriate issues to the jury, but does not shift the burden of proof, which rests upon plaintiff throughout to establish the validity of the contract. *Ibid.*

Authority of corporate officers to execute deed *held* question for jury on conflicting evidence. *Ibid.*

COSTS.

§ 3a. Parties Entitled to Recover—Successful Party.

Where two actions are consolidated for trial by consent, one in ejectment by heirs of the mortgagor and the other for foreclosure in which they are defendants, and partial recovery is had by the heirs in their action, the costs should be evenly divided between the parties. *Hughes v. Oliver*, 680.

COUNTIES.

§ 9½. Sinking Funds.

Ordinarily the County Treasurer is the proper custodian of all sinking fund securities, including school sinking funds and securities held for the retirement of term bonds where the county has assumed the payment of such bonds, G. S., 115-240, but the General Assembly may designate or change the custodian of sinking fund securities. Chap. 19, Session Laws of 1947, makes the Board of Education of Johnston County custodian of school sinking funds of the county. *Johnson v. Morrow*, 58.

§ 10. Budgets.

A county had an unencumbered surplus in its school sinking fund, invested in securities, including unmatured serial school bonds of the county. By special act (Chap. 19, Session Laws of 1947) the Board of Education was made custodian of the sinking fund and the surplus was directed to be used only for the construction, alteration, repair or additions to the public schools of the county. *Held:* Such surplus is subject to the County Fiscal Control Act, and the Board of County Commissioners is charged with the duty to determine what expenditures will be made for such purposes, G. S., 115-83, and the surplus should be taken into consideration by it in the preparation and adoption of future budget and the levy of taxes therefor. G. S., 153-114, G. S., 153-142. *Johnson v. Morrow*, 58.

§ 11. Application of Revenue.

Although the General Assembly cannot authorize a diversion of a county's sinking funds which are necessary to pay outstanding sinking fund bonds, it can direct the expenditure of surplus unencumbered sinking funds, provided the expenditure is for a public purpose. Constitution of N. C., Art. II, Sec. 30. *Johnson v. Morrow*, 58.

§ 31. Actions by County—Parties.

In the absence of a refusal of the Board of Commissioners of a county to institute an action in its behalf, the action must be instituted in the name of the county or on relation of the county. G. S., 155-18, G. S., 153-2 (1). *Johnson v. Morrow*, 58.

COURTS.

§ 2. Jurisdiction in General.

The court of another state, having jurisdiction of the parties, entered decree for divorce, and in awarding alimony, directed the husband to convey to his wife his interest in lands located in North Carolina and provided that upon his failure to do so the decree should operate as a conveyance. *Held:* While the divorce decree was within its jurisdiction and it had authority to enforce its order for alimony by its process *in personam*, the judgment *in rem* is a nullity and does not affect title to the lands in this State nor establish any right in the property enforceable in this State. *McRary v. McRary*, 714.

Jurisdiction cannot be conferred upon a court by the consent of the parties. *Ibid.*

§ 3a. Jurisdiction of Superior Courts in General.

The Legislature has full authority to provide for appeals to the Superior Court by licensees whose driving licenses have been suspended or revoked by the discretionary action of the Department of Motor Vehicles. G. S., 20-25; N. C. Constitution, Art. IV, sec. 12. *In re Wright*, 484.

COURTS—*Continued.*

The Superior Court has original jurisdiction of all civil actions where exclusive jurisdiction is not given to some other court. G. S., 7-63. *Brake v. Brake*, 609.

§ 3b. Exclusive Original Jurisdiction.

The Superior Court has exclusive original jurisdiction of a cause on contract to recover an amount less than $200 when plaintiff seeks to have the recovery adjudged a lien on specific property under the terms of the instrument. *Wilmington v. Schutt*, 285.

§ 3c. Concurrent Original Jurisdiction of Superior Court.

Where a Recorder's Court and the Superior Court have concurrent jurisdiction, the court first taking cognizance of the offense has jurisdiction thereof to the exclusion of the other. G. S., 7-64. *S. v. Reavis*, 18.

Courts of justices of the peace do not have exclusive original jurisdiction of actions in summary ejectment but the Superior Courts have concurrent jurisdiction of such actions, G. S., 7-63, and therefore in a possessory action against a tenant wrongfully holding over, instituted in the Superior Court, defendant's motion to dismiss for want of jurisdiction is properly overruled whether the action be regarded as one to recover possession of the land or a summary proceeding in ejectment. G. S., 42-28. *Stonestreet v. Means*, 113.

§ 4b. Jurisdiction of Superior Court on Appeal from Municipal, County and Recorders' Courts.

On appeal from a municipal court, the Superior Court may not dismiss the appeal and at the same time enter an order in the cause, since the dismissal of the appeal divests it of jurisdiction. *S. v. Richardson*, 426.

An appeal from the Recorder's Court of Nash County to the Superior Court in a cause within the original jurisdiction of the Recorder's Court takes the cause to the Superior Court for trial *de novo*. *Brake v. Brake*, 609.

No appeal lies to the Superior Court from judgment of the general county court executing a suspended sentence on condition broken, review being solely by *certiorari*. *S. v. Peterson*, 736.

§ 4c. Jurisdiction of Superior Court on Appeal from Clerk.

Upon appeal to the Superior Court from action of the Clerk taken in the exercise of his probate jurisdiction, the jurisdiction of the Superior Court is derivative, and G. S., 1-276, does not apply. *In re Will of Hine*, 405.

Where, in a special proceeding for partition of lands as between the widow and one of the children to whom the husband had conveyed the premises, the question of dower right arises and the other heirs are made parties, the Superior Court on appeal from the order of the Clerk that petitioner was entitled to actual partition, has jurisdiction to adjudicate the right to dower, since once having obtained jurisdiction of the cause, the Superior Court will administer all necessary incidental matters in connection with the litigation. *Artis v. Artis*, 754.

§ 4d. Jurisdiction of Superior Court on Appeal from Justice of the Peace.

The jurisdiction of the Superior Court on appeals in summary ejectment is derivative, and where the jury, upon conflicting evidence, in a trial free from error, finds that the defendant did not enter into possession as tenant of plaintiff, judgment for defendant is not error. *Goins v. McLoud*, 655.

COURTS—*Continued.*

§ 4e. Jurisdiction to Review Action of State Commissions or Agencies.

Courts have inherent authority to review the discretionary action of any administrative agency, whenever such action affects personal or property rights, upon a *prima facie* showing, by petition for *certiorari*, that such agency has acted arbitrarily, capriciously or in disregard of law. *In re Wright*, 584.

§ 11. Jurisdiction of Recorders' Courts.

Where a Recorder's Court and the Superior Court have concurrent jurisdiction, the court first taking cognizance of the offense has jurisdiction thereof to the exclusion of the other. G. S., 7-64. *S. v. Reavis*, 18.

§ 14. Conflict of Laws—As Between Courts of the Several States in General.

A caveat to the recordation of the exemplification of a will and the proceedings had in connection with its probate in another state, G. S., 31-27, alleging fraud in the procurement of the will and of its probate, is not subject to dismissal on the ground of want of jurisdiction of our court so far as it affects realty situate here, and when the caveat also challenges jurisdiction of the court of probate on the ground that testatrix was a resident of this State, there is no want of jurisdiction of the caveat proceedings in regard to personalty situate within this State. *In re Will of Chatman*, 246.

CRIMINAL LAW.

§ 3. Distinction Between Crimes, Misdemeanors, Penalties, and Civil Liability.

The Common Law Rule obtains in this State that where a statute enacted in the public interest commands an act to be done or proscribes the commission of an act, and no penalty is expressly provided for its breach, its violation may be punished as for a misdemeanor. G. S., 4-1. *S. v. Bishop*, 371.

§ 8. Parties and Offenses—Principals.

Where two or more persons are present, aiding and encouraging one another in a common purpose which results in a homicide, all are principals and equally guilty. *S. v. Brooks*, 68.

A person who conspires to engage in an unlawful enterprise and is present and aids and abets the perpetrator in the commission of the crime is guilty as a principal. *S. v. Forshee*, 268.

Where the State's evidence tends to show that defendants were the aggressors and acted in concert in making an armed attack, it is immaterial which one of them fired the shot inflicting the fatal wound. *S. v. Riddle*, 251.

§ 12b—Jurisdiction—Place of Crime.

Our courts have no jurisdiction of a prosecution of a husband for willful abandonment of his wife without providing for her adequate support if the abandonment occurs outside the State. *S. v. Carson*, 151.

§ 17a. Plea of Not Guilty.

Defendants' plea of not guilty puts credibility of State's evidence in issue, including testimony of alleged confession by defendant. *S. v. Snead*, 37.

§ 17f. Pleas in Amnesty.

Where, upon defendants' plea in amnesty, the court denies the motion without findings as to some of the material facts alleged as the basis for the

CRIMINAL LAW—*Continued.*

motion, judgment will be vacated and the cause remanded for further proceedings. The determination of the motion upon the subsequent hearing is within the discretionary authority of the court. G. S., 8-55. *S. v. Foster*, 72.

§ 27. Judicial Notice.

The courts will take judicial notice of the day of the week a particular date falls, the dates of the terms of the Superior Courts, and of the judges of the Superior Court. *S. v. Anderson*, 720.

§ 28. Presumptions and Burden of Proof.

Defendant's plea of not guilty puts credibility of State's evidence in issue, including testimony of alleged confession by defendant. *S. v. Snead*, 37.

Where defendant pleads not guilty, he enters upon the trial with the common law presumption of innocence in his favor, and the burden is on the State to establish his guilt beyond a reasonable doubt. *S. v. Harvey*, 62.

§ 29b. Evidence of Guilt of Other Offenses.

Evidence of defendant's guilt of crimes other than the one charged in the bill of indictment is incompetent for the purpose of showing the character of defendant or his disposition to commit an offense of the nature of the one charged. *S. v. Choate*, 491.

As an exception to the general rule, evidence of defendant's guilt of crimes other than the one charged in the bill of indictment is admissible when such evidence tends to show *quo animo* intent, design, guilty knowledge, or *scienter* or for the purpose of identification. *Ibid.*

§ 31c. Opinion Evidence—Sanity, Mental Capacity and Drunkenness.

A lay witness is competent to testify whether or not in his opinion a person was drunk or sober on a given occasion on which he observed him. *S. v. Dawson*, 85.

The conditions and the opportunity for observation goes to the credibility of a witness' testimony as to whether the person observed was intoxicated, and not to its competency. *Ibid.*

Testimony of witnesses to the effect that defendant was intoxicated, based upon their observation, some about three hours prior, others about fifteen minutes prior, others immediately after and others up to three hours after the automobile accident in question, tends to show that defendant was continuously under the influence of intoxicants, and none of the evidence is incompetent as being too remote in point of time. *Ibid.*

Testimony of witnesses to the effect that while defendant was unconscious from a blow on the head received in the collision they smelled the odor of alcohol on his breath, with testimony of the opinion of one of them from such observation that defendant was under the influence of some intoxicant, *is held* no substantial evidence that defendant was under the influence of intoxicants as defined by the statute while driving prior to the accident, and defendant's motion to nonsuit in a prosecution under G. S., 20-138, should have been allowed. *S. v. Flinchem*, 149.

§ 31d. Evidence—Fingerprints.

The fact that finger-prints corresponding to those of an accused are found in a place where a crime was committed is without probative force unless the circumstances are such that the finger-prints could have been impressed only at the time the crime was perpetrated. *S. v. Minton*, 518.

CRIMINAL LAW—*Continued.*

§ 31e. Evidence—Footprints.

Testimony that when arrested defendant had shoes worn so as to make a peculiar mark on the ground and that these shoes fitted with the tracks at the scene of the crime is competent. *S. v. Warren*, 22.

§ 34d. Flight as Implied Admission of Guilt.

The fact that defendant, upon being apprehended at a still in operation, fled immediately upon seeing an officer, is competent to be considered by the jury in connection with the other circumstances. *S. v. Peterson*, 736.

§ 34e. Silence as Implied Admission of Guilt.

Defendant was charged with embezzlement of funds obtained by him as agent of prosecuting witness to pay off a chattel mortgage on the witness' car. Witness testified that defendant stated he had sent the money to the mortgagee, that witness thereupon emphatically challenged the veracity of the statement and accused defendant of not having sent the money. *Held:* Failure of defendant to deny witness' accusation is competent as an implied admission that defendant had not sent the money. *S. v. Gentry*, 643.

§ 38c. Admissibility in Evidence of Clothes and Articles Found at Scene of Crime.

The introduction in evidence of the cap found at the scene of the crime shortly after its occurrence, identified by defendant's mother-in-law as being defendant's cap, is without error when there is evidence that defendant was wearing the cap when he left his home shortly before the crime was committed and returned without it. *S. v. Hooks*, 689.

§ 38d. Evidence—Photographs.

Photographs are not competent as substantive evidence but may be used by a witness only for the restricted purpose of explaining or illustrating his testimony when description in words of the scene, object or person represented would be competent. *S. v. Gardner*, 567.

The accuracy of a photograph as a true representation of the scene, object or person it purports to portray must be shown by extrinsic evidence, but it is not required that this be established by the photographer, it being sufficient if it is established by any witness familiar with the scene, object or person portrayed. *Ibid.*

Whether there is sufficient extrinsic evidence to establish the accuracy of a photograph is a preliminary question of fact for the trial judge. *Ibid.*

The fact that an authenticated photograph competent for the purpose of illustrating or explaining the witness' testimony is gory or gruesome or may tend to arouse prejudice does not render the photograph incompetent. *Ibid.*

The fact that a photograph showing the wound described by the doctor was taken in the morgue after the body had been cleansed, does not of itself render the photograph incompetent for use in illustrating the testimony of the doctor. *Ibid.*

§ 38f. Experimental Evidence.

Experimental evidence is competent when the experiment is carried out under substantially similar circumstances and tends to shed light on the transaction in question, and while it is required that the experiment be carried out under substantially similar conditions, it is not required that the conditions be

CRIMINAL LAW—*Continued.*

precisely similar, the want of exact similarity going to the weight of the evidence with the jury. *S. v. Phillips*, 595.

Whether the circumstances and conditions under which an experiment is carried out are sufficiently similar to those of the transaction in question, so that the experiment tends to throw light on that transaction and not tend to confuse or mislead the jury, is a preliminary question for the court in determining its competency, and the court's ruling thereon will be upheld unless too wide of the mark. *Ibid.*

Defendant testified that the fatal shot was fired while the pistol was in deceased's right hand and defendant's hand on the barrel. There were no powder burns on the clothing of deceased. The fatal shell was of Hungarian manufacture. The State introduced evidence of experiments made with the pistol, using American manufactured shells, to determine the distance at which powder stains or burns would appear on the target. An officer who made the experiments testified that the amount of powder in a shell and the type of powder would affect discoloration but would not affect powder burns. *Held:* The conditions under which the experiments were carried out were sufficiently similar to render the evidence competent. *Ibid.*

§ 42c. Cross-Examination.

The limits of legitimate cross-examination are largely within the discretion of the trial judge, and his ruling thereon will not be held for error in the absence of showing that the verdict was improperly influenced thereby. *S. v. Edwards*, 153.

Action of the court in limiting cross-examination of witnesses *held* not reversible error on defendant's exceptions. *S. v. Ensley*, 271.

Defendant's answers on cross-examination to questions relating to collateral matters asked for the purpose of impeachment, are conclusive, and the State may not contradict the answers by other evidence. *S. v. Choate*, 491.

§ 42d. Evidence Competent to Corroborate Witness.

Where the testimony of a witness is challenged and its credibility put at issue by a plea of not guilty and by extensive cross-examination, the admission of a written statement made by the witness prior to trial, in substantial accord with her testimony, for the purpose of corroboration, is without error. *S. v. Dawson*, 85.

Where, in a prosecution for embezzlement, testimony in regard to papers upon which defendant obtained money from a finance company as agent for the prosecuting witness is competent, the introduction in evidence of the papers is competent for the purpose of corroboration. *S. v. Gentry*, 643.

The prosecuting witness identified defendant upon the trial as the perpetrator of the crime. Testimony of statements made by prosecutrix immediately after the crime was committed to the effect that a colored man had broken into her house and attacked her but that she did not know his name, and that when defendant was shortly thereafter brought before her, she identified him, *is held* competent for the purpose of corroborating the testimony of the prosecuting witness. *S. v. Hooks*, 689.

Where defendant has attacked the credibility of a State's witness by cross-examination, the scope of evidence competent for the purpose of corroborating the witness is not limited to those facts testified to by her which are controverted by defendant. *Ibid.*

CRIMINAL LAW—*Continued.*

§ 42e. Evidence Competent to Impeach or Discredit Witness.

Defendant's answers on cross-examination to questions relating to collateral matters asked for the purpose of impeachment, are conclusive, and the State may not contradict the answers by other evidence. *S. v. Choate,* 491.

§ 48c. Evidence Competent for Restricted Purpose.

Exception to the general admission of evidence competent for a restricted purpose will not be sustained in the absence of a request by appellant, at the time the evidence is admitted, that its admission be restricted. *S. v. Gentry,* 643.

§ 48d. Withdrawal of Evidence.

Withdrawal of prejudicial evidence after it had been with jury overnight *held* not to have cured error in its admission. *S. v. Choate,* 491.

§ 50d. Expression of Opinion by Court During Progress of Trial.

The record disclosed that a State's witness testified on cross-examination that he saw defendant "make a run and her hand go that way." The court interposed, "What do you mean by 'make a run'? Give a step like that and hit him?" A. "He got up, she took a step and hit him." *Held:* The record discloses only the words of the court, and does not affirmatively disclose any demonstrative action by the court constituting an expression or intimation of opinion on the evidence forbidden by law, and defendant's exception thereto cannot be sustained. *S. v. Gardner,* 567.

The remark of the court, in excluding evidence of the violent character of deceased when under the influence of an intoxicant, that "there was no evidence of self-defense" cannot be held for error as an inhibited expression of opinion by the court when the statement is true at the time, particularly when the testimony is subsequently admitted. *S. v. Culberson,* 615.

A remark of the court that it would allow the introduction of the fingerprints as found at the scene and the fingerprints of defendant for the purpose of identification, will not be held for error as an expression of opinion that the fingerprints were actually taken from the scene of the crime, it being obvious that the court was merely identifying the exhibits offered by the State. *S. v. Hooks,* 689.

§ 50f. Argument and Conduct of Counsel or Solicitor.

Wide latitude is given counsel in the exercise of the right to argue to the jury the whole case, as well of law as of fact, but counsel is not entitled to travel outside of the record and argue facts no included in the evidence, and when counsel attempts to do so it is the right and duty of the court to correct the argument, either at the time or in the charge to the jury. G. S., 84-14. *S. v. Little,* 417.

Argument of the solicitor in the trial of a capital case that in the event of conviction there would be an appeal and in the event the decision of the lower court were affirmed, there would be an appeal to the Governor, and that not more than 60% of prisoners convicted of capital offenses were ever executed, *is held* improper and prejudicial and not justified by argument of counsel for defendant to the effect that only errors of law could be corrected by appeal and that only the Governor could correct errors of judgment on the party of the jury. *Ibid.*

Where grace impropriety in the argument of the solicitor is brought to the trial court's attention it is the duty of the trial court to make correction

CRIMINAL LAW—*Continued.*

regardless of the attitude of counsel for defendant, and the fact that upon the court's offer to make partial correction if counsel for defendant should so request, counsel for defendant remains silent, is not a waiver. *Ibid.*

While ordinarily exceptions to improper argument of the solicitor should be taken before verdict, the rule *is held* inapplicable under the facts in this case where gross impropriety in the solicitor's argument was called to the court's attention and the court offered to make only partial correction if requested by counsel. *Ibid.*

§ 51. Authority and Duty of Court in General.

The trial court has discretionary power to withdraw a juror and order a mistrial and continue the case. *S. v. Barrier*, 751.

§ 52a. Sufficiency of Evidence and Nonsuit.

A motion to nonsuit, made for the first time at the conclusion of all the evidence, does not present the sufficiency of the evidence for review, it being incumbent upon the defendant to move for nonsuit at the close of the State's evidence, note exception if overruled, and, if he introduce evidence, to renew the motion at the close of all the evidence, and note exception if overruled, and assign error based on the latter exception. G. S., 15-173. *S. v. Weaver*, 39.

On motion to nonsuit the evidence must be considered in the light most favorable to the State. *S. v. Webb*, 304.

The intensity of proof required of the State, whether relying on circumstantial or direct evidence, is to prove defendant's guilt to a moral certainty or beyond a reasonable doubt, but when aptly requested to do so, the court must charge that circumstantial evidence must produce in the minds of the jurors a moral certainty of defendant's guilt and exclude every other reasonable hypothesis.. *S. v. Warren*, 22.

Circumstantial evidence is a recognized and accepted instrumentality in the ascertainment of truth, but in order to justify conviction the facts relied on must be of such a nature and so connected or related as to point unerringly to the defendant's guilt and exclude any other reasonabl hypothesis. *S. v. Harvey*, 62; *S. v. Coffey*, 119.

When circumstantial evidence raises reasonable inference of defendants' guilt, it is for the jury to decide whether the facts taken singly or in combination produce in their minds the moral conviction of guilt beyond a reasonable doubt. *S. v. Massengill*, 612.

Circumstantial evidence which tends only to show an opportunity to commit the crime charged is insufficient to be submitted to the jury. *S. v. Coffey*, 119.

Circumstantial evidence is insufficient to sustain a conviction unless the circumstantial facts shown on the hearing are of such a nature and so connected or related as to point unerringly to the defendant's guilt and exclude any other reasonable hypothesis. *S. v. Minton*, 518.

The introduction of testimony by the State of statements made by defendant does not preclude the State from showing that the facts are otherwise, but where the State offers no evidence tending to contradict the statements, the State presents such statements as worthy of belief. *S. v. Coffey*, 119.

While evidence of motive is not necessary to sustain conviction, motive or the absence of motive is a circumstance to be considered. *Ibid.*

Evidence *held* insufficient to show commission of crime charged and nonsuit should have been granted. *S. v. Yancey*, 313.

CRIMINAL LAW—*Continued.*

Motion to nonsuit in a criminal prosecution is properly denied if there is any competent evidence to support the allegations of the bill of indictment, considering the evidence in the light most favorable to the State, and giving it the benefit of every reasonable inference fairly deducible therefrom. *S. v. Gentry*, 643.

§ 52b. Directed Verdict and Peremptory Instructions.

It is improper for the court to charge the jury that upon defendant's own testimony he is guilty of the offense charged and that the jury must return such verdict, and thereupon to sentence defendant. *S. v. Daniel*, 536.

§ 53a. Form and Sufficiency of Instructions in General.

The chief purposes of the charge are clarification of the issues, elimination of extraneous matters, and declaration and application of the law arising upon the evidence. G. S., 1-180. *S. v. Jackson*, 656.

§ 53c. Applicability to Courts and Evidence.

Charge *held* not supported by evidence and constituted prejudicial error. *S. v. Alston*, 555.

§ 53d. Instructions—Statement of Evidence and Application of Law Thereon.

When defendant pleads not guilty, and State introduced testimony of alleged confession made by defendant, it is error for court to assume the testimony is true and charge that defendant had admitted killing with deadly weapon. *S. v. Snead*, 37.

An instruction that if the jury is satisfied beyond a reasonable doubt that defendant is guilty of reckless driving to convict him, otherwise to acquit him, is insufficient in a prosecution under G. S., 20-140, to meet the requirements of G. S., 1-180, since it fails to explain the law or apply the law to the facts as the jury should find them to be. *S. v. Flinchem*, 149.

Exceptions to the manner in which the court stated the testimony, not brought to the court's attention, cannot be sustained when it appears that the court, though it may not have used the exact language of the witnesses, fairly stated the substance of their testimony and no harm or prejudicial effect to defendant's cause is discernible. *S. v. Edwards*, 153.

Defendants introduced evidence that deceased was a man of violent character. *Held:* An instruction during the trial to the effect that such evidence was competent upon the plea of self-defense, without any instruction in the charge or elsewhere applying such evidence to the question of defendants' reasonable apprehension of death or great bodily harm from the attack which their evidence tended to show deceased had made on them, is insufficient to meet the requirements of G. S., 1-180, notwithstanding the absence of a request for special instructions. *S. v. Riddle*, 251.

Where the evidence as against each of the several defendants charged is not identical, the trial court should submit the question of the guilt or innocence of each separately, and an instruction which requires the jury either to convict all defendants or to acquit all, is reversible error. *S. v. Massengill*, 612.

The action of the trial court in prefacing a special instruction with a charge that the jury should disregard previous instructions if and to the extent of inconsistency with the instructions about to be given, is not approved, but in the instant case *it is held* not prejudicial. *S. v. Jackson*, 656.

CRIMINAL LAW—*Continued.*

§ 53e. Charge on Circumstantial Evidence.

In the absence of a request, it is not error for the court to fail to define circumstantial evidence and to instruct the jury how to evaluate such evidence, the general charge as to the burden and *quantum* of proof required being without error. *S. v. Warren*, 22.

But when aptly requested, court must charge that circumstantial evidence must exclude every reasonable hypothesis of innocense in order to sustain conviction. *Ibid.*

§ 53f. Expression of Opinion on Evidence in Charge.

The use of the phrases "tending to show" or "tends to show" in arraying the evidence for the State, the same expressions being used in reciting defendant's testimony, does not constitute an expression of opinion on the facts. *S. v. Jackson*, 656.

The fact that the court necessarily consumes more time in stating the contentions of the State because of the greater volume of the State's testimony is not ground for exception, it being incumbent upon defendant to call the court's attention at the time to any asserted failure to fully and accurately state his contentions or if he desires any amplification thereof. *S. v. Anderson*, 720.

§ 53g. Duty to Charge on Question of Guilt of Less Degree of Crime Charged.

Where there is evidence of defendant's guilt of a less degree of the crime included in the bill of indictment, defendant is entitled to have the question submitted to the jury. G. S., 15-170. *S. v. Childress*, 208.

Where evidence tends to show commission of crime charged, and there is no evidence of guilt of a less degree of the crime, the court properly refuses to submit the question of defendant's guilt of a less degree. *S. v. Forshee*, 268.

Where all the evidence tends to show that defendant feloniously took money from the person of prosecuting witness by violence and against his will through the use or threatened use of firearms, the court properly limits the jury to a verdict of guilty of robbery with firearms or a verdict of not guilty, there being no evidence warranting the court in submitting the question of defendants' guilt of less degrees of the crime. *S. v. Bell*, 659.

§ 53i. Charge on Credibility of Defendant as Witness.

An instruction, after charging that the jury were to consider defendant's evidence of good character as substantive evidence, that the jury then "ought" to consider it, rather than "were" to consider it, on the question of defendant's credibility as a witness in his own behalf, *is held* without prejudicial error. *S. v. McMahan*, 293.

§ 53k. Charge on Contentions of Parties.

Where the court gives the State's contentions on a particular aspect of the case it is reversible error for the court to fail to give defendant's contentions arising upon his evidence upon the same aspect. *S. v. Correll*, 28; *S. v. Alston*, 555.

Defendant's exceptions to the court's statement of his contentions *held* without merit. *S. v. Bryant*, 641.

CRIMINAL LAW—*Continued.*

§ 53m. Recalling Jury and Additional Instructions.

In this prosecution for carnal knowledge of a girl between 14 and 16 years of age, the period of gestation was relevant solely as bearing upon the accuracy of prosecutrix' testimony as to the time of the intercourse, which she testified resulted in pregnancy. In response to a juror's question, the court charged that there was no law on the period of gestation and no medical evidence had been introduced in regard thereto, but later recalled the jury and instructed them that as a matter of common knowledge the period of gestation is ten lunar months or 280 days. *Held:* The court merely corrected an inadvertence and the jury was neither confused nor misled. *S. v. Bryant*, 641.

§ 54b. Form, Sufficiency and Effect of Verdict.

Where two separate indictments are consolidated for trial and the jury returns a verdict of guilty as to one of them without saying anything in respect of the other charge, it is equivalent to a verdict of not guilty on such other charge. *S. v. Choate*, 491.

§ 56. Arrest of Judgment.

Motions in arrest of judgment in criminal actions are allowable only when some error or fatal defect appears on the face of the record. *S. v. Foster*, 72.

Where the warrant upon which defendant is tried is fatally defective, motion in arrest of judgment will be allowed even though interposed for the first time in the Supreme Court on appeal. *S. v. Phillips*, 446.

§ 57d. Motion for New Trial on Ground That Defendant Was Deprived of Constitutional Rights.

Upon defendant's motion for a new trial on the ground that he was deprived of his constitutional rights in the trial resulting in his conviction, the burden is upon him to show affirmatively facts inducing the legal conclusion that his constitutional rights in the respects alleged were denied him, the presumption being in favor of the regularity of the trial. *S. v. Chesson*, 259.

Defendant was convicted of a crime less than a capital felony. Defendant moved for a new trial on the ground that want of counsel, the speed with which the trial was conducted to its conclusion, coupled with defendant's youth and inexperience, amounted to a denial of due process of law. *Held:* Upon the facts found disclosing that defendant made no request for counsel, and that the trial was in the regular course of practice of the courts having jurisdiction, the denial of defendant's motion was without error. *Ibid.*

§ 60b. Judgment and Sentence—Conformity to Verdict.

Where, in a prosecution for driving while under the influence of intoxicants, the court withdraws a juror and orders a mistrial and continues the case, the court is without authority to order that defendant's right to drive an automobile upon the highways be revoked for the period of continuance. *S. v. Barrier*, 751.

§ 62f. Suspended Judgments and Executions.

No appeal lies to the Superior Court from judgment of the general county court executing a suspended sentence on condition broken, review being solely by *certiorari*. *S. v. Peterson*, 736.

CRIMINAL LAW—*Continued.*

§ 67a. Jurisdiction of Supreme Court.

Where the Superior Court has no jurisdiction, the Supreme Court can acquire none by appeal, and when lack of jurisdiction is apparent, the appeal will be dismissed on plea, suggestion, motion, or *ex mero motu*. *S. v. Peterson*, 736.

§ 76a. Certiorari to Preserve Right to Review.

Certiorari will not be granted on the ground that due to illness and a misunderstanding on the part of the court reporter she was unable to prepare a proper transcript within the time allowed for service of statement of case on appeal, since there is a failure to show merit or to negative laches. *S. v. Parrott*, 752.

§ 77d. Conclusiveness and Effect of Record.

The record imports verity and the Supreme Court is bound thereby. *S. v. Snead*, 37; *S. v. Weaver*, 39.

§ 78e (1). Form and Requisites of Objections and Exceptions to Charge.

An exception for failure of the court to charge upon the question of manslaughter, without exception to any portion of the charge or exception under G. S., 1-180, on the ground that the court failed to explain the law arising on the evidence and pointing out wherein the court failed to comply with the statute, does not properly present the question for review. *S. v. Brooks*, 68.

An exception to the charge "as a whole" is unavailing as an unpointed exception. *S. v. Anderson*, 720.

§ 78e (2). Necessity That Objection to Charge Be Brought to Trial Court's Attention.

Any error or omission in the statement of the evidence on a subordinate feature of the case, or in the contentions of the parties, must be called to the attention of the court in time for correction. *S. v. Dawson*, 85.

Ordinarily, misstatements in recapitulating the evidence or in stating defendant's contentions must be brought to the attention of the trial court in time to afford opportunity for correction. *S. v. Gentry*, 643.

A misstatement made in stating the contentions of the State that defendant had admitted a witness to be a fingerprint expert, will not be held for error on defendant's exception when the misstatement is not called to the court's attention at the time. *S. v. Hooks*, 689.

§ 79. Briefs—Abandonment of Exceptions by Failing to Discuss.

Exceptions not set out in the brief and in support of which no argument is given, are deemed abandoned. *S. v. Randolph*, 228.

§ 80b (4). Dismissal for Failure to Prosecute Appeal.

Where defendant fails to serve his case on appeal within the time allowed, no extension of time having been granted, the motion of the Attorney-General to docket and dismiss will be allowed, but where the defendant stands convicted of a capital felony this will be done only after examination of the record proper fails to disclose error. *S. v. Breeze*, 352.

§ 80b (5). Dismissal for Incomplete or Defective Record.

The record in this case, while somewhat deficient and wanting in clarity, *is held* to contain sufficient matter to give the Supreme Court jurisdiction of the appeal, and the State's motion to dismiss is overruled. *S. v. Daniel*, 536.

CRIMINAL LAW—*Continued.*

§ 81a. Matters Reviewable—Discretionary Matters.

The discretionary denial of motions for continuance and for change of venue of for jury from another county, is not reviewable in the absence of abuse of discretion. *S. v. Culberson*, 615.

§ 81b. Presumptions and Burden of Showing Error.

Upon review by *certiorari* of the denial of defendant's motion for a new trial on the ground that he was denied due process of law in the trial resulting in his conviction, it will be presumed that the trial court correctly instructed the jury as to the facts of the case, in the absence of suggestion to the contrary. G. S., 1-180. *S. v. Hedgbeth*, 259.

The charge of the court will be deemed without error when it is not set out in the record. *S. v. Whitaker*, 352; *S. v. Wooten*, 628.

Where the record on appeal fails to show what testimony was before the grand jury or what the witnesses who appeared before that body knew about the charge under investigation, defendant's exceptions relating to the denial of his motions to quash on the ground that there was no competent evidence before the grand jury, cannot be sustained. *S. v. Choate*, 491.

The record disclosed that a State's witness testified on cross-examination that he saw defendant "make a run and her hand go that way." The court interposed, "What do you mean by 'make a run'? Give a step like that and hit him?" A. "He got up, she took a step and hit him." *Held:* The record discloses only the words of the court, and does not affirmatively disclose any demonstrative action by the court constituting an expression or intimation of opinion on the evidence forbidden by law, and defendant's exception thereto cannot be sustained. *S. v. Gardner*, 567.

§ 81c (2). Harmless and Prejudicial Error in Instructions.

Where the charge is free from prejudicial error when construed contextually, assignments of error thereto will not be sustained. *S. v. Dawson*, 85; *S. v. Edwards*, 153; *S. v. Ensley*, 271; *S. v. Phillips*, 595; *S. v. Culberson*, 616; *S. v. Holbrook*, 620.

Defendant cannot complain of instruction favorable to him. *S. v. DeBerry*, 147.

The action of the trial court in prefacing a special instruction with a charge that the jury should disregard previous instructions if and to the extent of inconsistency with the instructions about to be given, is not approved, but in the instant case *it is held* not prejudicial. *S. v. Jackson*, 656.

§ 81c (3). Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

Where it does not appear what the answer of the witness would have been, an exception to the action of the trial court in sustaining the adverse party's objection to the question cannot be sustained, since it cannot be determined from the record that the exclusion of the testimony was prejudicial. *S. v. Webb*, 304.

Withdrawal of prejudicial evidence after it had been with jury overnight *held* not to have cured error in its admission. *S. v. Choate*, 491.

The State's witness testified that after the homicide defendant said, "she would have cut his damned head off if they had let her alone,—that she didn't care," and then, in response to a question by the solicitor as to whether defend-

CRIMINAL LAW—*Continued.*

ant expressed any remorse answered "Not any." *Held:* Conceding that defendant's objection to the question as to whether defendant expressed remorse should have been sustained, the testimony in regard thereto, when considered with the testimony immediately preceding, was not of sufficient prejudicial import to warrant a new trial. *S. v. Gardner*, 567.

Exception to the admission of evidence cannot be sustained when other evidence of like import is admitted without objection. *Ibid.; S. v. Anderson*, 720.

Defendant was charged with embezzlement of funds obtained by him as agent of the prosecuting witness to pay off a chattel mortgage on the witness' car. *Held:* The mortgagee being the only foreign corporation referred to by witnesses and that it repossessed the car because of default being a reasonable inference from the evidence, testimony of prosecuting witness to this effect is harmless, even though he did not give the name of the company and had no personal knowledge of the reason for repossession. *S. v. Gentry*, 643.

The admission of evidence corroborating the testimony of a witness as to a fact not controverted by defendant could not be prejudicial. *S. v. Hook*, 689.

§ 81c (4). Harmless and Prejudicial Error—Error Relating to One Count Only.

Where defendants are convicted on two separate charges, and the sentences thereon run concurrently, exception relating solely to the charge carrying the shorter sentence cannot be held prejudicial. *S. v. Edwards*, 153.

§ 81c (5). Error Cured by Verdict.

Error in failing to submit the question of defendant's guilt of a less degree of the crime is not cured by a verdict of guilty of a higher offense, since it cannot be known whether the jury would have rendered a milder verdict if permitted to do so. *S. v. Childress*, 208.

§ 81h. Review of Findings on Motions.

Where all the evidence is not sent up in response to *certiorari* to review the denial of defendant's motion for a new trial, it will be presumed, in the absence of a showing to the contrary, that a finding by the court hearing the motion was based on the evidence before it, notwithstanding the record evidence fails to contain all the supporting evidence. *S. v. Hedgbeth*, 259.

Upon defendant's motion for a new trial on the ground that he was denied due process of law, the allegations in the petition and affidavits are not conclusive but the findings of the court supported by evidence offered by defendant or the evidence offered by the State *contra*, are conclusive. *Ibid.*

§ 83. Determination and Disposition of Cause.

Cause remanded for finding of material facts sufficient for determination of defendants' plea in amnesty. *S. v. Foster*, 72.

DEATH.

§ 3. Nature and Grounds of Right of Action for Wrongful Death.

Right of action for wrongful death is solely statutory, G. S., 28-173, and the action must be asserted in strict conformity with the statute. *Webb v. Eggleston*, 574.

DEATH—*Continued.*

§ 4. Time Within Which Action for Wrongful Death Must Be Instituted.

The requirement that an action for wrongful death must be instituted within one year after such death is an integral part of the action in the nature of a condition precedent, and the lapse of the statutory time not only bars the remedy but destroys the liability. *Webb v. Eggleston*, 574.

It is incumbent upon plaintiff to show in evidence that his action for wrongful death was instituted within the time allowed. *Ibid.*

Where demurrer is sustained to the complaint in an action for wrongful death, with leave to plaintiff to amend, and an amended complaint is thereafter filed, the action is instituted for the purpose of applying the provisions of G. S., 28-173, from the date the amended complaint was filed, since the action could not be maintained on the original complaint. *Ibid.*

The fact that the amended complaint stating for the first time a cause of action for wrongful death, is filed more than one year after the death of plaintiff's intestate, may be taken advantage of by demurrer. *Ibid.*

DEDICATION.

§ 6. Revocation of Dedication.

In an action for damages for trespass and to enjoin further trespass upon an easement claimed by plaintiffs by dedication the burden is on plaintiffs to establish the property right asserted, and defendants are entitled to introduce the record of withdrawal of dedication executed pursuant to G. S., 136-96, as a release or extinguishment by estoppel of record from sources to which plaintiffs were a privity, notwithstanding the absence of allegation in their answer of such withdrawal from dedication. *Pritchard v. Fields*, 441.

DEEDS.

§ 6½. Revocation of Deeds of Gift.

A voluntary conveyance of property in trust to named beneficiaries for life with contingent limitation over to persons not *in esse*, is revoked as to such contingent limitation by proper deed executed by the trustee and surviving trustors within six months after the effective date of Ch. 437, Session Laws 1943, the deed of revocation being executed prior to the happening of the contingency upon which the limitation over was to vest. *Kirkland v. Deck*, 439.

§ 8. Effect of Registration.

A grantee in a deed given without consideration does not come under the protection of G. S., 47-18. *McRary v. McRary*, 714.

§ 12b. Power of Disposition.

Whether a conveyance of property in general terms or by general description constitutes a valid exercise of a power of disposition or appointment is to be determined in accordance with the general rule in respect to conveyances by deed, but is governed by statute, G. S., 31-43, in respect to the exercise of such power by will. *Schaeffer v. Haseltine*, 484.

§ 13a. Estates and Interests Created by Construction of Instrument.

Ordinarily, the premises and granting clauses designate grantee and the thing granted, and the *habendum* relates to the *quantum* of the estate, the granting clause being the very essence of the contract. *Artis v. Artis*, 754.

DEEDS—*Continued.*

Where the granting clause and the *habendum* convey the entire estate in fee simple, and the warranty is in harmony therewith, a clause in any other part of the instrument which undertakes to divest or limit the fee simple title will be rejected as repugnant to the estate and interest conveyed. *Ibid.*

The decisions construing G. S., 31-38, pertaining to the construction of wills, are pertinent in construing G. S., 39-1, pertaining to the construction of deeds, since the statutes are similar in wording and effect. *Ibid.*

§ 16a. Covenants and Stipulations in General.

Grantee in a deed poll, containing covenants and stipulations purporting to bind him, becomes bound for their performance, though he does not execute the deed, since he who takes the benefits of a contract must assume its burdens, or else bear the consequences attendant thereon. *Williams v. Joines*, 141.

§ 16c. Covenants and Agreements to Support Grantor.

The parties entered into an agreement under which defendants were to care for and maintain a home for plaintiff the remainder of his natural life, operate plaintiff's businesses and turn over to plaintiff a percentage of the profits, in consideration, *inter alia*, of plaintiff's execution of a deed to defendants, deposited in escrow under the agreement. The contract provided for arbitration in the event the parties decided, for any cause, to terminate the contract and cancel the deed. *Held:* The provision for arbitration does not empower either party acting alone to terminate the contract and force settlement of all differences by arbitration, but relates only to differences which might arise in a final settlement or accounting in the event the parties mutually agree to terminate the contract and cancel the deed. *Cox v. Hinshaw*, 102.

In an action for breach of conditions in a contract under which defendants were to care for and provide a home for plaintiff in consideration of plaintiff's conveyance of realty to defendants, testimony of plaintiff as to the condition of his room subsequent to the time plaintiff quit the premises for alleged condition broken, is incompetent in the absence of evidence that plaintiff had in the meantime requested that the room be put in order and made available to him. *Ibid.*

§ 16d. Covenants to Reconvey.

A clause in the deed which provides for a reconveyance on the conditions stated, nothing else appearing, would seem to stamp the transaction as a conditional sale and not a mortgage. *Williams v. Joines*, 141.

In this action by grantors to enforce resale and reconveyance of the land pursuant to stipulation contained in the deed poll, defendant grantee pleaded the statute of frauds. G. S., 22-2. *Held:* The deed was competent in evidence as constituting the written contract between the parties, irrespective of whether the statute of frauds precludes the remedy of specific performance, and the judgment of involuntary nonsuit suffered by plaintiffs upon the exclusion of the deed from evidence is reversed. *Ibid.*

§ 18. Proceedings to Establish Title Under Torrens Law.

A proceeding under the Torrens Law is a proceeding *in rem*. *Davis v. Morgan*, 78.

DIVORCE.

§ 1b. Grounds for Divorce from Bed and Board—Abandonment.

If the wife is compelled to leave the home of the husband because he offers such indignities to her person as to render her condition intolerable and life burdensome, his acts constitute in law an abandonment of the wife by the husband. *Barwick v. Barwick*, 109; *Eggleston v. Eggleston*, 668.

§ 1d. Grounds for Divorce from Bed and Board—Cruelty.

Acts of a husband which will constitute such indignities to the person of his wife as to render her condition intolerable and life burdensome largely depend upon the facts and circumstances in each particular case. *Barwick v. Barwick*, 109.

§ 2½b. Condonation.

While condonation obliterates the conduct condoned as a cause for divorce, a subsequent renewal of the misconduct may be such as to revive the former offense and render it competent for the consideration of the jury upon the issue. *Eggleston v. Eggleston*, 668.

§ 4. Conditions Precedent—Residence.

Plaintiff must be physically present in this State and have the intention of making his residence here a permanent abiding place in order to be domiciled here within the meaning of the statute making residence in this State for six months a jurisdictional prerequisite to the institution of an action for divorce on the grounds of two years separation. *Bryant v. Bryant*, 287.

§ 5d. Pleadings in Actions for Alimony Without Divorce.

Where the complaint in an action for alimony without divorce sufficiently alleges a cause of action on the ground that defendant is a drunkard, the fact that the causes alleged on the grounds of cruelty and intolerable treatment, G. S., 50-7 (3) (4), are fatally defective in failing to allege with sufficient particularity the circumstances and that defendant's acts were without adequate provocation on her part, is not ground for demurrer, the result being only that plaintiff may not rely upon the defective causes without amendment in the face of timely objection by defendant. *Best v. Best*, 9.

Complaint *held* sufficient to allege cause of action for alimony without divorce on ground of constructive abandonment and on ground that husband had offered such indignities to her person as to render her condition intolerable and life burdensome. *Barwick v. Barwick*, 109.

§ 9d. Instructions in Actions for Alimony Without Divorce.

Where plaintiff's evidence discloses assaults and threats over a period of years, an instruction which limits the jury, in determining the issue of abandonment, to the last incident culminating in the wife's leaving the domicile of the husband, must be held for error, since the plaintiff has the right to rely upon the cumulative effect of the years of mistreatment upon this issue. *Eggleston v. Eggleston*, 668.

In an action for alimony without divorce, an instruction which fails to enlighten the jury as to the character of the provocative words or acts on the part of plaintiff which would excuse the conduct of defendant is prejudicial to plaintiff on the question of abandonment and the question of his cruel and inhuman treatment. *Ibid.*

DIVORCE—*Continued.*

§ 10. Verdict and Decree.

Where defendant enters an appearance and files answer in a divorce action instituted in another state, she is bound by the divorce decree entered, and the decree is valid here under the full faith and credit clause of the Federal Constitution, Art. IV, sec. 1. *McRary v. McRary*, 714; *In re Biggers*, 743.

§ 12. Alimony Pendente Lite.

The amount of allowance for reasonable subsistence and counsel fees *pendente lite* in an action for alimony without divorce, G. S., 50-16, is within the sound discretion of the judge hearing the motion and having jurisdiction thereof. *Best v. Best*, 9; *Barwick v. Barwick*, 109.

If the complaint sufficiently alleges any one of the grounds for alimony without divorce, it is sufficient to sustain an order for alimony *pendente lite*. *Barwick v. Barwick*, 109.

A temporary order for subsistence and attorneys' fees upon proper findings by the court do not affect the controverted issues of fact which must be determined by the jury upon the evidence in the action. *Ibid.*

Where, upon the wife's motion in the cause to require defendant to provide support for the minor child of the marriage, made after decree of absolute divorce, the husband files affidavit denying paternity, and at his instance the issue is transferred to the civil issue docket, the trial court has the discretionary power to order defendant to provide for support of the child and counsel fees *pendente lite*, and the presumption of legitimacy arising from the birth of the child in wedlock obtains in her favor in passing upon the question. The sufficiency of the affidavit to raise the issue and the correctness of the order transferring the issue to the civil issue docket are not presented by exception. *Winfield v. Winfield*, 256.

Averment that defendant had obtained an absolute divorce from plaintiff suing for alimony without divorce, is a matter of defense to the cause of action but does not preclude the court from allowing alimony *pendente lite* and counsel fees. *Hare v. Hare*, 740.

§ 14. Alimony Without Divorce. (Pleadings in action for alimony without divorce see *supra* § 5d.)

An action for alimony without divorce, G. S., 50-16, lies in favor of the wife if the husband (1) shall separate himself from his wife and fail to provide her and the children of the marriage with necessary subsistence or (2) if he shall be a drunkard or spendthrift or (3) if he be guilty of misconduct or acts which would be grounds for divorce either absolute or from bed and board. *Best v. Best*, 9.

When the husband by cruel treatment renders the life of the wife intolerable or puts her in such fear for her safety that she is compelled to leave the home, the abandonment is his, and is sufficient ground for alimony without divorce. *Barwick v. Barwick*, 109; *Eggleston v. Eggleston*, 668.

§ 17. Jurisdiction and Procedure to Award Custody and Compel Support of Children of the Marriage.

Where the wife institutes suit for divorce, her remedy to require defendant to provide support for the minor child of the marriage is by motion in the cause, which may be filed either before or after final judgment. G. S., 50-13. *Winfield v. Winfield*, 256.

DIVORCE—*Continued.*

After decree for absolute divorce entered by the Recorder's Court of Nash County, the court entered an order awarding the custody of the child of the marriage. G. S., 50-13. Defendant appealed to the Superior Court. *Held:* If the Recorder's Court had jurisdiction to enter the order, the hearing in the Superior Court on appeal was *de novo*, while if the jurisdiction of the Recorder's Court did not include jurisdiction to award the custody of the child (Session Laws 1943, chap. 768), the petition may be considered an application to the judge of the Superior Court and the Superior Court had jurisdiction to enter a different order awarding the custody of the child, since in no event was its jurisdiction derivative. *Brake v. Brake*, 609.

Whether a decree awarding the custody of children of the marriage, entered by a court of another state upon its decree for divorce, is binding here depends upon whether the children were and are residents of such other state or were or have become residents of this State, and when the fact of their residence does not appear of record the cause will be remanded to the Superior Court. *In re Biggers*, 743.

§ 19. Determination and Decree Awarding Custody of Minor Children.

In awarding custody of minor children as between the parents in a divorce action, the welfare of the child is the paramount consideration which must guide the court in exercising its discretionary power. G. S., 50-13. *Brake v. Brake*, 609.

DOMICILE.

To establish a domicile, there must be a residence, and the intention to make it a home or to live there indefinitely. *Bryant v. Bryant*, 287; *Owens v. Chaplin*, 705.

The fact that a person obtains automobile license and ration cards in another state, giving such state as his residence, while competent on the question of domicile, is not conclusive. *Bryant v. Bryant*, 287.

DOWER.

§ 3. Conveyancing by Husband of Lands Subject to Dower.

Alienation by the husband alone passes his interest in the estate but does not affect the wife's dower right except in respect to mortgages or deeds of trust to secure purchase money, G. S., 30-6, and where the husband has conveyed the home site without joinder of the wife, the conveyance does not deprive her of her dower, either inchoate or consummate, and the grantee takes title subject to the dower right of the wife therein should she survive the husband. G. S., 30-8. *Artis v. Artis*, 754.

The husband, without joinder of his wife, conveyed the home site to his wife and one of his sons. In special proceedings for partition instituted after the husband's death, it was determined that the wife was entitled to dower in all of his lands but no dower was actually allotted to her, and the lands other than the home site were partitioned among all the children. It was found as a fact that the value of the home site did not exceed the value of one-third interest in all the lands of which the husband died seized. *Held:* The allotment to the wife of a life estate in the home site as and for the value of her dower is without error, since the grantees in the deed took subject to dower. *Ibid.*

DOWER—*Continued.*

§ 7. Nature and Incidents of Dower Consummate in General.

The widow is entitled to dower in one-third in value of all lands, tenements and hereditaments whereof her husband was seized and possessed at any time during coverture, the dower to include the dwelling house in which the husband usually resided. *Artis v. Artis*, 754.

§ 8a. Procedure for Allotment of Dower.

The equitable jurisdiction of the Superior Court over dower has not been taken away by giving cognizance of such matters to the Clerk of the Superior Court. *Artis v. Artis*, 754.

DRAINAGE DISTRICTS.

§ 1. Establishment and Modification.

The statutes authorizing the creation, maintenance and improvements of drainage districts provide flexible procedure which may be modified and molded by decrees from time to time to promote the beneficial objects sought by the creation of the district, subject to the restrictions that there should be no material change or any change that would throw additional costs upon landowners except to the extent of benefit to them. *In re Drainage District*, 248.

The correct procedure to secure additional authority for proper maintenance and improvements in a drainage district is by motion or petition in the original cause. *Ibid.*

§ 5. Nature and Validity of Assessments.

Where proposed improvements and repairs will primarily benefit lands embraced in one section of a drainage district and would be of no substantial benefit to landowners in another section thereof, the drainage commissioners have power under statutory authority to issue bonds and make assessments applicable only to the section benefited. G. S., Chap. 156, Session Laws of 1947, Chap. 732. *In re Drainage District*, 248.

EASEMENTS.

§ 5. Extent of Right and Interference.

Plaintiff is the owner of an easement, acquired by condemnation, 50 feet wide, for the purpose of erecting and maintaining electric power lines, with right of access for maintenance and inspection. The fee remained in the owner of the servient tenement for all purposes not inconsistent with the easement. Defendants are the purchasers for value of the fee. Plaintiff offered evidence that defendants had erected large permanent structures on the land, the top of one of such structures being within seven or eight feet of plaintiff's heavily charged transmission lines, creating a special hazard. *Held:* Plaintiff's evidence should have been submitted to the jury on the issue of whether the structures constitute an obstruction and interference to the exercise of plaintiff's easement. *Light Co. v. Bowman*, 319.

EJECTMENT.

§ 4. Jurisdiction of Summary Ejectment.

Courts of justices of the peace do not have exclusive original jurisdiction of actions in summary ejectment but the Superior Courts have concurrent

EJECTMENT—*Continued.*

jurisdiction of such actions, G. S., 7-63, and therefore in a possessory action against a tenant wrongfully holding over, instituted in the Superior Court, defendant's motion to dismiss for want of jurisdiction is properly overruled whether the action be regarded as one to recover possession of the land or a summary proceeding in ejectment. G. S., 42-28. *Stonestreet v. Means*, 113.

A magistrate has jurisdiction of proceedings in summary ejectment only if there is a contract of tenancy creating the relationship of landlord and tenant and if defendant holds over after the expiration of the term, and the remedy does not extend to a tenant at sufferance or at will. *Goins v. McLoud*, 655.

§ 7. Sufficiency of Evidence and Nonsuit in Summary Ejectment.

In an action in summary ejectment on the ground that lessee had forfeited the lease by nonpayment of rent, nonsuit will be entered upon failure of proof of forfeiture as set out in the complaint. *Mills, Inc., v. Veneer Co.*, 115.

In an action in summary ejectment proof of notice given the 14th of the month to quit the premises on or before the first of the following month is insufficient to show the statutory notice terminating the term. G. S., 42-14, when it appears that the original occupancy was taken on the 18th of the month and plaintiff offers no evidence as to the date of the month the term began or when the monthly rentals became due. G. S., 42-26, and upon failure also of proof of plaintiff's averment of nonpayment of rent, defendant's motion to nonsuit is allowed in the Supreme Court. G. S., 1-183. *Stafford v. Yale*, 220.

§ 9. Appeal to Superior Court in Summary Ejectment.

The jurisdiction of the Superior Court on appeals in summary ejectment is derivative, and where the jury, upon conflicting evidence, in a trial free from error, finds that defendant did not enter into possession as tenant of plaintiff, judgment for defendant is not error. *Goins v. McLoud*, 655.

§ 15. Burden of Proof in Actions in Ejectment.

Answer in a possessory action denying plaintiffs' title imposes the burden of proof on plaintiffs of showing title in themselves. *Teel v. Johnson*, 155.

§ 17. Sufficiency of Evidence and Nonsuit in Actions in Ejectment.

In an action for possession of real property, plaintiffs' evidence of deed to themselves and *mesne* conveyances covering a period of 12 years, without evidence of title by adverse possession, or a common source of title, is insufficient to overrule defendants' motion to nonsuit. *Teel v. Johnson*, 155.

§ 20. Damages, Rents and Profits.

Where, in an action in ejectment, defendants disclaim all right and title to a part of the *locus*, plaintiffs are entitled to recover the reasonable rental value of that part for the three years next preceding the institution of the action. *Hughes v. Oliver*, 680.

ELECTION OF REMEDIES.

§ 2. Between Rescission and Action for Fraud.

Plaintiff alleged that during plaintiff's minority, her mother purchased certain property with funds of plaintiff and gave a deed of trust thereon. The deed of trust was foreclosed. *Held:* Plaintiff's suit to recover damages upon allegations of fraudulent conspiracy to extinguish her property rights is not an election of remedies barring her subsequent action to recover the property

ELECTION OF REMEDIES—*Continued.*

upon the ground of a resulting trust, since the action to declare a resulting trust is not an action to rescind, and is not inconsistent with the action to recover damages for the fraud. *Randle v. Grady*, 159.

ELECTIONS.

§ 1. Right of Suffrage and Qualifications of Elections in General.

The General Assembly is without power to prescribe qualifications for voters different from those found in the Constitution, and the meaning of the term "residence" within the purview of N. C. Constitution, Art. VI, sec. 2, is a judicial question and cannot be made the matter of legislative construction. G. S., 163-25 (d) (f). *Owens v. Chaplin*, 705.

§ 2f. Qualification of Electors—Residence.

Residence as a prerequisite to the right to vote in this State within the purview of N. C. Constitution, Art. VI, sec. 2, is synonymous with domicile, which denotes a permanent dwelling place to which the person, when absent, intends to return. *Owens v. Chaplin*, 705.

Domicile, once established, cannot be lost until a new one is acquired, and therefore where an elector is a resident at the time of registration he is entitled to vote in the precinct of his residence unless prior to the election he abandons his residence here and acquires a new domicile by moving to another place with intention of making it his permanent home. *Ibid.*

Uncontroverted testimony discloses that electors whose votes were challenged on the ground of nonresidence, left their homes and moved to another state or to another county in this State for temporary purposes, but that at no time did they intend making the other state or the other county in this State a permanent home, is insufficient to support a finding that they had lost their domicile in the county for the purpose of voting. *Ibid.*

§ 8. Duties and Authority of County Board of Elections.

The fact that the Chairman of a County Board of Elections delivers absentee ballots in person to the voters at their temporary residences outside the boundaries of the State, and that the voters deliver the votes in the sealed containers to him in person instead of mailing them, G. S., 163-58, is not sufficient, standing alone, to vitiate the votes. *Owens v. Chaplin*, 705.

§ 11b. Preliminary Procedure for Absentee Voting.

Where the evidence supports the findings that certain absentee voters were not sworn, the rejection of their ballots is proper. *Owens v. Chaplin*, 705.

The fact that the oaths of absentee voters were not taken by them upon the Bible but were taken with uplifted hands, does not invalidate their votes. *Ibid.*

The fact that the oaths of absentee voters were not taken by them upon the Bible but were taken with uplifted hands, does not invalidate their votes. *Ibid.*

The interest of the Clerk of the Superior Court in his own re-election, standing alone, does not disqualify him from administering oaths to absentee voters, G. S., 163-57; G. S., 163-58, administering the oaths being ministerial and not judicial. *Ibid.*

The fact that the Chairman of the County Board of Elections, in company with candidates in the election, delivers absentee ballots to absentee voters at their temporary residences in another state is insufficient, of itself, to vitiate

their votes, there being no evidence remotely suggesting coercion, fraud or imposition. *Ibid.*

Persons in all respects qualified to cast absentee ballots will not be disfranchised for the mistake or even willful misconduct of election officials in performing their duties when the mistake or misconduct does not amount to coercion, fraud or imposition and it appears that the ballots expressed only the free choices of the electors themselves. *Ibid.*

§ 11c. Depositing, Mailing and Opening of Absentee Ballots.

The fact that the Chairman of a County Board of Elections delivers absentee ballots in person to the voters at their temporary residences outside the boundaries of the State, and that the voters deliver the votes in the sealed containers to him in person instead of mailing them, G. S., 163-58, is not sufficient, standing alone, to vitiate the votes. *Owens v. Chaplin*, 705.

EMBEZZLEMENT.

§ 1. Nature and Elements of the Crime in General.

Persons undertaking, for a fee, to obtain chattel mortgage for purpose of refinancing loan *held* agent of mortgagor within meaning of embezzlement statute. *S. v. Gentry*, 643.

§ 2. Intent.

Fraudulent intent within the meaning of G. S., 14-90, is the intent of an agent to embezzle or otherwise willfully and corruptly use or misapply the property of the principal or employer for purposes other than those for which the property is held. *S. v. Gentry*, 643.

§ 7. Sufficiency of Evidence and Nonsuit.

The evidence tended to show that prosecuting witness requested defendant to refinance a chattel mortgage on the witness' automobile, that defendant agreed to do so for a fee, that defendant obtained cash from a finance company on a second chattel mortgage and notes executed by the witness or purported to have been executd by him, and advisd the witness that he had sent the money to pay off the prior mortgage, that the prior mortgage was not paid, and that defendant refused to reimburse the witness. *Held:* The evidence is sufficient to be submitted to the jury on the charge of embezzlement by defendant of funds received by him as agent of the prosecuting witness. *S. v. Gentry*, 643.

EMINENT DOMAIN.

§ 2. Right to, and Necessity for, Compensation.

The right to compensation for property taken under the power of eminent domain does not rest upon statute but has always obtained in this jurisdiction. *Lewis v. Highway Com.*, 618.

§ 21a. Limitations of Actions by Owner for Damages.

The requirement of G. S., 136-19, that actions for damages for the taking of a right of way for highway purposes where the owner and the Commission cannot agree upon the amount, must be commenced within six months from the completion of the project, is a statute of limitation rather than a condition precedent to the right of action. *Lewis v. Highway Com.*, 618.

EQUITY.

§ 3. Laches.

Laches is an equitable defense which is not ordinarily tenable in a court of law and on a legal demand, and in this action to recover the balance due on purchase price of potatoes the plea of laches *is held* unavailing. *Coppersmith v. Upton*, 545.

Plaintiff heirs attack foreclosure of a mortgage executed by their ancestor on the ground that the mortgagee purchased at his own sale. It appeared that plaintiffs with full knowledge of all the facts and with knowledge that defendant was placing valuale improvements on the property, waited more than twelve years to attack the foreclosure. The holding of the court that plaintiffs were estopped by their laches from maintaining the action is upheld. *Hughes v. Oliver*, 680.

ESTATES.

§ 5. Estates in Fee Simple.

A good title in fee simple is title to the whole property absolutely, and is necessarily marketable and unencumbered. *Lea v. Bridgeman*, 565.

§ 16. Joint Estates and Survivorship.

Under the proviso of the statute abolishing survivorship in personalty generally, a surviving partner is vested with title to the partnership estate for the purpose of settling the affairs of the partnership. G. S., 41-2. *Coppersmith v. Upton*, 545.

EVIDENCE.

§ 2. Judicial Knowledge of Judicial, Legislative and Executive Acts of This State.

The courts will take judicial knowledge of the terms of the Superior Courts. *Grady v. Parker*, 54; *S. v. Anderson*, 720.

And of the judges of the Superior Courts. *S. v. Anderson*, 720.

§ 3. Judicial Notice of Judicial, Legislative and Executive Acts of Other States.

Our courts will take judicial notice of the laws of a sister state. *Lewis v. Furr*, 89.

§ 5. Judicial Notice of Matters Within Common Knowledge.

It is a matter of common knowledge that .22 caliber rifles are small firearms three feet or more in length. *Williams v. Coach Co.*, 191.

Municipal public ways are commonly divided into sidewalks and streets with an intervening space, used as a matter of common knowledge for the location and maintenance of telephone and telegraph poles, traffic signs, fire hydrants, water meters and similar structures, and the maintenance of such objects or structures is not negligence unless they render the way unsafe for the respective purposes to which each portion is devoted. *Wood v. Tel. Co.*, 605.

Courts will take judicial notice of day of the week on which a particular date falls. *S. v. Anderson*, 720.

§ 18. Evidence Competent for Purpose of Corroborating Witness.

Testimony of statements made by plaintiff as to her physical condition and suffering after the injury in suit, is competent for the purpose of corroborating her testimony at the trial. *Humphries v. Coach Co.*, 399.

EVIDENCE—*Continued.*

§ 20. Character Evidence.

In a civil action, defendant's evidence of good character relates only to his credibility as a witness, and an instruction that it might also be considered as substantive evidence for defendant must *be held* for prejudicial error when it appears that it may have influenced the verdict of the jury. *Morgan v. Coach Co.*, 280.

§ 26. Similar Facts and Transactions.

In an action to recover for injury sustained from the internal explosion of a bottle of Coca-Cola, evidence that other bottles prepared by defendant under substantially similar conditions had exploded, is competent when accompanied by proof of substantially similar circumstances and reasonable proximity in time. *Davis v. Bottling Co.*, 32.

§ 30a. Photographs.

Where a photograph is used solely to explain testimony as to the damage to a car and not to depict the scene of the accident, the fact that the car had been moved from the scene at the time the photograph was taken does not render it incompetent. *Steelman v. Benfield*, 651.

§ 31½. Depositions.

Where the notary public taking a deposition seals same in an envelope, the fact that the attorney of the party offering the deposition in evidence brings same back with him to this State and drops it in the mail as requested by the notary, does not render the deposition incompetent. G. S., 8-71. *Randle v. Grady*, 159.

§ 36. Accounts, Ledgers, Records and Private Writings.

Objection to the admission in evidence of an itemized, verified statement attached to the complaint is untenable when the statement is not admitted as such but is admitted only after a witness competent to testify is examined and testifies of his own knowledge concerning the matters therein contained. *Owsley v. Henderson*, 224.

§ 38. Secondary Evidence of Lost or Destroyed Instruments.

Where a party offers evidence tending to show that pertinent bank records had been taken to court in connection with another prior action and that they could not be found upon diligent inquiry and search, he is entitled to introduce the portion of the agreed case on appeal in such prior action, as secondary evidence of the bank records. *Randle v. Grady*, 159.

§ 39. Parol or Extrinsic Evidence Affecting Writings.

Where defendants allege that the contract between the parties contained the complete agreement in which all prior negotiations were merged, and do not seek reformation for fraud, it is error for the trial court to permit a defendant to read out portions of the contract to which he objected and to testify as to what those provisions should have been according to the proposals of plaintiff made prior to the execution of the agreement. *Cox v. Hinshaw*, 102.

In the absence of evidence of fraud or mistake, a grantee may not introduce evidence that his deed absolute in form, was intended to be a mortgage. *Poston v. Bowen*, 202.

EVIDENCE—*Continued.*

§ 41. Hearsay Evidence in General.

Where ownership of property is in issue, testimony of a witness of a statement of one of the parties, contrary to her position on the trial, that she owned the property, is hearsay and incompetent as substantive evidence. *Randle v. Grady*, 159.

§ 42c. Admissions by Parties.

Testimony of an admission by defendant that the accident in suit was his fault, made when he visited plaintiffs in the hospital after the collision, is competent as an admission against interest by a party to the action, and the fact that it was not a part of the *res gestæ* is immaterial. *Wells v. Burton Lines*, 422.

The extra-judicial admissions of one of several caveators, made without authority of the others, is not competent on behalf of propounders to contradict caveators' assertion of testamentary incapacity, since even though it be a declaration against interest and would be competent against the caveator making the admissions if he were the sole caveator, yet such caveator is not in privity with the others and has no joint interest with them in the matter in suit, and therefore the admissions are incompetent as against the other caveators. *In re Will of Cassada*, 548.

§ 42f. Admissions in Pleadings.

Plaintiff's alleged title under a State grant and under a judgment in a proceeding under the Torrens Law. At the trial, plaintiffs were allowed to amend by withdrawing all reference to the proceeding under the Torrens Law. *Held:* Defendant was entitled to introduce the portions of the original complaint which had been withdrawn in evidence as "evidential admissions" or declarations against interest, and the exclusion of such evidence is error. *Davis v. Morgan*, 78.

§ 43b. Declarations by Decedents.

In an action to establish a resulting trust, defendant's objection to testimony of a statement made by decedent that she owned the *locus* is untenable when the testimony discloses that defendant was present at the time and made no contrary statement. *Davis v. Davis*, 48.

§ 45. Opinion Evidence in General.

A patrolman not present at the time of the accident is not competent to give an opinion as to the speed of car involved in the collision. *Webb v. Hutchins*, 1.

EXECUTORS AND ADMINISTRATORS.

§ 9. Collection of Assets of Estate.

Where a note payable to decedent matures before his death, an action for the collection of such note must be instituted by the representative of the estate in his representative capacity. G. S., 28-176. *Cannon v. Cannon*, 211.

A foreign executrix cannot maintain an action in the courts of this State against a debtor of the estate residing here to recover on the debt, even though the debt be evidenced by a note, maturing prior to testator's death, payable to testator in the state of his residence and of the appointment of the executrix. *Ibid.*

A debt is an asset where the debtor resides even though a note has been given therefor, without regard to the place where the note is held or where it is payable, and therefore the debt constitutes a sufficient asset upon which to base a proceeding for the appointment of an ancillary administrator in the state of the debtor's residence. *Ibid.*

§ 15d. Claims for Personal Services Rendered Deceased.

Recovery cannot be had upon *assumpsit* or *quantum meruit* for personal services rendered in reliance upon an oral contract to devise when the action is instituted more than three years after the death of the promissor and the statute of limitations is pleaded in bar. G. S., 1-52. *Dunn v. Brewer*, 43.

But cause of action does not accrue until death, and action begun within three years of promissor's death is not barred. *Stewart v. Wyrick*, 429.

A parol contract to devise realty in consideration of personal services is unenforceable under the statute of frauds, but where the services have been rendered in reliance upon the promise to devise, the law substitutes in place of the unenforceable promise a valid promise to pay the reasonable worth of the services, and recovery may be had upon *quantum meruit*, the mainspring of the statute of frauds being to prevent frauds and not to promote them. *Ibid.*

Where personal services are rendered and are knowingly and voluntarily accepted, the law, ordinarily, will imply a promise to pay their reasonable worth; except where the person rendering the services is so related to the beneficiary that the services will be presumed to have been rendered in obedience to the obligation of kinship, and even in those instances, the presumption may be refuted by proof of an agreement to pay or of facts and circumstances permitting the inference that payment was intended on the one hand and expected on the other. *Ibid.*

Evidence that deceased's daughter-in-law performed personal services for him in reliance upon his parol agreement to leave her all of his property by will is sufficient to overrule a demurrer to the evidence in her action against his estate, the method, but not the right, of recovery being dependent upon whether the agreement is within or without the statute of frauds. *Ibid.*

In an action to recover for personal services rendered deceased in reliance upon his verbal agreement to devise realty, the submission of the issue of damages in the form of the amount plaintiff is entitled to recover for "breach" of the contract, while incorrect, will not be held for reversible error when it appears the court instructed the jury to answer the issue in the amount they found the services reasonably to be worth, and the verdict indicates no misunderstanding on the part of the jury. *Ibid.*

Where recovery for breach of an alleged contract to devise and bequeath is precluded by the statute of frauds, evidence that plaintiff rendered personal services to deceased in reliance upon the agreement warrants the submission of the case to the jury upon implied *assumpsit* or *quantum meruit*, without amendment of the complaint. *Jamerson v. Logan*, 540.

FALSE IMPRISONMENT.

§ 1. Nature and Essentials of Right of Action.

Good faith of defendant in procuring the issuance of the warrant does not preclude the recovery of actual or compensatory damages for false imprisonment, proof of express malice not being required, since malice may be inferred

FALSE IMPRISONMENT—*Continued.*

from the willful and purposeful doing of an unlawful act injurious to another. *Caudle v. Benbow*, 282.

§ 2. Actions for False Imprisonment.

A complaint alleging the institution of a criminal action prompted by malice and the termination of the action by plaintiff's acquittal, and also that defendant cause plaintiff to be arrested on the warrant issued in the criminal action, is sufficient to state a cause of action for false arrest as well as malicious prosecution. *Caudle v. Benbow*, 282.

And when the evidence shows that the arrest was under an invalid warrant the trial court properly submits issues relating to false imprisonment in conformity with the evidence. *Ibid.*

An instruction to the effect that actual malice is prerequisite to the award of punitive damages, but that the jury might consider, among other things, lack of probable cause upon the question of actual malice, is without error. *Ibid.*

FALSE PRETENSE.

§ 2. Prosecutions for False Pretense.

Defendant was charged with obtaining a quantity of tobacco at a tobacco market by representing that another was his purchasing agent and that drafts drawn by such agent would be honored. *Held:* Under the terms of the indictment there must have been a positive misrepresentation by defendant, G. S., 14-100, and there being no evidence of such misrepresentation made by defendant, evidence of circumstances offered by the State for the purpose of corroborating its theory that defendant made such representations is feckless, and defendant's motion to nonsuit should have been allowed. *S. v. Yancey*, 313.

A warrant charging defendant with obtaining a money advance under promise to do certain work, and with failure to perform the work, without alleging that the advances were obtained with intent to cheat or defraud, is fatally defective. G. S., 14-104. *S. v. Phillips*, 446.

FOOD.

§ 6b. Liability of Manufacturer to Consumer—Competency of Evidence.

In an action to recover for injury sustained from the internal explosion of a bottle of Coca-Cola, evidence that other bottles prepared by defendant under substantially similar conditions had exploded, is competent when accompanied by proof of substantially similar circumstances and reasonable proximity in time. *Davis v. Bottling Co.*, 32.

§ 6c. Liability of Manufacturer to Consumer—Sufficiency of Evidence of Negligence.

The doctrine of *res ipsa loquitur* does not apply to the bursting of a bottle of Coca-Cola, and standing alone, it is insufficient to make out a case of actionable negligence. *Davis v. Bottling Co.*, 32.

Evidence that plaintiff was injured by the internal explosion or bursting of a bottle of Coca-Cola and that other bottles prepared by the same manufacturer within a reasonable proximity in time had in like manner unaccountably exploded, *is held* sufficient to make out a case of actionable negligence. *Ibid.*

FRAUDS, STATUTE OF.

§ 1. Purpose and Operation of Statute of Frauds in General.

Our statute of frauds affects not only the enforcement of contracts coming within its terms but also their validity. *Jamerson v. Logan*, 540.

A parol contract to devise realty in consideration of personal services is unenforceable under the statute of frauds, but where the services have been rendered in reliance upon the promise to devise, the law substitutes in place of the unenforceable promise a valid promise to pay the reasonable worth of the services, and recovery may be had upon *quantum meruit*, the mainspring of the statute of frauds being to prevent frauds and not to promote them. *Stewart v. Wyrick*, 429.

§ 2. Sufficiency of Writing and Signature of Party to Be Bound.

In an action to recover royalties on minerals mined, allegations that the individual defendant executed a written mining lease or contract, and that the corporate defendant was a silent partner and shared in the profits under the lease, is sufficient as against demurrer to allege liability on the part of the corporate defendant for obligations incurred under the contract. *Clapp v. Mills*, 78.

§ 3. Pleading of Statute.

Denial of the contract as alleged is sufficient to raise the defense of the statute of frauds, since it places the burden upon plaintiff of establishing the contract by competent evidence, and if the contract be within the statute, the writing itself is the only competent evidence to prove its existence. *Jamerson v. Logan*, 540.

§ 4. Estoppel and Waiver of Defense of Statute.

Defendant's failure to object to parol evidence offered to show the existence of the contract is not a waiver of his defense of the statute of frauds, *a fortiori* if the evidence admitted without objection does not tend to show the existence of the contract but tends only to support a recovery on implied *assumpsit*, since the denial of the contract casts the burden on plaintiff to establish his cause of action by legal evidence. *Jamerson v. Logan*, 540.

§ 10. Contracts to Convey or Devise.

Contract to devise realty comes within statute of frauds. *Dunn v. Brewer*, 43; *Stewart v. Wyrick*, 429.

An indivisible contract to devise real and personal property comes within the statute of frauds. *Jamerson v. Logan*, 540.

GAMING.

§§ 11, 12. Judgment and Forfeitures.

Sentence and fine imposed upon conviction of violating G. S., 14-291.1, is *in personam;* an order of confiscation entered under G. S., 14-299, is *in rem* and is no part of the personal judgment against the accused. *S. v. Richardson*, 426.

A defendant may comply with the personal judgment entered against him upon conviction of violating G. S., 14-291.1, and at the same time prosecute an appeal from order of confiscation entered under G. S., 14-299, whether embraced in the same judgment or not, but the failure to appeal the personal judgment, while not estopping him from further contesting the order of confiscation, forever precludes him from contesting the fact of guilt. *Ibid.*

HABEAS CORPUS.

§ 3. To Obtain Custody of Minor Children.

Habeas corpus will not lie at the instance of the father of an illegitimate child to obtain its custody and control from its mother. Neither G. S., 17-39, nor G. S., 50-13, is applicable. *In re McGraw*, 46.

Proceedings to obtain control of a minor child between persons with whom the child had been placed for adoption and welfare officers seeking to place the child with his family is not a proceeding under G. S., 17-3, to set the infant free but is a proceeding to fix and determine the right of custody. *In re Thompson*, 74.

Jurisdiction to determine the right of custody of an infant as between persons with whom the infant had been placed with a view to adoption and welfare officers seeking to place the infant with his family, is within the exclusive jurisdiction of the juvenile court, G. S., 110-21 (3), and writ of *habeas corpus* is inadvisedly issued by the Superior Court, but pending determination of the juvenile court, respondent should not surrender custody to a nonresident and no order should be entered until petitioners have had notice and an opportunity to be heard. *Ibid.*

In *habeas corpus* to determine the custody of a minor child as between husband and wife separated but not divorced, G. S., 17-39, the findings of the court that the best interests of the infant require that its custody be awarded its mother are sufficient to support the judgment in her favor, and an exception to the signing and entering of the judgment cannot be sustained. *In re Barwick*, 113.

A petition for review and modification of an order awarding custody of minor children as between the parents separated but not divorced, G. S., 17-39, and to have respondent attached for contempt for failure to comply with the order as originally entered, was dismissed for want of service of notice upon respondent. *Held:* The fact of dismissal, alone, does not preclude the court from considering a subsequent petition. *In re Biggers*, 743.

§ 8. Appeal and Review.

No appeal lies from the order of the court in proceedings in *habeas corpus* to determine the custody of a minor child as between persons who had obtained control of the child with a view to adoption and welfare officers seeking control of the child to place him with members of his family, review being solely by *certiorari*. *In re Thompson*, 74.

HOMICIDE.

§ 1c. "Deadly Weapon."

The deadly character of a weapon used in an assault may be inferred by the jury from the manner of its use and the injury inflicted, and evidence of slashes with a knife across the upper arm and lower back along the belt line, producing cuts requiring 16 stitches to close, is sufficient for the jury to infer that the knife was a deadly weapon. *S. v. Randolph*, 228.

§ 2. Parties and Offenses.

Where three prisoners conspire to escape, and contemplate as a part of the plan that one of them should attack the guard and another seize the guard's gun, and in the execution of the common design in accordance with the plan, the prisoner agreed upon does seize the gun and kills a guard in order to effectuate the escape, all are equally guilty, and the contention of the co-conspirators that they conspired only to commit an escape which is a misde-

meanor, G. S., 14-256, and therefore could not be guilty of more than manslaughter, is untenable since the killing was a natural and probable consequence of the conspiracy as formulated. *S. v. Brooks*, 68.

Where the State's evidence tends to show that defendants were the aggressors and acted in concert in making an armed attack, it is immaterial which one of them fired the shot inflicting the fatal wound. *S. v. Riddle*, 251.

§ 11. Self-Defense. (Instructions on, see hereunder § 27f.)

The surrounding facts and circumstances, and not defendant's belief, constitute the determinative factors as to whether defendant acted on the defensive and not as an aggressor. *S. v. Randolph*, 228.

A person is an aggressor if he enters the fight willingly in the sense of voluntarily and without lawful excuse. *Ibid.*

A person who is the victim of an unprovoked assault while on his own premises is not required to retreat before he can justify fighting in self-defense regardless of whether the assault is felonious or not. *S. v. Grant*, 522.

§ 16. Presumptions and Burden of Proof.

Plea of not guilty puts credibility of State's evidence in issue, including testimony of alleged confession by defendant, and it is error for court to assume testimony is true and charge that burden is on defendant to rebut presumptions arising from killing with deadly weapon. *S. v. Snead*, 37.

The rebuttable presumptions that the killing was unlawful and that it was done with malice do not arise from the mere fact a killing with a deadly weapon, but it is also necessary that the killing be intentional in order for the presumptions to obtain. *S. v. Childress*, 208.

The intensity of proof required to establish an intentional killing with a deadly weapon, where not admitted, is "beyond a reasonable doubt." The degree of proof required to rebut the presumption arising from an intentional killing with a deadly weapon, when established or admitted, is "to the satisfaction of the jury." *Ibid.*

§ 18. Dying Declarations.

A statement is competent as a dying declaration if declarant at the time he makes the statement is in actual danger of impending death and fully apprehends such danger, and death ensues. *S. v. Ensley*, 271.

Where declarant, mortally wounded, dies about 20 minutes after making a statement revealing his full apprehension of his condition and describing his assailant and denying provocation on his part for the assault, the statement is competent as a dying declaration. *Ibid.*

§ 19. Admissions.

Admission that defendant shot deceased is not an admission that defendant inflicted mortal injury. *S. v. Minton*, 15.

§ 22. Evidence Competent on Issue of Self-Defense.

Ordinarily, uncommunicated threats are not admissible in homicide cases, but where defendant offers evidence of self-defense, and testimony of threats made by deceased against him shortly before the fatal occurrence tend to throw light on the occurrence and have an explanatory effect on the plea of self-defense, such uncommunicated threats are competent and the exclusion of testimony thereof is reversible error. *S. v. Minton*, 15.

HOMICIDE—*Continued.*

Where defendant pleads self-defense, testimony as to the bloody condition of the room immediately after defendant's fatal attack on deceased is competent as bearing upon the character of the attack. *S. v. Gardner*, 567.

And, therefore, photographs of the room taken immediately after the fatal encounter are competent to illustrate the testimony of the witnesses. *Ibid.*

§ 25. Sufficiency of Evidence and Nonsuit.

Circumstantial evidence *held* insufficient to show that defendant was the perpetrator of the homicide. *S. v. Harvey*, 62; *S. v. Coffey*, 119.

When an intentional killing with a deadly weapon has been established, the law implies malice, and the State cannot be nonsuited. *S. v. Brooks*, 68.

Evidence *held* sufficient to sustain verdict of guilty of murder in the first degree. *S. v. Little*, 417.

Expert testimony that deceased died "as a result of a bullet wound, injuring the spinal cord, causing paralysis, general decline and malnutrition until his death" is sufficient evidence that the bullet wound caused death notwithstanding the elapse of some five months between the injury and death. *S. v. Culberson*, 615.

Evidence tending to show that defendant perpetrated or attempted to perpetrate the crime of arson upon a dwelling house and thereby proximately caused the deaths of the occupants, is sufficient to be submitted to the jury on the charge of murder in first degree. *S. v. Anderson*, 720.

§ 27a. Form and Sufficiency of Instructions in General.

In this homicide prosecution defendant pleaded self-defense. The evidence tended to show that defendant went to a social gathering with a loaded pistol in his pocket, that while there he got in an impromptu dice game with his uncle, another guest, and that his uncle lost and became greatly incensed and later moved to attack defendant with a loaded gun as defendant was sitting in his car waiting for his companions in order to leave, and that in the encounter his uncle fired twice and defendant fired once, inflicting fatal injury. It was not clear from the evidence as to which fired first. *Held:* An instruction to the effect that if defendant armed himself and went to the gathering with the intention of using the weapon if he got into a fight with deceased, and provoked a fight in which both used deadly weapons, defendant would be guilty of murder in the second degree, must be held for prejudicial error, since the instruction, although correct in itself, is not supported by the evidence. *S. v. Alston*, 555.

§ 27b. Instructions on Presumptions and Burden of Proof.

Testimony by defendant that he shot deceased does not support an instruction that there was an admission that defendant killed deceased with a deadly weapon. *S. v. Minton*, 15.

Defendant's plea of not guilty puts the credibility of the State evidence in issue, and where the defendant does not go upon the stand but the State introduces testimony of an alleged confession made by defendant that he killed deceased with a deadly weapon, it is error for the court to assume that the testimony is true and instruct the jury that the burden is upon defendant to rebut the presumption arising from a killing with a deadly weapon without predicating such instruction upon a finding by the jury of the requisite facts. *S. v. Snead*, 37.

HOMICIDE—*Continued.*

§ 27e. Charge on Question of Manslaughter.

A new trial is awarded in this case for that according to the record the court used the word "murder" rather than the word "manslaughter" in its charge upon the offense of manslaughter. *S. v. Weaver*, 39.

§ 27f. Instructions on Question of Self-Defense.

Defendant's evidence tended to show an assault made upon him at his place of business operated in his residence. *Held:* An instruction on the right of self-defense predicated solely upon a felonious assault and omitting to charge upon defendant's right to stand his ground in the case of a nonfelonious assault, is reversible error. *S. v. Minton*, 15.

Instruction *held* error in failing to charge upon defendant's evidence that he had abandoned fight and so notified adversary. *S. v. Correll*, 28.

Where the court charges the law on defendant's right of defense of himself or any member of his family against unprovoked assault, defendant cannot complain of a subsequent correct instruction, supported by the State's evidence, on the right of self-defense if it should be found by the jury that defendant provoked or willingly entered into the affray. *S. v. DeBerry*, 147.

The facts and circumstances surrounding the assault in this case, with defendant's testimony that as prosecuting witness opened the door of his cab and attempted to come on him with a tire tool, defendant pulled out his knife, opened it, and jumped out of his truck and met prosecuting witness in the street, *is held* to show that defendant entered the fight voluntarily and without lawful excuse, and therefore there was no error in the refusal of the trial judge to submit to the jury defendant's plea of self-defense. *S. v. Randolph*, 228.

Defendants introduced evidence that deceased was a man of violent character. *Held:* An instruction during the trial to the effect that such evidence was competent upon the plea of self-defense, without any instruction in the charge or elsewhere applying such evidence to the question of defendants' reasonable apprhension of death or great bodily harm from the attack which their evidence tended to show deceased had made on them, is insufficient to meet the requiremnts of G. S., 1-180, notwithstanding the absence of a request for special instructions. *S. v. Riddle*, 251.

Where the evidence shows that defendant was on his own premises, an instruction which predicates his right of self-defense upon a felonious assault being made upon him or, in the event of a non-felonious assault, his duty to retreat to the wall, must be held for prejudicial error. *S. v. Grant*, 522.

The evidence tended to show that defendant went to a social gathering with a loaded pistol, had an altercation with another guest, and, in an encounter in which each shot at the other, fatally wounded such other guest. *Held:* It was error for the court to give the State's contentions on this phase of the evidence without giving defendant's opposing contentions that the fact that defendant had a loaded pistol in his pocket would not deprive him of his legal right of self-defense if he made no unlawful use of the pistol prior to the attack upon him by deceased. *S. v. Alston*, 555.

§ 27h. Duty to Charge on Less Degrees of the Crime.

Defendant testified to the effect that he was a taxicab driver and carried a pistol in his taxi, that upon reaching home he took the gun in the house, and that the pistol accidentally discharged, inflicting fatal injury to his wife, as he was throwing it on the bed. *Held:* It was error for the court to fail to

HOMICIDE—*Continued.*

submit to the jury the question of defendant's guilt of manslaughter, and a new trial is awarded upon his appeal from conviction of murder in the second degree. *S. v. Childress*, 208.

§ 29. Judgment and Sentence.

Upon verdict of guilty of arson, G. S., 14-58, there being no recommendation by the jury in respect to the punishment, and verdict of guilty of murder in the first degree, G. S., 14-17, sentence of death is mandatory. *S. v. Anderson*, 720.

HUSBAND AND WIFE.

§ 4. Presumption That Wife's Services Are Gratuitous.

The presumption that services rendered by the wife to her husband are gratuitous is not conclusive and may be overcome by evidence tending to show that the services were not gratuitous. *Eggleston v. Eggleston*, 668.

§ 12b. Contracts Between Husband and Wife.

Husband and wife may enter into a contract creating a business partnership between them, G. S., 52-2, but where the wife's separate estate is involved as a part of the partnership property the provision of G. S., 52-12, must be observed. *Eggleston v. Eggleston*, 668.

Plaintiff wife sought to establish an implied partnership agreement based upon her personal services to the business. *Held:* An instruction predicating plaintiff's right to a share in the partnership assets solely upon a gift *inter vivos* to her by her husband, is error. *Ibid.*

§ 14. Creation and Existence of Estates by Entireties.

Under the rule in *Shelley's case* a devise to R. and his wife during their natural lives and then to R.'s lawful heirs, vests the fee simple in the male devisee subject to the life estate of his wife, and does not create an estate by entireties. *Rawls v. Roebuck*, 537.

§ 17. Nature and Elements of Offense of Abandonment.

Separation by consent is not abandonment. *S. v. Carson*, 151.

G. S., 14-322, is penal in nature and must be strictly construed. *Ibid.*

The offense proscribed by G. S., 14-322, is the willful or wrongful separation of husband from his wife coupled with his willful failure to provide adequate support for her according to his means and station in life, and wrongful discontinuance of cohabitation alone is not a criminal offense. *Ibid.*

§ 22. Sufficiency of Evidence and Nonsuit in Prosecutions for Abandonment.

Testimony to the effect that defendant and prosecutrix separated and that he had ceased to provide for her support is insufficient to be submitted to the jury in a prosecution for abandonment, since it fails to show an unjustifiable or wrongful desertion, or that the failure to support was willful. *S. v. Carson*, 151.

INDEMNITY.

§ 2b. Construction and Operation of Agreement—Losses Covered.

Evidence tending to show theft of money and checks from safe at night, and that safe must have been opened by person knowing combination, with evidence exculpating all persons other than employees who knew or had known

INDEMNITY—*Continued.*

the combination of the safe, *held* sufficient for jury in action on policy indemnifying insured against theft or embezzlement by employees. *Bottling Co. v. Casualty Co.*, 411.

§ 2d. Extent and Proof of Loss.

Insured is not entitled to recover the face amount of checks abstracted from his safe in the absence of evidence that insured took reasonable action to avoid loss thereon but nevertheless suffered loss in the amount claimed. *Bottling Co. v. Casualty Co.*, 411.

INDICTMENT.

§ 9. Charge of Crime.

An indictment which follows substantially the language of the statute as to its essential elements meets the requirements of law. *S. v. Randolph*, 228.

§ 13. Motions to Quash for Incompetent Evidence Before Grand Jury.

It is incumbent upon defendant to show that all the witnesses heard by the grand jury were disqualified or that all the testimony before the grand jury was incompetent in order to be entitled to quashal of the indictment, since quashal on this ground will not be allowed if some of the witnesses were qualified or some of the evidence before the grand jury was competent. *S. v. Choate*, 491.

§ 20. Variance in General.

An indictment for larceny of an automobile which had been seized by officers of the law which lays the ownership of the automobile individually in one of the officers who had seized it, will not be held fatally defective, since such officer was entitled to hold the automobile and approve bond for its return, and thus had a special interest therein sufficient to obviate a fatal variance. *S. v. Law*, 443.

§ 22. Sufficiency of Indictment to Support Conviction of Less Degrees of Crime. (Sufficiency of evidence to require instruction on, see Criminal Law § 53g.)

An indictment for robbery with firearms will support a conviction of the lesser offenses of common law robbery, assault, larceny from the person, or simple larceny, if there is evidence of guilt of such lesser offenses. *S. v. Bell*, 659.

INJUNCTIONS.

§ 1. Nature and Grounds of Injunctive Relief in General.

Licensed barbers in their individual capacity may not challenge the constitutionality of Chap. 941, Session Laws of 1947, by injunction upon the ground that the granting of licenses to returned veterans under the provisions of the statute would tend to lower the standards or destroy the security of the trade, since there is no allegation of specific injury to personal or property right sufficient to invoke equitable jurisdiction. *Motley v. Board of Barber Examiners*, 337.

§ 2. Inadequacy of Legal Remedy.

Licensed barbers may not attack the constitutionality of Chap. 941, Session Laws of 1947, by injunction on the ground that the granting of licenses to returned veterans under the provisions of the act would result in unlawful

competition which would diminish their income from the trade, or even amount to its confiscation, since if the act is unconstitutional there is adequate remedy by prosecution of interlopers. *Motley v. Board of Barber Examiners*, 337.

Suit by an experienced barber who had applied for and was refused license for failure to pass the examination of the Board of Barber Examiners, to enjoin the Board from issuing licenses to returned veterans without an examination under the provisions of Chap. 941, Session Laws of 1947, is determined upon its merits. *Ibid.*

Injunction will lie where adequate remedy is not obtainable through administrative agency. *Transit Co. v. Coach Co.*, 768.

§ 4d. Subjects of Injunctive Relief—Nuisances.

In a suit by private individuals to restrain a municipality from emptying untreated sewerage into a stream, from which a public drinking-water supply is not taken, a complaint which fails to allege that plaintiffs own land along or adjacent to the stream and that the acts complained of constitute a nuisance resulting in continuing, irreparable damages, is demurrable. *Banks v. Burnsville*, 553.

§ 4e. Subjects of Injunctive Relief—Personal Contractual Rights and Duties.

Stipulation in contract that employee should not work for competitor in designated territory for prescribed period after termination of employment with plaintiff *held* broader in territorial extent than necessary for reasonable protection of plaintiff, and was therefore void, and injunction would not lie to restrain violation. *Noe v. McDevitt*, 242.

§ 4f. Enjoining Institution or Prosecution of Civil Action.

Where an action to try title is pending, a judge of the Superior Court has judicial power to issue an order restraining a party to the action from further action or proceeding to obtain possession against a tenant of the adverse party. G. S., 1-493. *Massengill v. Lee*, 35.

§ 4g. Enjoining Commission of Crime.

Fact that acts complained of are criminal under monopoly statute does not preclude injunctive relief when plaintiff alleges relief is necessary for protection of his business. *Transit Co. v. Coach Co.*, 768.

§ 4i. Protection of Franchise Rights.

Equity may enjoin libelous or slanderous statements affecting plaintiff's business, even where no breach of trust or contract is involved, when irreparable and continuing injury is alleged and it appears that injunction pending final determination of the action is necessary for protection of plaintiff's business or property rights. *Transit Co. v. Coach Co.*, 768.

The fact that the unfair practices complained of are made criminal offenses by statute, G. S., 75-1; G. S., 75-5, does not preclude a common carrier whose franchise rights have been injured and threatened by the wrongful acts, from instituting civil action for damages and obtaining injunctive relief to prevent irreparable injury pending final determination of the action. *Ibid.*

But carrier is not entitled to injunctive relief against alleged illegal schedules or fares, since adequate remedy is available through administrative agency. *Ibid.*

INJUNCTIONS—*Continued.*

§ 9. Hearings.

In an action for damages for trespass and to enjoin further trespass upon an easement claimed by plaintiffs by dedication the burden is on plaintiffs to establish the property right asserted, and defendants are entitled to introduce the record of withdrawal of dedication executed pursuant to G. S., 136-96, as a release or extinguishment by estoppel of record from sources to which plaintiffs were a privity, notwithstanding the absence of allegation in their answer of such withdrawal from dedication. *Pritchard v. Fields*, 441.

§ 12. Violation and Enforcement of Restraining Orders in General.

Where a temporary restraining order is issued by a judge having judicial power to issue the order, the remedy, if the order is erroneous, is by motion to dissolve or by appeal, and not by defiance. *Massengill v. Lee*, 35.

INSURANCE.

§ 4. Form and Statutory Requirements of Policies in General.

Waivers inserted in or attached to a policy of fire insurance which have the effect of making the provisions of the standard policy form more restrictive are void. G. S., 58-176 (1) and (2), G. S., 58-177 (c). *Glover v. Ins. Co.*, 195.

The Commissioner of Insurance has no power to authorize or acquiesce in the issuance of policies unauthorized or forbidden by statute. *Ibid.*

The rule that insurance contracts must provide the protection required by law and that if statutory provisions are not therein included they are incorporated therein by operation of law, does not preclude the parties from contracting for protection in addition to the minimum prescribed by statute. *Owsley v. Henderson*, 224.

§ 9. Authority of Agents and Brokers.

An endorsement on a policy of insurance made by the local agent without the knowledge of the insurer and placed on the policy after the happening of the event upon which liability is predicated, can be no part of the insurance contract and in no way binds insurer. *Transport, Inc., v. Casualty Co.*, 144.

§ 19b. Construction of Fire Policies—Risks Covered.

A waiver attached to a policy of fire insurance which provides that the policy should not cover loss caused by fire originating on the property of a neighbor if the property insured is situate within a stipulated distance of the combustible property of a neighbor, is restrictive of the provisions of the standard policy form, and is void. *Glover v. Ins. Co.*, 195.

§ 25d. Actions on Fire Policies.

Insured paid the premium on a policy of fire insurance on his barn at the rate for a "private stable," and not the much higher rate for a "livery stable." The policy provided that insurer should not be liable for loss if the hazard were increased by any means within the control or knowledge of insured. Insured testified, "I work in the winter and rent horses in the summer," that he had run a riding academy but closed that business when he moved to the premises in question, and had only four horses at the time of the fire, that he never rented horses to anybody and that the barn was private. The fire occurred in the winter. *Held:* Plaintiff's evidence, even though contradictory or equivocal, does not justify nonsuit on the theory that plaintiff's evidence shows no liability to him on the policy in suit. *Emery v. Ins. Co.*, 532.

INSURANCE—*Continued.*

§ 43b. Liability and Collision Insurance—Construction of Policy as to Vehicles Insured.

A policy describing a trailer covered by the contract by make and year but without serial number is a sufficient description to permit evidence *aliunde* that the trailer involved in the accident was the only one of that description owned and operated by insured at the time the policy was issued so as to identify the trailer as the one covered by the contract. *Transport, Inc., v. Casualty Co.*, 144.

§ 61. Construction of Policies of Marine Insurance as to Risks Covered.

A provision in a policy of marine insurance "warranted free of particular average unless caused by the vessel or interest being stranded, sunk, burnt, on fire or in collision," means insurer exempts itself from liability from a particular peril or loss unless such loss arises from "being stranded, sunk, burnt, on fire or in collision." *Baum v. Ins. Co.*, 525.

A policy of marine insurance indemnifying against loss caused by "collision" does not cover loss occasioned by contact between the vessel and a submerged obstruction. *Ibid.*

INTOXICATING LIQUOR.

§ 3. Definitions—"Intoxicating Liquor."

Testimony that defendant had in his possession sloe gin is evidence of possession of intoxicating liquor. G. S., 18-1. *S. v. Holbrook*, 582.

§ 8. Forfeitures.

The jurisdiction to declare forfeiture of a vehicle used in the transportation of intoxicating liquor is in the court which has jurisdiction of the offense charged against the person operating the vehicle. G. S., 18-6. *S. v. Rearis*, 18.

Defendant was tried in the Recorder's Court upon a warrant charging the illegal transportation of intoxicating liquor. The State accepted a plea of guilty of unlawful possession, and the judgment, after imposing a suspended sentence, ordered that the vehicle used by defendant be returned to him. No appeal was taken. Thereafter the sheriff filed a petition in the Superior Court to confiscate the vehicle. *Held:* The Superior Court was without jurisdiction of the petition and judgment of confiscation and sale is reversed. *Ibid.*

An indictment for larceny of an automobile which had been seized by officers of the law which lays the ownership of the automobile individually in one of the officers who had seized it, will not be held fatally defective, since such officer was entitled to hold the automobile and approve bond for its return, and thus had a special interest therein sufficient to obviate a fatal variance. *S. v. Law*, 443.

§ 9b. Presumptions and Burden of Proof.

The proviso of G. S., 18-49, permitting the transportation of alcoholic beverages not in excess of one gallon from a county which has elected to come under the Alcoholic Beverage Control Act to another county not coming under the provisions of this Act, is a matter of defense, and it is incumbent upon the defendant to bring his case within the exception either from the State's evidence or from his own. *S. v. Holbrook*, 582.

§ 9d. Sufficiency of Evidence and Nonsuit.

The State's evidence tending to show that officers found in defendant's car, which defendant was driving, four fifth gallon bottles of intoxicating liquor

INTOXICATING LIQUOR—*Continued.*

intact and four broken bottles from which some of the contents had leaked out, all of which contained or had contained sloe gin, *is held* sufficient to overrule nonsuit in a prosecution under G. S., 18-2, for transportation and possession of intoxicating liquor in a county which had not elected to come under the Alcoholic Beverage Control Act. G. S., 18-36, *et seq.* *S. v. Holbrook*, 582.

Evidence that defendant was apprehended at a still which was then in operation and which had manufactured about a gallon of whiskey, and that upon seeing the officer, he fled, is sufficient to be submitted to the jury on each of the charges of possession of nontax-paid whiskey and possession of property designed for the manufacture of intoxicating liquor and aiding and abetting in its manufacture. *S. v. Peterson*, 736.

JUDGES.

§ 2c. Commissions.

The recitation of an erroneous date in the concluding part of a commission to an emergency judge to hold a term of court will not invalidate the commission when it is manifestly a clerical error without tendency to mislead when the commission is construed in its entirety in the light of the dates for the commencement of the terms of court. *S. v. Anderson*, 720.

JUDGMENTS.

§ 1. Nature and Essentials of Consent Judgments.

A consent judgment is not the judgment of the court upon the merits, but is the agreement of the parties which acquires the status of a judgment through approval of the judge and its recordation in the records of the court. *McRary v. McRary*, 714.

A consent judgment should show upon its face that it is an agreement of the parties entered upon the records with the consent of the court, and when a judgment discloses that the cause came on for hearing by a court and that the court considered and decided the controversy on its merits, the judgment is not a consent judgment, and the fact that the "OK" of counsel is entered at the foot of the judgment does not alter its character. *Ibid.*

A consent judgment has no greater force or effect than a judgment rendered upon trial of issues, and if the court has no jurisdiction of the subject matter, the judgment acquires no validity by reason of the fact that it is a consent judgment. *Ibid.*

§ 20a. Jurisdiction of Trial Court to Modify or Correct Its Judgments.

The power of a court to correct its records to make them speak the truth extends to clerical errors or to make the judgment entered express correctly the action taken by the court, but not to the correction of errors of law. *In re Will of Hine*, 405.

§ 23. Life of Lien for Purpose of Execution.

A party may not enjoin execution on a judgment until the statute of limitations has run and then plead the bar of the statute against the judgment. *Holden v. Totten*, 204.

§ 25. Procedure to Attack.

A judgment rendered on a *supersedeas* bond is of independent force and may not be attacked on the ground that the original judgment was void except for fraud or essential invalidity of the original judgment. *Holden v. Totten*, 204.

JUDGMENTS—*Continued.*

This action was instituted to set aside a divorce decree obtained on service by publication. Plaintiff alleged that the averments in the affidavit for service by publication that affiant had a good cause of action and that the facts therein alleged as constituting grounds for divorce had existed to affiant's knowledge, were false. *Held:* The remedy for the defects alleged is by motion in the original cause, and defendant's demurrer to the independent action brought in another county was properly sustained. *Simmons v. Simmons*, 233.

An independent action, even on the grounds of fraud, may be treated as a motion in the cause if brought in the county where judgment was rendered, but not if brought in another county. *Ibid.*

Allegations that in defendant's prior action for divorce he testified falsely that the parties had lived separately and apart more than two years prior to the institution of the action, and that he knew of the falsity of such testimony, charge intrinsic fraud, and the remedy to attack the judgment is by motion in the cause and not by independent action. *Ibid.*

The proper procedure to attack a divorce decree on the ground that plaintiff had not been a resident of the State for six months preceding the institution of the action, G. S., 50-6, is by motion in the cause. *Bryant v. Bryant*, 287.

The finding of the court, supported by evidence, that plaintiff was physically present in this State for more than six months prior to instituting action for divorce and that he regarded his residence here as a permanent home, is sufficient to support judgment denying defendant's motion in the cause to set aside the divorce decree on the ground of want of the jurisdictional requirement of domicile. *Ibid.*

Void judgment may be collaterally attacked or ignored without proof or suggestion of merit. *McRary v. McRary*, 714.

§ 27a (2). Motions to Set Aside Default Judgments Under Soldiers' and Sailors' Civil Relief Act.

The Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A. appx. 520 (4), is limited by its express terms to judgments entered "on a default of any appearance by the defendant." *Lightner v. Boone*, 199.

A finding that defendant has no meritorious defense is a finding that defendant has no "meritorious or legal defense" within the meaning of the Soldiers' and Sailors' Civil Relief Act. *Ibid.*

Upon the hearing of a motion under the Soldiers' and Sailors' Civil Relief Act to set aside a judgment, the findings by the court that defendant had full opportunity to present his defense, that he presented all facts available to him, and that such facts do not establish a meritorious defense, obviates finding that defendant had not been prejudiced by reason of military service in making his defense, since if defendant has no valid defense he has not been prejudiced. *Ibid.*

§ 27b. Void Judgments.

Jurisdiction is a prerequisite of a valid judgment, and a judgment rendered without jurisdiction is a nullity and may be collaterally attacked or ignored without proof or suggestion of merit. *McRary v. McRary*, 714.

§ 30. Matters Concluded by Judgment.

In a suit to invoke the equitable jurisdiction of the court to permit trustees to sell part of the realty to preserve the purpose of the charitable trust, decree authorizing sale by the trustees necessarily adjudicates title in the trustees,

JUDGMENTS—*Continued.*

and is conclusive as a holding *in rem* in a subsequent suit for authority to sell the remaining property, even though the charity which, in the second suit, asserts its right to control and administer the trust funds as trustee to carry out the purpose of the trust, was not a party to the prior suit. *McKay v. Presbyterian Foundation*, 309.

The validity of the statute providing for the licensing of barbers and the control and regulation of the trade having been judicially determined, the validity of the act may not be attacked in a subsequent suit. *Motley v. Board of Barber Examiners*, 337.

§ 31. Conclusiveness of Adjudication—Foreign Judgments.

The court of another state, having jurisdiction of the parties, entered decree for divorce, and in awarding alimony, directed the husband to convey to his wife his interest in lands located in North Carolina and provided that upon his failure to do so the decree should operate as a conveyance. *Held:* While the divorce decree was within its jurisdiction and it had authority to enforce its order for alimony by its process *in personam*, the judgment *in rem* is a nullity and does not affect title to the lands in this State nor establish any right in the property enforceable in this State. *McRary v. McRary*, 714.

§ 32. Operation of Judgments as Bar to Subsequent Action in General.

The present plaintiffs and defendant were parties defendant in a proceeding under the Torrens Law, but the description of the land in that proceeding did not include the land claimed by plaintiffs in this suit. *Held:* Plaintiffs in this suit could not have filed cross-complaint against defendant herein to try title to the land not described in the Torrens proceeding, and therefore the judgment in that proceeding cannot operate as an estoppel, the matter in dispute not being cognizable in the former action. *Davis v. Morgan*, 78.

Judgment in an action for damages allegedly resulting from a fraudulent conspiracy to extinguish property rights of plaintiff in lands and furnishings, without seeking recovery of the personalty or realty or for injuries to the realty, does not bar a subsequent action to recover the lands and personalty on the ground of a resulting trust. *Randle v. Grady*, 159.

Adjudication, upon defendant's motion for a continuance under the Soldiers' and Sailors' Civil Relief Act, that defendant had made a general appearance, is *res judicata* upon a subsequent motion to set the judgment rendered aside. *Lightner v. Boone*, 199.

A judgment may not be attacked on the ground that defendant was released by the release of his co-debtor, who was not a judgment debtor, when such defense could have been raised prior to the final judgment. *Holden v. Totten*, 204.

JURY.

§ 4½. Preservation of Objections and Waiver.

Objection to a special venire is waived by failure to challenge the array until after trial and judgment. *S. v. Anderson*, 720.

Objection to individual jurors is waived by failure of challenges to the polls and failure to exhaust peremptory challenges. *Ibid.*

§ 9. Special Venires.

A written order entitled as of the action, commanding the sheriff to summon a special venire of twenty-five freeholders from the body of the county to

JURY—*Continued.*

appear on a specified date to act as jurors in the case, is in substance a special writ of *venire facias*. *S. v. Anderson*, 720.

An order for a special venire properly specifies that the veniremen are to be freeholders. *Ibid.*

The failure of the trial judge to sign the order for a special venire does not alone invalidate the special venire, it having been ordered and summoned in all other respects in conformity with statute. *Ibid.*

JUSTICES OF THE PEACE.

§ 3. Civil Jurisdiction.

Justices of the peace have no equity jurisdiction, and therefore no jurisdiction of a cause on contract to recover an amount less than $200 when plaintiff seeks to have the recovery declared a lien on specific realty under the terms of the contract. *Wilmington v. Schutt*, 285.

LANDLORD AND TENANT.

§ 2. Form, Requisites and Validity of Leases.

A seal is not necessary to the validity of a lease. *Leno v. Ins. Co.*, 501.

§ 8. Possession and Quiet Enjoyment.

The action was instituted on a bond for peaceful occupancy executed by lessor, who was a life tenant of the premises. The lease provided that lessees should have the right to remove buildings placed on the land upon termination of the lease. The bond for peaceful occupancy specifically stipulated that if lessor should be compelled to pay the penalty of the bond, lessor should be entitled to hold the improvements. Lessor died, terminating the lease prior to the expiration of the term, and title to the property passed *eo instante* to the remaindermen. *Held:* Under the terms of the bond, liability thereunder was conditioned upon the right to the improvements, and since the improvements passed with the land to the remaindermen, the demurrer of the lessor's administrator should have been sustained. *Satterfield v. Manning*, 467.

§ 22a. Forfeiture for Nonpayment of Rent.

Where rent is payable quarterly, contention of forfeiture of the lease for nonpayment of the July quarter rent is untenable when it appears that the following December lessor wrote lessee that unless another lease agreement were reached lessor would repossess the following January, and in October of the following year lessor institutes summary ejectment and seeks to recover rent only from the prior January, since it would seem that lessor had waived the alleged breach. *Mills, Inc., v. Veneer Co.*, 115.

Where a lease beginning the calendar year stipulates quarterly rental, the first quarter rent to be due April 1st and quarterly thereafter, the rent is payable at any time during the quarter, particularly when this is accordant with the *ante litem motam* interpretation of the parties. *Ibid.*

§ 37. Actions for Interference With Lessee's Rights by Third Person.

The grantor of land reserved the hunting rights in himself and later gave an oral lease of the hunting rights at a stipulated sum yearly. The successor to the grantee refused to permit the lessee of the hunting rights to enter upon the property for the purpose of hunting. *Held:* The lessor cannot maintain an

action against defendant for damages, since if the lease of the hunting rights is valid the lessee and not the lessor is the one who suffered the damages, whereas if the lease is void defendant cannot be made to respond in damages for refusing to recognize it. *Jones v. Neisler*, 444.

LARCENY.

§ 4. Indictment.

An indictment for larceny of an automobile which had been seized by officers of the law which lays the ownership of the automobile individually in one of the officers who had seized it, will not be held fatally defective, since such officer was entitled to hold the automobile and approve bond for its return, and thus had a special interest therein sufficient to obviate a fatal variance. *S. v. Law*, 443.

§ 7. Sufficiency of Evidence and Nonsuit.

In a prosecution for larceny and receiving, evidence that a defendant, with another, was in the company of the prosecuting witness in a field where the three drank liquor, that thereafter the prosecuting witness went to sleep and that when he awoke a large sum of money which he had on his person was gone, with further evidence that defendant's shoe tracks led from the place where prosecuting witness slept and that a sum of money somewhat less than the amount the prosecuting witness had lost, but in the same denominations, was found in defendant's house and that a paper which had been in the prosecuting witness' billfold was found on his premises, *is held* sufficient to overrule defendant's motion to nonsuit. *S. v. Warren*, 22.

In a prosecution for larceny and receiving, evidence tending only to show that a defendant was in the company of the prosecuting witness on the night prior to the time the money was stolen, and that after defendant had been jailed he was told that all he would have to do to get out of trouble would be to give the prosecuting witness so much money, to which defendant replied 'go get my daddy and B." the prosecuting witness, *is held* insufficient to be submitted to the jury. *Ibid.*

Circumstantial evidence of defendant's identity as perpetrator of crime *held* insufficient. *S. v. Minton*, 518; *S. v. Massengill*, 612.

§ 8. Instructions.

An instruction in a larceny prosecution which inadvertently fails to charge that the taking must be felonious, must be held for reversible error. *S. v. Massengill*, 612.

LIMITATION OF ACTIONS.

(Limitation of actions to foreclose, see Mortgages.)

§ 1. Nature and Construction of Statutes of Limitations in General.

The requirement of G. S., 136-19, that actions for damages for the taking of a right of way for highway purposes where the owner and the Commission cannot agree upon the amount, must be commenced within six months from the completion of the project, is a statute of limitation rather than a condition precedent to the right of action. *Lewis v. Highway Com.*, 618.

§ 12a. Effect of Partial Payment in General.

A partial payment on the principal of a note under circumstances permitting an inference that the debtor recognizes the debt and his obligation to pay same

amounts in law to a revival of the indebtedness and fixes a new date from which the statute of limitations begins to run. G. S., 1-47 (2). *Smith v. Davis*, 172.

§ 14. Waiver or Agreements Not to Plead Statute.

The fact that representatives of the Highway and Public Works Commission assured the owners of the servient tenement that the Commission would provide them a safe approach to the new highway, does not estop the Commission from pleading the six months statute of limitations as a defense to their action for damages for the taking of a right of way for highway purposes, there being no evidence that the Commission requested plaintiffs to delay the pursuit of their rights or that it made any agreement, express or implied, that it would not plead the statute. *Lewis v. Highway Com.*, 618.

MALICIOUS PROSECUTION.

§ 2. Valid Process.

An action for malicious prosecution must be predicated upon a valid warrant. *Caudle v. Benbow*, 282.

§ 7. Pleadings in Actions for Malicious Prosecution.

A complaint alleging the institution of a criminal action promptly by malice and the termination of the action by plaintiff's acquittal and also that defendant caused plaintiff to be arrested on the warrant issued on the criminal action, is sufficient to state a cause of action for false arrest as well as malicious prosecution. *Caudle v. Benbow*, 282.

And when the evidence discloses that the process was invalid, the court properly submits the case to the jury on the evidence of false imprisonment. *Ibid.*

MARSHALING.

§ 1. Nature and Scope of Remedy.

In decreeing foreclosing of a deed of trust covering two tracts of land it is proper for the court to order that the tract not covered by a second mortgage should be first sold before resort to be the second tract which had been acquired by the second mortgagee. *Hughes v. Oliver*, 680.

MASTER AND SERVANT.

§ 4a. Distinction Between "Employee" and "Independent Contractor."

An independent contractor is one who exercises an independent employment and contracts to do certain work according to his own judgment and method, without being subject to his employer except as to the result of his work. *Perley v. Paving Co.*, 479.

§ 9. Wages and Compensation.

A bonus offered by an employer to an employee to render more efficient service over a stipulated period of time is not a gratuity or gift, but is a supplementary contract and enforceable, whether the bonus is promised in a fixed sum or is to be measured by the earnings of the business or the efficiency of production. *Chen v. Leonard*, 181.

Agreement to pay bonus if employee saved stipulated amount in manufacture of products *held* not void for uncertainty. *Ibid.*

MASTER AND SERVANT—*Continued.*

§ 39b. "Employees" Within Meaning of Compensation Act—Independent Contractors.

The evidence tended to show that deceased was a licensed contract hauler, and was engaged to haul sand, gravel and concrete from the defendant's bins to defendant's concrete mixer along a route selected by defendant, but that defendant had no control over the number of hours deceased worked or whether deceased drove his own truck or employed driver, and that deceased paid for his own gas and oil and made his own repairs to his truck. Deceased was paid a stipulated sum per load and was also paid the hourly wage of truck drivers employed by defendant for that time lost waiting in line when the concrete mixer broke down. Deceased was killed when struck by a train at a grade crossing while hauling for defendant on the route selected. *Held:* Upon the evidence, deceased was an independent contractor and not an employee within the meaning of the Workmen's Compensation Act. G. S., 97-2 (b), and the judgment of the Superior Court affirming the award of compensation by the Industrial Commission, is reversed. *Perley v. Paving Co.*, 479.

§ 40a. Injuries Compensable in General.

An injury compensable under the Workmen's Compensation Act must be the result of an accident which arises out of and in the course of the employment. *Taylor v. Wake Forest*, 346; *Bolling v. Belk-White Co.*, 749.

§ 40c. Whether Accident "Arises Out of Employment."

The term "arising out of the employment" within the meaning of the Workmen's Compensation Act refers to the origin or cause of the accident, and while it must be interpreted in the light of the facts and circumstances of each case, and may not be precisely defined, there must be some causal connection between the injury and the employment. *Taylor v. Wake Forest*, 346.

An accident "arises out of" the employment if it results from a risk involved therein or incident thereto, or to conditions under which the work is required to be performed, so that there is a causal connection between the employment and the injury. *Bolling v. Belk-White Co.*, 749.

Evidence tending to show that deceased came to his death as a result of a pistol wound while at a place where he had a right to be in the course of his employment, without evidence that he was authorized to keep a pistol or use it in the business of the employer, is insufficient to support an award of compensation on the ground that in the absence of a showing of suicide it will be presumed that the death resulted from an accident, since, even so, there is neither presumption nor evidence to support the necessary basis for compensation that the accident arose out of the employment. *Ibid.*

§ 40d. Whether Injury "Arises in Course of Employment."

The words "in the course of the employment" within the meaning of the Workmen's Compensation Act refer to time, place and circumstances under which the accident occurs. *Taylor v. Wake Forest*, 337.

Evidence tending to show that deceased employee, a township constable, was also employed by a municipality of the township to maintain order in its business district during certain hours of the night, and that prior to the hours of his employment by the town, a policeman of the municipality, who knew he was a constable but did not know of his employment by the town, requested him to go with him on a call outside the limits of the town, and that there he was fatally injured in attempting to make an arrest, *is held* to show that

MASTER AND SERVANT—*Continued.*

the fatal injury did not arise in the course of his employment by defendant municipality. *Ibid.*

§ 41. Actions Against Third-Person Tort-Feasor.

The remedies given an employee under the Workmen's Compensation Act are exclusive as against the employer only, G. S., 97-10, and the Act does not preclude an employee from waiving his claim against his employer and pursuing his remedy against a third party tort-feasor by common law action for negligence, although his rights against such third party after a claim for compensation is filed, are limited. *Ward v. Bowles*, 273.

In an action by the administrator of a deceased employee against the third-party tort-feasor, allegations in defendant's answer of an illegal agreement between the dependents and the employer for the distribution of the fund, are properly stricken on motion, since the administrator is an official of the court under duty to make disbursement of any recovery in conformity with statute, and could not be bound by the terms of the agreement alleged. G. S., 97-10. *Penny v. Stone*, 295.

In an action by the administrator of an employee against the third-party tort-feasor, evidence concerning amount of compensation paid by the employer or the amount thereof to which dependents are entitled, is prohibited. G. S., 97-10. *Ibid.*

This action was instituted by the administrator of a deceased employee against the third-party tort-feasor. Compensation had been paid for the employee's death under the Workmen's Compensation Act. Defendant alleged in its answer that in the collision causing the death of plaintiff's intestate, other persons were killed or injured, that the other actions growing out of the collision were compromised, and that in the settlement defendant made a substantial contribution upon the assurance of the attorneys for the employer and insurance carrier that they would recommend that this action not be instituted. *Held:* The allegations failed to show a contract by the employer or the insurance carrier not to sue, or that the attorneys did not make the promised recommendation in good faith; and the allegations were properly stricken upon motion in the administrator's action. *Ibid.*

§ 43. Notice and Filing of Claim—Limitations.

Claimant was injured by accident arising out of and in the course of his employment. He reported the accident to the employer, who, on the day of the accident, reported it to the Industrial Commission as required by G. S., 97-92. Subsequently bills for medical services rendered claimant as a result of the injury were approved for payment by the Commission. No claim for compensation was filed by the employee, the employer or the insurance carrier. More than a year after the accident the employee first discovered the serious effects of the accident and requested a hearing before the Industrial Commission. *Held:* No claim for compensation having been filed within twelve months from the date of the accident and no request for a hearing having been made within that time, and no payment of bills for medical treatment having been made within the twelve months prior to the request for a hearing, the claim is barred by G. S., 97-24. *Whitted v. Palmer-Bee Co.*, 447.

§ 53b (3). Medical Treatment and Expenses.

Payment of medical or hospital expenses constitutes no part of compensation to an employee or his dependents under the provisions of our Workmen's Compensation Act. G. S., 97-2 (k). *Whitted v. Palmer-Bee Co.*, 447.

MASTER AND SERVANT—*Continued.*

§ 53c. Change of Condition and Review of Award.

The review of an award for change of condition must be made within twelve months from the date of the last payment of compensation pursuant to an award, and while the right to review was enlarged by ch. 823, Session Laws of 1947, to include instances in which only medical or other treatment bills are paid, the amendment provides for review in such cases only within twelve months of the date of last payment of bills for medical or other treatment. G. S., 97-47. *Whitted v. Palmer-Bee Co.*, 447.

§ 55d. Review of Findings of Industrial Commission.

Facts found by the Industrial Commission under a misapprehension of law are not binding on appeal. *Whitted v. Palmer-Bee Co.*, 447.

The rule that the findings of fact of the Industrial Commission are conclusive on appeal when supported by any competent evidence does not preclude the courts from setting aside an award when the findings, involving mixed questions of law and of fact, are not supported by evidence. *Perley v. Paving Co.*, 479.

§ 59c. Unemployment Compensation Act—Reserves.

An employer under the Employment Security Act was engaged in the business of printing and publishing a newspaper and also the business of operating a job printing business as separate business with separate books. Thereafter an independent corporation was organized which took over all the assets of the job printing business and retained all the employees of that department. *Held:* The new corporation is not entitled to a *pro rata* transfer to it of the reserve fund. *Employment Security Com. v. Publishing Co.*, 332.

§ 60. Right to Unemployment Compensation.

Employee-claimants who are not directly interested in the labor dispute which brings about the stoppage of work, and who do not participate in, help finance or benefit from the dispute, are nevertheless disqualified from unemployment compensation benefits if they belong to a grade or class of workers employed at the premises immediately before the commencement of the stoppage, some of whom, immediately before the stoppage occurs, participate in, finance or are directly interested in such labor dispute. *Unemployment Compensation Com. v. Martin*, 277.

§ 62. Appeals from Unemployment Compensation Commission.

The finding of the Unemployment Compensation Commission that employee-claimants belong to the same grade or class of workers as other employees, some of whom, immediately before the stoppage occurred, participated in and were directly interested in the labor dispute causing the stoppage, *is held* supported by ample evidence and is therefore conclusive, there being no allegation or evidence of fraud. G. S., 96-15. *Unemployment Compensation Com. v. Martin*, 277.

MONOPOLIES.

§ 5. Criminal Liability.

The violation of Chap. 328, Session Laws of 1947, declaring the public policy of this State that the right to work shall not be dependent upon membership or non-membership in a labor union, is a criminal offense. *S. v. Whitaker*, 352; *S. v. Bishop*, 371.

MORTGAGES.

§ 1a. Nature and Distinction Between Mortgages and Other Instruments.

A clause in the deed which provides for a reconveyance on the conditions stated, nothing else appearing, would seem to stamp the transaction as a conditional sale and not a mortgage. *Williams v. Joines*, 141.

§ 17. Rights and Liabilities of Mortgagees and Cestuis in Possession.

In an action by the mortgagee in possession to foreclose, defendants may not contend that the mortgagee must account for rents and profits while in possession when no such relief is sought by them in their pleadings. In the present case there was no tender or allegation of a desire to redeem. *Hughes v. Oliver*, 680.

§ 20. Parties Who May Pay Debt and Demand Assignment.

Lessees are entitled to pay the debt secured by a deed of trust to prevent threatened foreclosure in order to protect their leasehold estate in a part of the mortgaged premises, and to have the deed of trust and notes secured thereby assigned or delivered to them uncanceled under the equitable doctrine of subrogation. *Leno v. Ins. Co.*, 501.

§ 30a. Right to Foreclose in General.

The law does not recognize partial foreclosure, and where more than one tract of land is included in a mortgage or deed of trust, all lying in the same county, a foreclosure of one tract, either by action or exercise of the power of sale, extinguishes the mortgage or deed of trust and terminates the relationship of mortgagor and mortgagee or trustor and *cestui que trust*. *Layden v. Layden*, 5.

§ 30i (1). Limitation of Actions to Foreclose.

Where partial payment is made on a note secured by deed of trust, action to foreclose the instrument is not barred until ten years from date of such payment. G. S., 1-47 (3). *Smith v. Davis*, 172.

§ 30i (2). Presumption of Satisfaction of Terms of Deeds of Trust or Mortgages.

Construing the language of G. S., 45-37 (5), with reference to the caption of the original act and the purpose sought to be accomplished, *it is held* the presumption of payment of a mortgage or deed of trust arises in favor of creditors or purchasers for valuable consideration from the mortgagor or trustor who extend credit or purchase after the expiration of the fifteen year period, and does not arise in favor of those who become creditors or purchasers for valuable consideration prior thereto. *Smith v. Davis*, 172.

§ 31b. Parties and Procedure in Foreclosure Proceedings.

In an action by a successor guardian against the original guardian to recover funds of the estate which the original guardian had loaned to himself and secured by deed of trust, judgment was entered for the amount and foreclosure of the deed of trust decreed. The trustee in the deed of trust was not a party to the action. *Held:* The decree of foreclosure is invalid, since jurisdiction of the trustee, who has legal title to the *res*, is prerequisite to such order, and defect cannot be cured by order making trustee a party *nunc pro tunc*. *Grady v. Parker*, 54.

MORTGAGES—*Continued.*

§ 33d. Report of Sale and Confirmation.

Whether the resident judge during vacation and at chambers may confirm a foreclosure sale of a mortgage deed of trust without consent of the parties, G. S., 1-218, *quære*. *Grady v. Parker*, 54.

§ 39c (1). Laches and Limitation of Actions to Set Aside Foreclosure.

Plaintiffs instituted this suit to quiet title. Defendants, claiming under a trustee's deed to their ancestor, pleaded G. S., 1-47 (4) as a bar, upon their contention that their ancestor was a mortgagee or *cestui* in possession for more than ten years prior to the institution of the action. It appeared that the tracts in dispute were included wih other tracts in the deed of trust, and that one of such other tracts had theretofore been foreclosed. *Held:* Upon the foreclosure of one of the tracts under the deed of trust it was extinguished, and therefore defendants' ancestor could not have been mortgagee or *cestui* in possession under a purported second foreclosure, and the statute does not apply. *Layden v. Layden*, 5.

An action for the redemption of a mortgage, where the mortgagee has been in possession, is barred after the expiration of ten years from the time the right of action accrued. G. S., 1-47 (4). *Hughes v. Oliver*, 680.

Plaintiff heirs attacks foreclosure of a mortgage executed by their ancestor on the ground that the mortgagee purchased at his own sale. It appeared that plaintiffs with full knowledge of all the facts and with knowledge that defendant was placing valuable improvements on the property, waited more than twelve years to attack the foreclosure. The holding of the court that plaintiffs were estopped by their laches from maintaining the action is upheld. *Ibid.*

§ 39e (8). Rights of Parties Upon Setting Aside of Foreclosure.

Where decree of foreclosure is entered in a suit in which the trustee is not a party and the *cestui* bids in the property at the sale, the foreclosure is void, and the trustor is entitled to redeem the property and to have an accounting of rents and profits against the mortgagee in possession. *Grady v. Parker*, 54.

MUNICIPAL CORPORATIONS.

§ 15b. Injuries from Operation of Municipal Sewerage Systems.

G. S., 130-117, giving a court of equity power to enjoin any person, firm, corporation or municipality from emptying untreated sewerage into a stream upon suit by any person, applies only when a public drinking-water supply is taken from the stream, in which instance proof of any injurious effect upon plaintiffs' water supply is not required. *Banks v. Burnsville*, 553.

In a suit by private individuals to restrain a municipality from emptying untreated sewerage into a stream, from which a public drinking-water supply is not taken, a complaint which fails to allege that plaintiffs own land along or adjacent to the stream and that the acts complained of constitute a nuisance resulting in continuing, irreparable damages, is demurrable. *Ibid.*

§ 25b. Control and Regulation of Streets and Sidewalks.

Municipal public ways are commonly divided into sidewalks and streets with an intervening space, used as a matter of common knowledge for the location and maintenance of telephone and telegraph poles, traffic signs, fire hydrants, water meters and similar structures, and the maintenance of such objects or

MUNICIPAL CORPORATIONS—*Continued.*

structures is not negligence unless they render the way unsafe for the respective purposes to which each portion is devoted. *Wood v. Tel. Co.*, 605.

NEGLIGENCE.

§ 1. Acts or Omissions Constituting Negligence in General.

Negligence, primary or contributory, is the failure to use the care and prevision which a reasonably prudent person would employ in the circumstances, the rule being consistent, while the degree of care varies with the exigencies of the occasion. *Tyson v. Ford*, 778.

§ 2. Sudden Peril and Emergencies.

The rule that a driver confronted with a sudden emergency is not held to the same degree of care as in ordinary circumstances but only to that degree of care which an ordinarily prudent person would use under similar circumstances, is not available to one who by his own negligence has brought about or contributed to the emergency. *Sparks v. Willis*, 25.

§ 4b. Attractive Nuisances.

Maintenance of a circular unenclosed pool 6½ feet in diameter and 24 inches deep on railroad property across the street from a baseball ground or park where children were accustomed to play, does not impose liability for the death of a 2½ year old child found drowned in the pool, since such unfortunate occurrence was not one which reasonably should have been anticipated and guarded against. *Nichols v. R. R.*, 222.

§ 4f (2). Liability of Proprietor to Invitees.

While the proprietor of a moving picture theatre is not an insurer of the safety of patrons, he is under duty to exercise ordinary care to keep the premises in a reasonable safe condition and to give warning of hidden perils or unsafe conditions in so far as they can be ascertained by reasonable inspection and supervision. *Drumwright v. Theatres*, 325.

The need for sufficient lights to enable patrons to find or leave their seats during the exhibition of a picture, and the need for sufficient darkness to exhibit the picture without eyestrain on those observing it, are factors to be considered in determining the correlative obligations and rights of the theatre proprietor on the one hand and its patrons on the other. *Ibid.*

Plaintiff's evidence tended to show that she was a patron of a moving picture theatre and was directed by an usher to the balcony of the theatre which was in semi-darkness, that she was unfamiliar with that part of the theatre, that there were no floor lights or seat lights burning in the aisle or on the steps as plaintiff was accustomed to see in darkened theatres, that no usher was on duty in the balcony, that the steps in the aisle were alternately long and short, and that plaintiff overstepped one of the short steps and fell to her injury. *Held:* Defendant's motion to nonsuit should have been overruled. *Ibid.*

One who is a patron of a place of recreation conducted for profit is an invitee. *Hahn v. Perkins*, 727.

A proprietor is not an insurer of the safety of invitees but is under duty to exercise due care to see that the premises are reasonably safe for the purposes for which they are maintained. *Ibid.*

NEGLIGENCE—*Continued.*

The evidence disclosed that 12 year old boy was patron of swimming pool, that his mother lost him in the crowd, and that his body was found some 12 hours later in deep water of the pool. *Held:* The evidence is insufficient to show that alleged negligence in failing to provide more lifeguards, failing to mark depth of water, and failure of guard to give alarm after notice, was proximate cause, and nonsuit was proper. *Ibid.*

§ 5. Proximate Cause in General.

Negligence is not actionable unless the proximate cause of injury, and foreseeability is an essential of proximate cause. *Wood v. Tel. Co.*, 605.

§ 9. Anticipation of Injury.

A party is not required to anticipate negligence on the part of others, but is entitled to assume, and act on the assumption that others will exercise ordinary care for their own safety in the absence of anything to give notice to the contrary. *Hill v. Lopez*, 433.

The law does not require omniscience but only that a person foresee the natural and probable consequences of his acts. *Wood v. Tel. Co.*, 605; *Benton v. Johnson*, 625.

The law requires only reasonable foresight and prevision. *Bethune v. Bridges*, 623.

§ 10. Last Clear Chance.

Doctrine of last clear chance does not apply unless peril could have been discovered in time to avoid injury. *Benton v. Johnson*, 625.

§ 11. Contributory Negligence in General.

It is not necessary that contributory negligence be the sole proximate cause of the injury to bar recovery, it being sufficient if it is the proximate cause or one of the proximate causes. *McKinnon v. Motor Lines*, 132; *Penland v. R. R.*, 528; *Tyson v. Ford*, 778.

Unless obviously dangerous, the conduct of plaintiff which otherwise might be pronounced contributory negligence as a matter of law, would be deprived of its character as such if done at the direction of the defendant or its agent. *Drumwright v. Theatres*, 325.

Evidence *held* to disclose contributory negligence in voluntarily selecting dangerous method of performing service. *Benton v. Johnson*, 625.

§ 12. Contributory Negligence of Minors.

Contributory negligence of minors injured in automobile accidents, see *Toney v. Henderson*, 253; *Morgan v. Coach Co.*, 280.

§ 19b (1). Sufficiency of Evidence and Nonsuit on Issue of Negligence in General.

Injury resulting when plaintiff attempted to recover piece of wood to replace it to rear of wheel to scotch truck *held* not foreseeable, and nonsuit was proper. *Benton v. Johnson*, 625.

§ 19b (2). Sufficiency of Evidence and Nonsuit—Prima Facie Case.

Ordinarily a *prima facie* showing of negligence carries the case to the jury in the absence of evidence establishing contributory negligence as a matter of law. *Humphries v. Coach Co.*, 399.

NEGLIGENCE—*Continued.*

§ 19b (3). Sufficiency of Evidence and Nonsuit—Last Clear Chance.

Even conceding evidence raised question of whether defendant's driver should have seen plaintiff's peril in reaching under wheels to recover piece of wood to scotch wheels of truck, evidence failed to show that peril could have been discovered in time to have avoided injury, and nonsuit was proper. *Benton v. Johnson*, 625.

§ 19c. Nonsuit on Issue of Contributory Negligence.

Defendant's driver, accompanied by a helper, was delivering a load of coal to plaintiff, and had to back the truck down a slight incline to unload the coal at the place designated by plaintiff. The evidence tended to show that the driver gave the order to scotch the truck, that his helper began putting stones to the rear of the wheel, that plaintiff then placed a stick of wood under the rear of the wheel on the other side, and that after the wheel had passed over the wood, plaintiff sought to retrieve it and replace it to the rear of the wheel when the wheel spun forward and engaged the wood which crushed plaintiff's hand. *Held:* Even conceding plaintiff was not a mere volunteer, he was not under duty to undertake the service or to pursue it in such dangerous manner, and plaintiff's own contributory negligence was at least a proximate cause of his injury. *Benton v. Johnson*, 625.

§ 19c. Nonsuit on Question of Proximate Cause.

Proximate cause is an inference of fact, to be drawn from other facts and circumstances of the case, and it is only when but one inference can be drawn from the facts in evidence that the court may determine the question as a matter of law. *Nichols v. Goldston*, 514; *Beaman v. Duncan*, 600.

§ 23. Definition of Culpable Negligence.

Culpable negligence imports more than actionable negligence in the law of torts, and is such recklessness or carelessness, proximately resulting in injury or death, as is incompatible with a proper regard for the safety or rights of others. *S. v. Wooten*, 628.

NUISANCES.

§ 7. Nature and Grounds of Remedy to Abate Public Nuisance.

The statutory procedure to abate a public nuisance, G. S., 19-2, is not appropriate against a municipal alcoholic control board set up under color of legislative authority (Chap. 862, Session Laws of 1947), nor against the lessor of the building used for the purpose of operating a liquor control store. *Amick v. Lancaster* 157.

PARTIES.

§ 1. Necessary Parties Plaintiff.

Every action must be prosecuted in the name of the real party in interest. G. S., 1-57. *Jones v. Neisler*, 444.

§ 3. Necessary Parties Defendant.

In an action by the purchaser against the real estate brokers to recover earnest money paid on the ground that the purchaser was induced to execute the contract by the brokers' fraudulent misrepresentations as to the property, in which the brokers by cross-action allege breach of the contract of purchase in which they had an interest for the amount of their commission in a sum less than the earnest money paid, with consequent damage to them and the

PARTIES—*Continued.*

seller, and that they were holding the earnest money to protect their interest and the interest of the seller, *held:* The seller is a necessary party to a complete determination of the controversy, and denial of defendant brokers' motion for his joinder as additional party defendant is reversible error. G. S., 1-73. *Lampros v. Chipley*, 236.

§ 10a. Joinder of Additional Parties in General.

Where decree of foreclosure of a deed of trust is entered in an action in which the trustee is not a party, the defect cannot be cured by an order entered subsequent to the decree making the trustee a party *nunc pro tunc*. *Grady v. Parker*, 54.

PARTNERSHIP.

§ 1a. Creation and Existence.

The complaint alleged the existence of a partnership between the parties. By amendment it was alleged that defendant filed partnership tax returns for a specified year and that plaintiff believed defendant, in filing the returns, intended to create a partnership. *Held:* Construing the allegations of the pleading liberally, plaintiff was not limited to evidence of transactions relating to the filing of the income tax returns, but evidence of prior transactions between the parties in regard to the business is competent not only as supporting the contention of the creation of a partnership at the time the returns were filed, but also under the allegations of the original complaint as tending to show there was an implied partnership agreement between the parties whenever or wherever created. *Eggleston v. Eggleston*, 668.

Husband and wife may create implied business partnership agreement. *Ibid.*

While a partnership rests on contract, the agreement may be written or verbal, express or implied. *Ibid.*

Evidence of a course of dealing between the parties is sufficient to establish a partnership between them if it evinces each of the essential elements of a partnership agreement, including the necessary intent. *Ibid.*

Partnership tax returns prepared by defendant are competent as an admission against interest in an action to establish the existence of a partnership between the parties, not as creating a partnership, *per se*, but as evidence to be considered with the other evidence of an implied agreement. The fact that immediately after dispute defendant filed an individual return by way of amendment does not render the original returns incompetent. *Ibid.*

Plaintiff relied upon a partnership tax return as evidence in support of her contention of an implied business partnership agreement between herself and husband. *Held:* Testimony of plaintiff that she acted in good faith and not as a participant in a fraudulent attempt to evade payment of income taxes in signing the returns, is competent. *Ibid.*

It is not necessary that each partner furnish a part of the partnership capital, but the services of one party may be balanced against the capital furnished by the other, and therefore an instruction to the effect that the partnership capital must belong in common to the parties in order to establish a partnership, is error. *Ibid.*

Plaintiff wife contended that over a period of years she performed personal services to the business carried on in the husband's name under an implied partnership agreement. Plaintiff introduced as supporting evidence, partnership tax returns for a specified year prepared by defendant. *Held:* An instruction that in making and filing the returns defendant must have intended

PARTNERSHIP—*Continued.*

to make his wife a partner is error, not only as limiting the question of intent to that one instance, but also as treating the returns as creating the partnership rather than only evidence of its existence. *Ibid.*

Plaintiff wife introduced in evidence partnership income tax returns prepared by defendant husband as supporting evidence of an implied partnership agreement. *Held:* An instruction that the jury was not concerned with whether the returns were filed for the purpose of defrauding the government is error as calculated to impress the jury that such a thing, if true, need not reflect upon defendant's credibility as a witness. *Ibid.*

§ 4. Actions Between Partners.

Plaintiff instituted this action on a note. Defendant alleged that at the time of the execution of the note it was agreed that it was to be paid solely out of the profits of a partnership in which plaintiff and defendant were then engaged, and set up a cross-action for an accounting upon allegations that plaintiff had theretofore wrongfully taken over all partnership assets, which were sufficient to pay the note. *Held:* The right to set up the cross-action for an accounting comes within the numerous exceptions to the general rule that one partner cannot sue another at law until there had been a complete settlement of the partnership affairs. *Carroll v. Brown*, 636.

§ 12. Settlement of Partnership Affairs Between Members and Representatives.

Under the proviso of the statute abolishing survivorship in personalty generally, a surviving partner is vested with title to the partnership estate for the purpose of settling the affairs of the partnership. G. S., 41-2. *Coppersmith v. Upton*, 545.

§ 13. Collection of Assets by Surviving Partner.

The fact that the surviving partner instituting action on a partnership asset has not filed bond as required by G. S., 59-74, is not ground for nonsuit, since the requirement of a bond is for the protection of the estate of the deceased partner, and the objection is not available to one who is merely a debtor of the partnership. This conclusion is consonant with G. S., 59-75, which provides that upon failure of the surviving partner to file bond, the Clerk of the Superior Court shall appoint a collector of the partnership upon application of any person interested in the estate of the deceased partner. *Coppersmith v. Upton*, 545.

PERJURY.

§ 7. Sufficiency of Evidence and Nonsuit.

In a prosecution for perjury the burden is upon the State to prove beyond a reasonable doubt the falsity of the oath, and this must be established by two witnesses or by one witness together with adminicular circumstances. *S. v. Webb*, 304.

Evidence that defendant knowingly made false oath in sanity hearing before clerk, resulting in his mother-in-law being committed to State Hospital, *held* sufficient for jury. *Ibid.*

PLEADINGS.

§ 3a. Statement of Cause of Action in General.

The complaint should contain allegations of the ultimate facts constituting the cause of action and not the evidential facts. G. S., 1-122. *Wilmington v. Schutt*, 285.

PLEADINGS—*Continued.*

§ 15. Office and Effect of Demurrer.

A demurrer *ore tenus* admits the facts alleged in the complaint. *Chew v. Leonard*, 181.

§ 19b. Demurrer for Misjoinder of Parties and Causes.

A complaint alleging that one defendant, acting pursuant to a joint purpose, went to plaintiff's residence and dragged her out of the house to a point beyond the lights, where the other defendant was lying in wait, and that then both defendants forcibly carried her into the street where they publicly assaulted and beat plaintiff, alleges a joint tort, and defendants' demurrer for misjoinder of parties and causes was properly overruled. *Garrett v. Garrett*, 530.

A passenger in a car sued the operator and owner of a truck involved in the collision with the car. Upon motion of defendants, the driver and owner of the car were joined upon averment that their negligence was the sole proximate cause of the accident. The additional parties defendant filed cross complaint against the original defendants to recover for personal injuries and damages arising out of the same collision. *Held:* The demurrer of the original defendants for misjoinder was properly overruled, the additional defendants having been joined at their request in order that the entire controversy be settled in one action. *Grant v. McGraw*, 745.

§ 22b. Amendment by Permission of Trial Court.

In this action in trespass plaintiffs allege title under a State grant and also under a judgment in a proceeding under the Torrens Law. *Held:* The court had discretionary power at the trial to permit plaintiffs to amend the complaint, over objection, by withdrawing all reference to proceedings under the Torrens Law. *Davis v. Morgan*, 78.

It is the established practice under our Code system to be liberal in allowing amendments of process and pleadings, to the end that causes may be tried upon their merits. *Hughes v. Oliver*, 680.

Upon the hearing of the report of the referee, the court remanded the cause to the referee to hear additional evidence, and allowed appellees ten days in which to file further pleadings setting up laches. *Held:* The court had discretionary power to allow an amendment setting up laches. *Ibid.*

§ 24a. Variance Between Allegation and Proof in General. (Nonsuit for fatal variance, see Trial § 21.)

Where a complaint alleges a cause of action for malicious prosecution and a cause of action for false imprisonment, and the evidence at the trial shows that the warrant upon which plaintiff was arrested was void, the court, under our liberal practice, may try the action in conformity to the evidence and submit issues relating to false imprisonment. *Caudle v. Benbow*, 282.

§ 24c. Necessity of Allegation to Support Proof.

In an action for damages for trespass and to enjoin further trespass upon an easement claimed by plaintiffs by dedication the burden is on plaintiffs to establish the property right asserted, and defendants are entitled to introduce the record of withdrawal of dedication executed pursuant to G. S., 136-96, as a release or extinguishment by estoppel of record from sources to which plaintiffs were a privity, notwithstanding the absence of allegation in their answer of such withdrawal from dedication. *Pritchard v. Fields*, 441.

Complaint and amended complaint, liberally construed, *held* to allege existence of partnership, and therefore plaintiff was not limited to evidence of

PLEADINGS—*Continued.*

creation of partnership at time defendant filed partnership tax returns, even though amendment alleged creation of partnership at that time. *Eggleston v. Eggleston*, 668.

§ 28. Judgment on Pleadings—Nature and Grounds.

Where defendant admits liability under its own construction of the contract for a part of the amount alleged by plaintiff to be due thereunder, plaintiff is entitled to judgment for such amount without prejudice to the litigation of the balance claimed to be due him, G. S., 1-510, which right may not be defeated by defendant's tender of judgment under G. S., 1-541. *McKay v. Investment Co.*, 290.

Where, in an action on a note, defendants deny plaintiff's allegations that the note was to draw interest from maturity at the rate of 6% per annum, the note not having been set out in the complaint, judgment on the pleadings in plaintiff's favor is erroneous, since there is a denial of a fact necessary to be established as a basis for the relief prayed. *Carroll v. Brown*, 636.

Judgment on the pleadings against defendant is not permissible when defendant seeks affirmative relief and plaintiff denies the allegations upon which defendant's prayer for such relief is based. *Ibid.*

Judgment on the pleadings in an action on a note is error when defendant interposes a valid defense. *Ibid.*

§ 31. Matter Which Should Be Stricken Upon Motion.

All allegations which the pleader is not entitled to support by evidence at the hearing should be stricken upon motion aptly made. *Penny v. Stone*, 295.

Allegations *held* relevant and material and were erroneously stricken on motion. *Winston v. Lumber Co.*, 786.

PRINCIPAL AND SURETY.

§ 7. Bonds for Public Construction.

A bond for public construction conditioned upon the satisfaction of "all claims and demands incurred" in the performance of the contract . . . and payment for labor and material, *is held* to include rental cost of pneumatic machinery or equipment hired to do mechanical work in furtherance of the contract. G. S., 44-14. *Owsley v. Henderson*, 224.

The contention of the surety on a bond for public construction that its liability for rental charges for equipment used in the performance of the contract should be limited to the time such equipment was in actual operation is untenable, since the presence of such equipment at the job for use when needed is in furtherance of the performance of the contract. *Ibid.*

§ 18b. Competency of Declarations of Principal as Affecting Liability of Surety.

In an action on a surety bond for public construction, statements or admissions of the principal contractor made in the course of his dealings with those protected by the bond, which tend to prove the debt or the amount thereof, are competent against the surety. The rule that such statements are not binding on a surety simply means the surety is not precluded from offering evidence in contradiction thereof. *Owsley v. Henderson*, 224.

PROCESS.

§ 5b. Service on Nonresidents in State in Connection with Litigation.

A defendant in a criminal action is immune from service of process in a civil action arising out of the same facts as the criminal proceeding provided he is brought into the State by, or after waiver of extradition proceedings, G. S., 15-79; G. S., 15-82; G. S., 8-68. *Hare v. Hare*, 740.

Where it does not appear that a defendant in a criminal action was brought into the State by, or after waiver of extradition proceedings, his exception to the refusal of his motion to strike out return of summons issued in a civil action and served on him while in this State for the purpose of attending a criminal term of court at which he was under bond to appear, cannot be sustained. *Ibid.*

§ 6. Service by Publication.

Averment in the affidavit for service by publication that plaintiff has a "good" cause of action is addressed to the "satisfaction" of the issuing court and is to be determined upon the trial on the merits, and alleged falsity in the averment does not invalidate the order for service by publication or subject the judgment rendered to attack on the grounds of want of jurisdiction. *Simmons v. Simmons*, 233.

Averment in the affidavit that "defendant . . . after diligent inquiry cannot be found in the State of North Carolina" is in substantial compliance with the statute and supports an order for service by publication. G. S., 1-98. *Ibid.*

PUBLIC OFFICERS.

§ 5b. Duties and Authority in General.

Where the right to do a thing is dependent upon legislative authority, approval of a ministerial officer cannot authorize that which is forbidden or unauthorized by statute. *Glover v. Ins. Co.*, 195.

QUIETING TITLE.

§ 2. Actions to Remove Cloud on Title.

Where, in an action to quiet title, plaintiffs introduce evidence tending to show title in themselves and tending to show that the purported deed held by defendants is void, the rendition of judgment as of nonsuit is error. *Layden v. Layden*, 5.

Plaintiffs' evidence tending to identify the *locus* as the land embraced within the State grant under which they claim, and that the land was not covered by navigable water, *held* sufficient to overrule nonsuit. *Davis v. Morgan*, 78.

QUO WARRANTO.

§ 2. Quo Warranto Proceedings.

The official certificate of election is *prima facie* evidence that the person designated is entitled to the office, and imposes the burden on relator of establishing the grounds of his complaint. *Owens v. Chaplin*, 705.

Where, in an action in the nature of *quo warranto* the evidence is insufficient to invalidate a sufficient number of votes to change the result of the election, the motion by defendant for judgment as of nonsuit should be granted. *Ibid.*

RAILROADS.

(As common carriers, see Carriers.)

§ 4. Accidents at Crossings.

Evidence tending to show that plaintiff driver, when within 38 feet of defendant's track, had an unobstructed view in the direction from which the train approached from 150 to 300 feet, that he saw a dim light down the track but failed to recognize it as the headlight of the approaching engine, although others in the car with him did recognize it, that plaintiff proceeded across the tracks and was struck by defendant's train, *is held* to disclose contributory negligence barring recovery as a matter of law. G. S., 1-183. *Penland v. R. R.*, 528.

RAPE.

§ 4. Sufficiency of Evidence and Nonsuit in Prosecution for Rape.

Evidence *held* sufficient to sustain conviction for rape. *S. v. Hooks*, 689.

§ 5. Instructions in Prosecutions for Rape.

An instruction which fails to charge that the carnal knowledge of prosecutrix must have been accomplished by force and against her will to constitute the crime of rape must be held for reversible error. G. S., 14-21. *S. v. Simmons*, 258.

§ 17. Competency and Relevancy of Evidence in Prosecution for Carnal Knowledge of Female Between 12 and 16.

In this prosecution for carnal knowledge of a girl between 14 and 16 years of age, prosecutrix testified that the intercourse resulted in pregnancy. The child had not been born at the time of the trial. *Held:* Defendant's request that prosecutrix be examined to ascertain the status of the expected child was addressed to the discretion of the trial court, the issue being whether defendant committed the offense and the time of its commission being relevant solely as bearing upon the accuracy of prosecutrix' testimony as to the time of the intercourse. *S. v. Bryant*, 641.

§ 18. Sufficiency of Evidence and Nonsuit in Prosecution for Carnal Knowledge of Female Between 12 and 16.

Evidence *held* sufficient to support verdict of guilty in this prosecution for carnal knowledge of girl between 14 and 16 years of age. *S. v. Bryant*, 641.

§ 19. Instructions in Prosecution for Carnal Knowledge.

In this prosecution for carnal knowledge of a girl between 14 and 16 years of age, the period of gestation was relevant solely as bearing upon the accuracy of prosecutrix' testimony as to the time of the intercourse, which she testified resulted in pregnancy. In response to a juror's question, the court charged that there was no law on the period of gestation and no medical evidence had been introduced in regard thereto, but later recalled the jury and instructed them that as a matter of common knowledge the period of gestation is ten lunar months or 280 days. *Held:* The court merely corrected an inadvertence and the jury was neither confused nor misled. *S. v. Bryant*, 641.

§ 23. Prosecutions for Assault on Female.

Evidence tending to show that defendant, in a drunken condition, went to the office where prosecutrix worked, asked her a question, and after she had answered, continued to stare at her, that prosecutrix went out in the hall and

RAPE—*Continued.*

defendant, an adult male, followed and continued to stare at her, causing prosecutrix to become frightened and run up the steps followed by defendant, so that prosecutrix, frightened by implied threat of force, was caused to go where she otherwise would not have gone, *is held* sufficient evidence to sustain a verdict of guilty of assault on a female by a male over 18 years of age. *S. v. Sutton*, 534.

RECEIVERS.

§§ 1, 7. Nature and Grounds of Remedy in General.

The inherent power of a court of equity to appoint a receiver is not limited by the prevailing statutory provisions. G. S., 1-502; G. S., 55-147. *Sinclair v. R. R.*, 389.

Ordinarily the appointment of a receiver is ancillary to some other equitable relief prayed in order to preserve and insure the proper disposition of the subject of litigation. *Ibid.*

Some of the most common, but not exclusive, instances in which a receiver may be appointed are (1) to preserve, *pendente lite*, specific property which is the subject of litigation; (2) to tide an individual or corporation over a temporary financial embarrassment: (3) to prevent preferences and to insure the equitable distribution of the assets of an insolvent. *Ibid.*

Ordinarily the appointment of an operating receiver is limited to those instances where a temporary stay of creditor pressure is necessary to the preservation of the business, and a permanent operating receiver for financial embarrassment or impending insolvency will be appointed most commonly, if not exclusively, for railroads or other public utilities. *Ibid.*

Unless obligated to do so by its charter, a railroad should not be forced to continue operations in the public interests by the appointment of an operating receiver when such operation must be at continuing loss or the chance of profitable operation is nothing more than a gamble, and therefore the court before appointing an operating receiver should determine whether such operation will pay expenses and will tend to conserve rather than dissipate its assets. *Ibid.*

As a general rule a receiver for a corporation will not be appointed at the instance of a simple contract creditor without a lien unless he has some peculiar equity or beneficial interest in the property of the corporation, except perhaps to prevent preferences and to assure equitable distribution of the assets of an insolvent. *Ibid.*

Persons asserting unliquidated damages past and prospective resulting to them as consignees and consignors from the abandonment of the operation of a railroad may not in their individual capacities maintain an action to force continuing operation of the railroad by the appointment of a permanent operating receiver, since such damages, though possibly difference in degree, are not different in kind than those sustained by the public generally, and since the power to require continuous operation in the public interest of the State is vested exclusively by statute in the Utilities Commission. G. S., 62-46, *et seq.* *Ibid.*

Under G. S., 62-89, it would seem that the Legislature has withdrawn from the courts the right to authorize the issuance of receiver's certificates maturing more than two years after date of issue. *Ibid.*

§ 3. Bonds to Prevent Receivership.

Plaintiffs who are parties at the time the court accepts bond filed pursuant to G. S., 1-503, and denies application for appointment of a receiver, are

RECEIVERS—*Continued.*

thereby estopped from further prosecuting their application for a receiver, and the court is without authority to revoke such order at a subsequent term over objection of defendants. *Sinclair v. R. R.*, 389.

REFERENCE.

§ 9. Exceptions and Preservation of Grounds of Review.

Where the court sets aside all the findings of fact and conclusions of law of the referee except in so far as they coincide with the findings and conclusions of the court, exceptions to the referee's findings are not presented in the Supreme Court on appeal, there being no exception to the findings by the court. *Hughes v. Oliver*, 680.

§ 10. Duties and Power of Court in Regard to Referee's Findings.

The court has the power upon the filing of the report of the referee to affirm, amend, modify or set it aside, and to make its own findings of fact, and, when such findings are supported by competent evidence, they will not ordinarily be disturbed on appeal. *Hughes v. Oliver*, 680.

§ 10. Review of Report in General.

Where the parties by consent judgment stipulate that the amount of commissions due defendant should be determined by a referee and that the amount so found should be binding and conclusive on the parties, the amount found by the referee in accordance with the agreement is conclusive, and the trial court properly declines to entertain exceptions to the referee's report. *Ferrell v. Worthington*, 118.

REFORMATION OF INSTRUMENTS.

§ 2. Mistake Induced by Fraud.

Evidence that an employer, at the instance of an employee in financial distress, gave the employee a certain sum of money and took an absolute conveyance of the employee's property, that the employee remained thereon as tenant, paying rent to the employer, and that the employer promised the employee that he could get the property back upon payment of the amount plus expenditures by the employer, without evidence that the employee was unable to, or was prevented from, reading the instrument, *is held* insufficient to be submitted to the jury upon the contention that defeasance clause was omitted from the deed by mistake of the grantors induced by fraud or undue influence on the part of grantees. *Poston v. Bowen*, 202.

§§ 3, 4. Mutual Mistake: Mistake of Draftsman.

Where there is no evidence that grantors were unable to, or were prevented from, reading the deed absolute in form signed by them, it will be assumed they signed the instrument they intended to sign, and they are not entitled to have it reformed for mutual mistake of the parties or mistake of the draftsman. *Poston v. Bowen*, 202.

REGISTRATION.

§ 1. Instruments Required to Be Registered.

The provision of G. S., 40-19, that copy of judgment in eminent domain proceedings be registered in the county where the land lies, and the provision of G. S., 1-228, that judgments in which transfer of title is declared shall be

REGISTRATION—*Continued.*

registered under the same rules prescribed for deeds, *held* superseded by the later enactment of Chap. 148, Public Laws of 1917 (G. S., 47-27), exempting decrees of courts of competent jurisdiction in condemnation proceedings from the requirement as to registration. *Light Co. v. Bowman*, 319.

The proviso of Chap. 148, Public Laws of 1917, exempting decrees of condemnation from the requirement of registration *held* not repealed by the amendments of Chap. 107, Public Laws of 1919, and Chap. 750, Session Laws of 1943, and an easement created by judgment in condemnation proceedings is good as against creditors and purchasers for value from the owner of the servient tenement notwithstanding the absence of registration. G. S., 47-27; G. S., 47-18. *Ibid.*

ROBBERY.

§§ 1a, 1b. Robbery; Robbery With Firearms.

Common law robbery is the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear; and by statutory provision, a more severe punishment is prescribed if the offense be committed by the use or threatened use of firearms or other dangerous weapon whereby the life of a person is endangered or threatened. *S. v. Bell*, 659.

§ 3. Prosecutions and Punishment.

Where separate indictments charging defendants with robbing two individuals are consolidated for trial, and there is no evidence that defendants took any money or goods of value from one of the persons named, motion to nonsuit that prosecution should be allowed. *S. v. Bell*, 659.

Defendants' contention that nonsuit should have been allowed on the charge of robbery because the evidence failed to show violence or intimidation in the felonious taking of money from the person of prosecuting witness, it being in evidence that defendants accomplished the taking by impersonating officers of the law and threatening to arrest the victim for an alleged offense, *is held* untenable when there is evidence that defendants also used physical force and threatened to inflict bodily injury. *Ibid.*

Where there is evidence that one of defendants, in feloniously taking money from the person of prosecuting witness against his will by violence and intimidation, flourished and threatened to use a pistol, the other defendant being present aiding and abetting the commission of the offense, the evidence is sufficient to sustain conviction of robbery with firearms. *Ibid.*

Where all the evidence tends to show that defendants feloniously took money from the person of prosecuting witness by violence and against his will through the use or threatened use of firearms, the court properly limits the jury to a verdict of guilty of robbery with firearms or a verdict of not guilty, there being no evidence warranting the court in submitting the question of defendants' guilt of less degrees of the crime. *Ibid.*

SALES.

§ 15. Implied Warranties.

While under the doctrine of *caveat emptor* there is no implied warranty of quality in the sale of personalty, there is an implied warranty that the goods be not worthless for the purpose for which intended. *McConnell v. Jones*, 218.

SALES—*Continued.*

§ 27. Actions or Counterclaims for Breach of Warranty.

In a suit by the buyer to recover for breach of warranty the burden is upon the buyer both on the issue of liability and on the extent of recovery. *Yarn Co. v. Mauney*, 99.

Plaintiff ordered and defendants shipped cotton yarn "subject to provisions of the Cotton Yarn Rule of 1938." Plaintiff rejected the yarn for alleged breach of warranty. One of the rules stipulated that rejection had to be made within ten days after the buyer knew or should have known of defect. Defendants contended upon supporting evidence that the right of rejection was either barred or waived by this rule. *Held:* An instruction to the effect that if the jury should find that there was a breach of warranty and reach the issue of damages to answer that issue in the amount contended by plaintiff, is erroneous as being peremptory in form and as withdrawing from the consideration of the jury defendants' evidence relating to the waiver of the right of rejection. *Ibid.*

The purchaser admitted he owed a portion of the balance of the purchase price but contended that he was entitled to a reduction of the amount on account of breach of implied warranty. The seller contended he was entitled to recover the full balance of the purchase price. *Held:* An instruction to answer the issue for the full amount claimed by the seller or to answer the issue nothing, in accordance with the finding upon the question of breach of warranty, must be *held* for reversible error. *McConnell v. Jones*, 218.

SHERIFFS.

§ 6d. Motions to Amerce Sheriff.

Execution of a judgment against defendant in summary ejectment to remove her from the land was issued and delivered to the sheriff. The sheriff failed to serve the execution because of an intervening order restraining the plaintiff from further prosecuting the summary ejectment, issued in a prior pending action to try title. *Held:* Motion to amerce the sheriff for failure to serve the execution was properly denied, since the sheriff had shown sufficient cause for failing to serve the execution. G. S., 162-14. *Massengill v. Lee*, 35.

SPECIFIC PERFORMANCE.

§ 4. Proceedings and Relief.

Where the facts found support the court's conclusions that there was a written memorandum of the contract of purchase and sale of lands within the contemplation of G. S., 22-2, and that it contained a sufficient description to admit of parol evidence which fully identified the land, the conclusions support decree for specific performance. *Russos v. Bailey*, 783.

STATE.

§ 2c. Entry and Grant of State Lands.

Plaintiffs' evidence that the *locus in quo* embraced within their State grant was not covered by navigable waters, *held* sufficient to overrule nonsuit. G. S., 146-1. *Davis v. Morgan*, 78.

STATE—*Continued.*

§ 5. Jurisdiction and Powers in General. (Full faith and credit to judgments, see Constitutional Law; conflict of laws, see Courts.)

In proper instances the State has the power to permit acts to be done outside its borders when the legal consequences of such acts are to take place within its boundaries. *Owens v. Chaplin*, 705.

A state has exclusive control over all the legal incidents of real property within its boundaries, and no other state has power to affect such lands by laws, judgments or decrees. *McRary v. McRary*, 714.

STATUTES.

§ 4. Procedure to Test Validity of Statute.

A corporation prosecuted for violating a statutory proscription is entitled to assert the unconstitutionality of the statute in its defense. *S. v. Glidden Co.*, 664.

§ 5a. General Rules for Construction of Statutes.

Where the meaning of a statute is in doubt, reference may be had to the title and contest of the act as legislative declarations of its purpose. *Smith v. Davis*, 172.

The intent and spirit of an act is controlling in its construction. *Ibid.*

§ 5b. Construction of Statutes—Administrative Interpretation.

Administrative interpretation of a statute, acquiesced in over a long period of time, is properly considered in the construction of the statute by the courts. *Knitting Mills v. Gill*, 764.

§ 6. Construction in Regard to Constitutionality.

The Supreme Court may not exercise its power to declare a statute unconstitutional and void unless it is clearly so. *Motley v. Board of Barber Examiners*, 337.

§ 8. Construction—Remedial Statutes.

A remedial statute operating under the police power will be construed in the light of the evil sought to be remedied. *S. v. Lovelace*, 186.

§ 13. Repeal by Implication and Construction.

The provision of G. S., 40-19, that copy of judgment in eminent domain proceedings be registered in the county where the land lies, and the provision of G. S., 1-228, that judgments in which transfer of title is declared shall be registered under the same rules prescribed for deeds, *held* superseded by the later enactment of Chap. 148, Public Laws of 1917 (G. S., 47-27), exempting decrees of courts of compeetnt jurisdiction in condemnation proceedings from the requirement as to registration. *Light Co. v. Bowman*, 319.

The proviso of Chap. 148, Public Laws of 1917, exempting decrees of condemnation from the requirement of registration *held* not repealed by the amendments of Chap. 107, Public Laws of 1919, and Chap. 750, Session Laws of 1943, and an easement created by judgment in condemnation proceedings is good as against creditors and purchasers for value from the owner of the servient tenement notwithstanding the absence of registration. G. S., 47-27; G. S., 47-18. *Ibid.*

SUBROGATION.

§ 1. Nature and Grounds of Remedy.

A person who is not a mere volunteer is entitled to the equity of subrogation upon payment of a debt which in justice and good conscience ought to be paid by another. *Leno v. Ins. Co.*, 501.

TAXATION.

§ 29. Levy and Assessment of Income Taxes.

The three year limitation from the time of filing original income tax returns during which the Commissioner of Revenue may review returns and make additional assessments is not strictly a statute of limitations and does not affect the right to additional tax but applies solely to administrative procedure by which the tax is assessed. *Knitting Mills v. Gill*, 764.

G. S., 105-160, considered *in pari materia* with the other pertinent provisions of the Revenue Act prior to the amendment of Chap. 501, sec. 4, Session Laws of 1947, does not preclude the Commissioner of Revenue from making additional assessments or refunds of income taxes after the expiration of three years from the filing of the original returns where the taxpayer has been forced to make changes in his Federal income tax return and pay an additional assessment of Federal income taxes, and has failed to notify the Commissioner of Revenue of such changes and file an additional return under oath as required by G. S., 105-159. *Ibid.*

§ 39. Sale of Personalty for Taxes.

Assets of a corporation which are sold to an innocent purchaser for value are not subject to levy to satisfy taxes due by the corporation. *Roach v. Pritchett*, 747.

TORTS.

§ 4. Determination of Whether Tort Is Joint or Separable.

Where two or more persons unite or intentionally act in concert in committing a wrongful act, or participate therein with common intent, they are jointly and severally liable for the resulting injuries. *Garrett v. Garrett*, 530.

TRESPASS TO TRY TITLE.

§ 3. Actions.

In an action in trespass to try title, the failure of evidence of title in one of the plaintiffs does not justify nonsuit, since one tenant in common owning only an undivided interest in the land can maintain action against a trespasser. *Davis v. Morgan*, 78.

The burden is on plaintiffs to prove the title alleged, and defendants are entitled to introduce record showing release or extinguishment by estoppel from sources to which plaintiffs are in privity, notwithstanding absence of allegation thereof in answer. *Pritchard v. Fields*, 441.

TRIAL.

§ 7. Argument and Conduct of Counsel.

Wide latitude is given counsel in the exercise of the right to argue to the jury the whole case, as well of law as of fact, but counsel is not entitled to travel outside of the record and argue facts not included in the evidence, and when counsel attempts to do so it is the right and duty of the court to correct

TRIAL—*Continued.*

the argument, either at the time or in the charge to the jury . *S. v. Little*, 417.

§ 11. Consolidation of Actions for Trial.

The trial judge has the discretionary power, *ex mero motu*, to consolidate actions for trial even though instituted by different plaintiffs against a common defendant or by the same plaintiff against several defendants, when the causes of action grow out of the same transaction and substantially the same defenses are interposed, provided such consolidation results in no prejudice or harmful complications to either party. *Peebles v. R. R.*, 590.

An order consolidating four actions, two instituted by personal representatives to recover for wrongful death and two by the survivors of the accident to recover for personal injuries, all four actions arising out of a grade crossing accident between defendant's train and the truck in which intestates and the survivors of the accident were riding, and in which practically the same defenses were interposed, *held* without error. *Ibid.*

An order of consolidation will not be reversed on the ground that it is based on an erroneous finding when the alleged error of fact does not affect the question of consolidation, since appellant is not prejudiced thereby, the pleadings and not the findings being controlling upon the trial. *Ibid.*

§ 14. Objections and Exceptions to Evidence.

Where, upon the overruling of an objection by the adverse party to a question, counsel, the witness not having answered, formulates the question in different language and the witness answers, the failure to object to the second question cannot be held a waiver of the objection to the first question. *Jamerson v. Logan*, 540.

Objection to the admission of a photograph in evidence, interposed for the first time when a witness undertakes to use the photograph to explain his testimony, is too late. *Steelman v. Benfield*, 651.

§ 15. Motions to Strike.

Motion to strike must be made immediately after the testimony objected to in order to preserve an exception to the admission of the evidence. *Steelman v. Benfield*, 651.

§ 17. Admission of Evidence Competent for Restricted Purpose.

Exception of one defendant to the general admission of evidence competent solely against the other defendant, is untenable in the absence of a request at the time that its admission be limited. *Owsley v. Henderson*, 224.

The general admission of evidence competent for a restricted purpose will not be held for reversible error in the absence of a request at the time that its admission be restricted. *Humphries v. Coach Co.*, 399.

§ 20. Questions of Law and of Fact.

Where the legal effect of the description in a deed is the sole question raised by the pleadings, the court properly determines the controversy as a question of law. *Lewis v. Furr*, 89.

§ 21. Office and Effect of Motion to Nonsuit.

A fatal variance between allegation and proof justifies nonsuit, as it amounts to a total failure of proof on the declaration or the cause alleged. *Mills, Inc., v. Veneer Co.*, 115; *Stafford v. Yale*, 220.

TRIAL—*Continued.*

The question of the sufficiency of the evidence must be presented by motion to nonsuit or by prayer for instructions or by objections to the submission of the issues, and an exception to the judgment on the ground that there was no sufficient evidence to sustain the verdict, is too late to raise the question. *Lea v. Bridgeman*, 565.

§ 22a. Consideration of Evidence on Motions to Nonsuit in General.

Upon motion to nonsuit, the evidence tending to support plaintiffs' claim must be construed most favorably to them and they are entitled to every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom. *Nichols v. Goldston*, 514.

§ 22b. Nonsuit—Consideration of Defendant's Evidence.

On motion to nonsuit, defendant's evidence which tends to contradict or impeach plaintiff's evidence will not be considered, but so much of defendant's evidence as is favorable to plaintiff or tends to explain and make clear evidence offered by plaintiff may be considered. *Humphries v. Coach Co.*, 399.

§ 22c. Nonsuit—Contradictions and Discrepancies in Plaintiff's Evidence.

When the entire evidence, giving plaintiff the benefit of every reasonable intendment and every reasonable inference therefrom, is sufficient to be submitted to the jury, the fact that the testimony of some of plaintiff's witnesses, standing alone, would seem to negate plaintiff's cause of action, does not justify nonsuit. *Sparks v. Willis*, 25.

Contradictions, discrepancies or equivocations in plaintiff's testimony affect his credibility but do not justify nonsuit. *Emery v. Ins. Co.*, 532.

§ 24b. Nonsuit of Co-defendant.

Where one defendant contends that the collision in suit was due solely to the negligence of plaintiff, he is in no position to press his exception to the granting of his co-defendant's motion to nonsuit. *Wells v. Burton Lines*, 422.

§ 31b. Statement of Evidence and Application of Law Thereto.

The trial court is required to charge the law upon all substantial features of the case arising on the evidence even though there is no request for special instructions. G. S., 1-180. *Yarn Co. v. Mauney*, 99.

An instruction that defendant's evidence of good character might be considered as substantive evidence in negligent injury action *held* prejudicial error. *Morgan v. Coach Co.*, 280.

The trial court, in reviewing the evidence, is not required to give a verbatim recital of the testimony, but only a summation sufficiently comprehensive to present every substantial and essential feature of the case. *Steelman v. Benfield*, 651.

Charge *held* for error in presenting only the inferences favorable to defendant on material phase of the case. *Gaskins v. Kelly*, 697.

§ 31c. Instructions—Conformity to Pleadings and Evidence.

In this action in trespass, defendant contended upon supporting evidence that the State grant under which plaintiffs claimed covered only a portion of the *locus*. *Held:* A charge of the court that either the plaintiffs are entitled to all the land in controversy or that the defendant is entitled to all the land, must be held for error as removing from consideration of the jury defendant's

evidence that plaintiffs' grant covered only a portion of the *locus*. *Davis v. Morgan*, 78.

The purchaser admitted he owed a portion of the balance of the purchase price but contended that he was entitled to a reduction of the amount on account of breach of implied warranty. The seller contended he was entitled to recover the full balance of the purchase price. *Held:* An instruction to answer the issue for the full amount claimed by the seller or to answer the issue nothing, in accordance with the finding upon the question of breach of warranty, must be *held* for reversible error. *McConnell v. Jones*, 218.

§ 31e. Expression of Opinion by Court on Weight or Credibility of Evidence.

Plaintiffs and defendant claimed the *locus* under respective State grants. Defendant contended that plaintiffs' grant could not be accurately located and that, if located, covered only a portion of the *locus*. *Held:* An instruction that by the two grants introduced in evidence title had been shown out of the State, must be held for error as an expression of opinion that the grant under which plaintiffs claim was valid and that it had been located to cover the land in question. G. S., 1-180. *Davis v. Morgan*, 78.

§ 39. Form and Sufficiency of Verdict.

A verdict, both in civil and criminal cases, may be given significance and correctly interpreted by reference to the pleadings, the facts in evidence, admissions of the parties, and the charge of the court. *Stewart v. Wyrick*, 429.

TRUSTS.

§ 2a. Creation and Validity of Parol Trusts.

A parol trust in favor of grantors may not be engrafted upon a deed absolute in form. *Poston v. Bowen*, 202.

§ 4b. Transactions Creating Resulting Trusts.

A resulting trust is created as of the time title is wrongfully taken in name of trustee. *Davis v. Davis*, 48.

§ 4c. Actions to Establish Resulting Trusts.

Suit to declare resulting trust may be maintained by sole heir at law of person wronged. *Davis v. Davis*, 48.

Plaintiff, sole heir at law of intestate, introduced evidence tending to show that intestate, while incapacitated by illness, gave defendant funds to purchase for intestate a certain lot, that defendant, who was intestate's brother-in-law, took title in himself, and, purporting to act as intestate's agent, built a house thereon with funds supplied by intestate, representing to her that title was in her name. *Held:* The evidence, though contradicted by that of defendant, is sufficient to be submitted to the jury, both on the theory of a resulting trust on the principle of following the funds, and on the theory of a constructive trust on the principle that defendant was a trustee *ex maleficio*. *Ibid.*

§ 5b. Transactions Creating Constructive Trusts.

A resulting or constructive trust is created as of the time title is wrongfully taken in the name of the trustee. *Davis v. Davis*, 48.

TRUSTS—*Continued.*

§ 5c. Actions to Declare Constructive Trusts.

A suit to declare a resulting or constructive trust may be maintained by the sole heir at law of the person wronged. *Davis v. Davis*, 48.

Plaintiff, sole heir at law of intestate, introduced evidence tending to show that intestate, while incapacitated by illness, gave defendant funds to purchase for intestate a certain lot, that defendant, who was intestate's brother-in-law, took title in himself, and, purporting to act as intestate's agent, built a house hereon with funds supplied by intestate, representing to her that title was in her name. *Held:* The evidence, though contradicted by that of defendant, is sufficient to be submitted to the jury, both on the theory of a resulting trust on the principle of following the funds, and on the theory of a constructive trust on the principle that defendant was a trustee *ex maleficio*. *Ibid.*

§ 6. Appointment and Tenure of Trustees.

Testatrix devised certain realty to the "Presbyterian Church in the United States" for a home for widows of ministers of that denomination, and set up a trust fund to endow the home and appointed as trustees of the endowment fund the trustees of the local church and the minister thereof and another local minister, their "successors to be chosen as occasion may require" by the General Assembly of the denomination. *Held:* The local trustees as designated by testatrix are entitled to the control and management of the trust funds in accordance with intent of testatrix as gathered from the entire instrument. *McKay v. Presbyterian Foundation*, 309.

§ 14b. Power of Trustee to Convey Trust Property.

Neither a devisee for life nor a trustee under a testamentary trust has authority to convey the fee in the land devised in the absence of authority conferred by the will, but the power to convey need not be expressly conferred but may be implied from the language of the instrument necessarily requiring the exercise of the power to effectuate the testamentary intent. *Hall v. Wardwell*, 562.

A devise of property in trust subject to an intervening life estate, with direction to the trustees to keep the principal invested and use the proceeds for purposes designated (G. S., 36-21), gives the trustees the power to convey the real estate in fee, since the right to invest and use the proceeds necessarily implies the power to convert into proceeds by sale. *Ibid.*

§ 24. Rights and Remedies of Beneficiaries Against Trustee for Maladministration.

Where the complaint alleges maladministration and misuse of trust funds, a court of equity will interpose its protective authority in behalf of the infant beneficiary, and defendant trustee's affidavits which failed to deny misuse of trust funds but controvert only whether the trust was created by will or by letter do not show a valid defense. *Lightner v. Boone*, 199.

§ 26. Revocation by Trustor.

A voluntary conveyance of property in trust to named beneficiaries for life with contingent limitation over to persons not *in esse*, is revoked as to such contingent limitation by proper deed executed by the trustee and surviving trustors within six months after the effective date of Ch. 437, Session Laws 1943, the deed of revocation being executed prior to the happening of the contingency upon which the limitation over was to vest. *Kirkland v. Deck*, 439.

TRUSTS—*Continued.*

§ 27. Modification and Abandonment in Equity Jurisdiction.

Testatrix set up a trust fund under the control and management of local trustees to maintain a home for widows of ministers of a designated denomination. The trustees of the denomination contended that the funds should be turned over to them for administration on the ground that the funds in themselves were insufficient for the purpose of the charity and that they were administering other funds for the same charitable purpose. *Held:* It not appearing that the local trustees were incapable of effectuating the purpose of the trust within the intent of trustor, the exigencies presently presented are insufficient to justify a court of equity in discharging as trustees those selected by the testatrix for the administration of the fund. *McKay v. Presbyterian Foundation*, 309.

UTILITIES COMMISSION.

§ 1. Functions and Jurisdiction.

Persons asserting unliquidated damages past and prospective resulting to them as consignees and consignors from the abandonment of the operation of a railroad may not in their individual capacities maintain an action to force continuing operation of the railroad by the appointment of a permanent operating receiver, since such damages, though possibly different in degree, are not different in kind than those sustained by the public generally, and since the power to require continuous operation in the public interest of the State is vested exclusively by statute in the Utilities Commission. G. S., 62-46, *et seq. Sinclair v. R. R.*, 389.

Carrier may enjoin libel by competing carrier upon allegation that relief is necessary to protect business, but may not enjoin illegal schedules or fares by competing carrier, since remedy is available through Utilities Commission. *Transit Co. v. Coach Co.*, 768.

VENDOR AND PURCHASER.

§ 13. Right of Purchaser to Rescind or Abandon Contract.

Where buildings, constituting a material and substantial inducement for the execution of a contract to purchase, are destroyed by fire, the loss will fall on the vendor, and the vendee is not required to complete the contract. *Poole v. Scott*, 464.

§ 32. Right to Proceeds of Fire Insurance.

In vendees' action to recover the proceeds of a policy of fire insurance collected by vendors, judgment on the pleadings in vendees' favor is error when the complaint fails to allege that the contract was in writing and signed by the parties to be charged, since it does not appear from the complaint that the contract was specifically enforceable at the time of the destruction of the property by fire. *Poole v. Scott*, 464.

This action was instituted by vendees to recover the proceeds of a policy of fire insurance collected by vendors. Vendees allege that they were induced to accept deed and pay the balance of the purchase price upon representations that the proceeds of the policy would be paid to them. Vendors denied that they or their agent had made such representations. *Held:* The pleadings raised a controverted issue of fact for the determination of the jury, and judgment on the pleadings for vendees is error. *Ibid.*

WATERS AND WATER COURSES.

§ 3. Pollution.

No right of prescription to pollute its streams can be acquired against the State. *S. v. Glidden Co.*, 664.

§ 12. Right to Accretion.

Plaintiffs claimed title to a part of the *locus in quo* by accretion. The court defined accretion as the gradual deposit of material by waters so as to cause that to become dry land which was theretofore covered by water, and in compliance with defendant's prayer for instruction, charged that the doctrine did not apply to land reclaimed by man in filling in land once under water. *Held:* Defendant cannot complain of the instruction. *Davis v. Morgan*, 78.

WILLS.

§ 4. Requisites and Validity of Contracts to Devise or Bequeath.

Parol contract to devise realty comes within statute of frauds. *Dunn v. Brewer*, 43; *Stewart v. Wyrick*, 429.

An indivisible contract to devise real and personal property comes within the statute of frauds. G. S., 22-2. *Jamerson v. Logan*, 540.

§ 5d. Sufficiency of Evidence and Nonsuit in Actions on Contract to Devise.

Where recovery for breach of an alleged contract to devise and bequeath is precluded by the statute of frauds, evidence that plaintiff rendered personal services to deceased in reliance upon the agreement warrants the submission of the case to the jury upon implied *assumpsit* or *quantum meruit*, without amendment of the complaint. *Jamerson v. Logan*, 540; *Stewart v. Wyrick*, 540.

§ 15b. Recordation of Foreign Wills.

Where a will devising realty in this State is duly probated in the court having jurisdiction in the state in which testate died, and a copy thereof is duly certified and authenticated by the clerk of that court, and it appears from such copy that the will was executed with two witnesses and proved by affidavit of one of them, G. S., 31-27, such copy may be recorded here as if an original. Want of proper authentication of such copy and of the probate proceedings in accordance with the Federal Rules may be supplied *nunc pro tunc*. U.S.C.A. Title 28, Sec. 688. *Lewis v. Furr*, 89.

A caveat to the recordation of the exemplification of a will and the proceedings had in connection with its probate in another state, G. S., 31-27, alleging fraud in the procurement of the will and of its probate, is not subject to dismissal on the ground of want of jurisdiction of our court so far as it affects realty situate here, and when the caveat also challenges jurisdiction of the court of probate on the ground that testatrix was a resident of this State, there is no want of jurisdiction of the caveat proceedings in regard to personalty situate within this State. *In re Will of Chatman*, 246.

§ 16. Effect of Probate.

Where the Clerk of the Superior Court probates a will in common form and records it in the manner prescribed, the record and probate is conclusive as to the validity of the will until vacated on appeal or declared void by a competent tribunal. *In re Will of Hine*, 405.

WILLS—*Continued.*

While the Clerk of the Superior Court in proper instances may set aside a probate in common form, he may not do so on grounds which are properly determinable by caveat. *Ibid.*

§ 17. Nature and Effect of Caveat Proceedings.

Upon the proper filing of a caveat, G. S., 31-32; G. S., 31-33; G. S., 31-36; the cause must be transferred to the civil issue docket where the proceeding is *in rem* for trial by jury, and neither party may waive jury trial, consent that the court hear the evidence and find the determinative facts or have nonsuit entered at his instance. *In re Will of Hine*, 405.

Where the Clerk of the Superior Court has admitted to probate in common form a purported will and two purported codicils as the last will and testament of a deceased, and caveat has been properly filed as to the second codicil and the cause transferred to the civil issue docket, the Clerk may not thereafter upon motion expunge from his records the entire probate proceedings and reprobate the purported will and second codicil on the ground that the second codicil revoked the first. *Ibid.*

While in a strict sense there are no parties to an issue of *devisavit vel non*, the proceeding being *in rem*, propounders and caveators may be put in the category of parties for the purpose of ruling upon the admissibility in evidence of their admissions and declarations. *In re Will of Cassada*, 548.

§ 18c. Caveators.

Caveators have a community of interest in the successful prosecution of the caveat, but they are not in privity and do not have a joint interest in the matter in suit in a legal sense, but, if successful, will hold their respective shares in the realty as tenants in common and their respective shares in the personalty in severalty. *In re Will of Cassada*, 548.

§ 23b. Competency of Evidence on Issue of Mental Capacity.

It is competent for the natural object of testatrix' bounty to testify on the issue of mental incapacity that, something less than two years prior to the execution of the instrument caveated, testatrix told the witness that papers had been prepared leaving the property to her, or at lease the admission of such testimony is not sufficient ground for reversal. *In re Will of Kestler*, 215.

The extra-judicial admissions of one of several caveators, made without authority of the others, is not competent on behalf of propounders to contradict caveators' assertion of testamentary incapacity, since even though it be a declaration against interest and would be competent against the caveator making the admissions if he were the sole caveator, yet such caveator is not in privity with the others and has no joint interest with them in the matter in suit, and therefore the admissions are incompetent as against the other caveators. *In re Will of Cassada*, 548.

§ 25. Instructions in Caveat Proceedings.

The use of the phrase "at the approximate time" of executing the instrument, in charging upon the question of mental capacity, will not be held for prejudicial error when the evidence tends to show a probable variation of several days between the preparation of the paper and its publication, and in other portions of the charge and in the issue submitted the question of mental capacity is directed to the time of the execution of the instrument. *In re Will of Kestler*, 215.

WILLS—*Continued.*

§ 32. Presumption Against Partial Intestacy.

The presumption against partial intestacy has varying force according to the circumstances of the particular case, but in no event can it justify the court in making a will for testator. *Sutton v. Quinerly*, 106.

The presumption against partial intestacy applies with particular force as to lands which testator undertakes to dispose of and selects the objects of his bounty. *Ibid.*

The rule against intestacy is merely one of construction to be applied where the phraseology is ambiguous or the intent uncertain, and the fact that a particular series of contingencies might result in partial intestacy does not render the provisions of the will invalid or justify the court in construing the language contrary to its plain and unambiguous meaning. *Van Winkle v. Berger*, 473.

§ 31. General Rules of Construction.

The intent of the testator as gathered from the four corners of the will is the guiding star in the interpretation of the instrument. *Schaeffer v. Haseltine*, 484.

Apparent inconsistent provisions will be reconciled if reasonably possible so as to give effect to each in accordance with the general purpose of the will. *Ibid.*

§ 33a. Estates and Interests Created in General.

A devise generally or indefinitely with power of disposition creates a fee. *Hardee v. Rivers*, 66.

Unless the intent of the testator to devise an estate of less dignity can be gathered from the instrument construed from its four corners, an unrestricted or indefinite devise of real property is a devise in fee simple, and a subsequent clause expressing a wish, desire or even direction for the disposition of what remains at the death of the devisee, will not be allowed to defeat the devise nor limit it to a life estate. G. S., 31-38. *Taylor v. Taylor*, 275.

A devise of real estate to devisees "to do as they like with it," with subsequent provision that after their death whatever property is left should go to testatrix' niece *is held* to vest the fee simple in the beneficiaries first named. *Ibid.*

§ 33b. Estates Created Under Rule in Shelley's Case.

In this jurisdiction the rule in *Shelley's case* is a rule of law. *Rawls v. Roebuck*, 537.

Under the rule in *Shelley's case* a devise to R. and his wife during their natural lives and then to R.'s lawful heirs, vests the fee simple in the male devisee subject to the life estate of his wife, and does not create an estate by entireties. *Ibid.*

The rule in *Shelley's case* does not apply to a devise to testator's grandchildren during the term of their natural lives, then "to their bodily heirs, or issue surviving them," with limitation over of the share of any grandchild who should die without issue, since it is apparent that the word "heirs" was not used in its technical sense, and the grandchildren take only a life estate. *Williams v. Johnson*, 732.

WILLS—*Continued.*

§ 33c. Vested and Contingent Remainders and Defeasible Fees.

Where there is devise to testator's daughter with limitation over to her children, and in the event of failure of such children then to the brother and sisters of the first taker who should survive her, those who take the contingent limitation over must be ascertained as of the date of the death of the first taker. *Sutton v. Quinerly*, 106.

Testator devised certain lands to his daughter for life with limitation over to her child or children if she should marry and bear children, but "if she does not marry" then to her brother or sisters who may survive her. *Held:* The limitation over to brother and sisters of the first taker is not defeated by her subsequent marriage, it being the obvious intent of the testator that the limitation over to them should take effect in the event the first taker dies without child or children of her marriage surviving her. *Ibid.*

Where a will sets up a trust with provision that the income therefrom be divided among named beneficiaries for life and the *corpus* proportionately to their issue upon their deaths, with further provision that if a beneficiary should die without issue, this share of the *corpus* should become a part of, and be distributed in accordance with, the residuary clause, *held*, the persons entitled to each share of the *corpus* is contingent upon whether each of the life beneficiaries dies with or without issue her surviving, and therefore the will sets up a contingent and not a vested limitation, and the roll must be called as to each share of the *corpus* as of the death of its life beneficiary. G. S., 41-4. *Van Winkle v. Berger*, 473.

Held: Beneficiary took vested defeasible life interest with power of disposition and could exercise power of disposition before termination of prior intervening life estate. *Schaeffer v. Haseltine*, 484.

A devise to the widow of testator's son for life, then to testator's grandchildren for life with remainder in fee to the issue of the grandchildren, with provision that upon the death of any grandchild "without leaving him surviving issue or issues, then to his next of kin, in fee simple," vests the remainder in fee in the issue of the grandchildren, defeasible as to the share of each grandchild upon his death without issue him or her surviving. *Williams v. Johnson*, 732.

§ 33f. Devises With Power of Disposition.

A devise for life with power of disposition creates a life estate only, since the power of disposition does not enlarge the estate devised or convert it into a fee. *Hardee v. Rivers*, 66.

The donee of a power of disposition may exercise that power under the terms and within the limitations contained in the will, and when so exercised by deed sufficient in form and substance to convey the whole estate in the land therein described the grantee takes an indefeasible fee. *Ibid.*

Tstator devised his realty to his wife for life with power, in the event that the income therefrom was not sufficient for her proper support and maintenance, to sell any or all the real estate at any time she deemed necessary and use the proceeds thereof for her own necessary use and benefit. *Held:* Upon the occurrence of the condition within the limitations contained in the will for the exercise of the power, the wife can convey an indefeasible fee to the grantee. *Ibid.*

The donee of a power of disposition is no more than a designated agent to exercise the power of appointment within the limits prescribed, and the title to the property does not vest in the donee. *Trust Co. v. Williamson*, 458.

WILLS—*Continued.*

The exercise of a power of appointment will not be held invalid *in toto* because some of the provisions thereof violate the rule against perpetuities if the provisions which violate the rule are severable from the valid provisions, and in the instant case the provisions being severable, the donee died intestate in regard to the invalid provision and, under the will of the original donor, this property vested in the children of the donee, free and clear of any restraints or other limitations. *Ibid.*

Where a clause disposes of property to named beneficiaries "and their respective heirs and assigns," the term "heirs and assigns" is descriptive of the estate conveyed and does not set up an independent class of legatees so as to carry the estate to persons designated by will of a beneficiary. *Van Winkle v. Berger*, 473.

Whether a conveyance of property in general terms or by general description constitutes a valid exercise of a power of disposition or appointment is to be determined in accordance with the general rule in respect to conveyances by deed, but is governed by statute, G. S., 31-43, in respect to the exercise of such power by will. *Shaeffer v. Haseltine*, 484.

Testatrix had a vested one-half interest in the *locus* with power of disposition, subject to a prior intervening life estate, and subject to defeasance at election of the prior life tenant. Testatrix died prior to the death of the first life tenant, who later died without exercising her election to defeat testatrix' interest. Testatrix devised all the rest and residue of her estate, "both real, personal and mixed, wherever situate," in trust for her daughter for life and then in fee to her son. *Held:* The will was a valid exercise of the power of appointment of testatrix' one-half interest in the *locus*, there being nothing in the will to indicate any contrary intent. G. S., 31-43. *Ibid.*

Neither a devisee for life nor a trustee under a testamentary trust has authority to convey the fee in the land devised in the absence of authority conferred by the will, but the power to convey need not be expressly conferred but may be implied from the language of the instrument necessarily requiring the exercise of the power to effectuate the testamentary intent. *Hall v. Wardwell*, 562.

A devise of the residue of testator's property, real and personal, for life, with direction to the life tenant to invest and keep invested the principal and use any portion thereof for any charitable or philanthropic purpose she might select, vests in the life tenant, by necessary implication, power to convey the real estate in fee. *Ibid.*

§ 33h. Rule Against Perpetuities.

Where there is a devise of property with power of disposition, the rule again perpetuities relates back to the time the power of appointment is given and not the date of its exercise. *Trust Co. v. Williamson*, 458.

Where the attempted exercise of a power of disposition by will is void because violative of the rule against perpetuities, the donee dies intestate as to such property. In the instant case the original will covered such contingency by providing that should the donee die intestate the property should go to the donee's child or children. *Ibid.*

Since the rule against perpetuities relates back to the time the power of appointment is given and not to the date of its exercise, the rule against perpetuities precludes the donee of the power from creating a trust which the donor could not have created had he so desired. *Ibid.*

WILLS—*Continued.*

Testator devised certain property in trust with power of disposition by will to his son. The son, in exercising the power, devised a part of the property in trust for his children with a limited power to them to dispose of by will. *Held:* Since the son's children may or may not die within twenty-one years from the son's death, the devise of the power of disposition by will to his children is void as violating the rule against perpetuities. *Ibid.*

The rule against perpetuities does not apply to charitable trusts, but it does apply to trusts created for private purposes, and a private trust must terminate within a life or lives in being and twenty-one years and ten lunar months thereafter. G. S., 36-21. *Ibid.*

§ 34. Designation of Legatees and Devisees and Their Respective Shares.

Where a clause disposes of property to named beneficiaries "and their respective heirs and assigns," the term "heirs and assigns" is descriptive of the estate conveyed and does not set up an independent class of legatees so as to carry the estate to persons designated by will of a beneficiary. *Van Winkle v. Berger*, 473.

The will in suit set up a trust fund with provision that the income be divided among named beneficiaries during their lives and the proportionate part of the *corpus* to go to the issue of each beneficiary upon her death, with further provision that should a beneficiary die without issue the proportionate part of the trust fund should become a part of, and be distributed in accordance with, the residuary clause. The life beneficiaries of the trust fund were also named as distributees in the residuary clause. *Held:* Upon the death of one of the life beneficiaries of the trust without issue, her estate takes no interest under the residuary clause and her attempted disposition of such property by will is ineffectual. *Ibid.*

A limitation over to the life tenant's next of kin in the event of the life tenant's death without issue him surviving, takes the estate upon the happening of the contingency, to the brothers and sisters of the life tenant to the exclusion of issue of deceased brothers and sisters, "next of kin" in such instance meaning "nearest of kin" or "next blood relation," and not "heir" or "heirs." *Williams v. Johnson*, 732.

A devise for life to testator's grandchildren remainder in fee to testator's great-grandchildren, with limitation over to the next of kin of any grandchild failing to leave issue him or her surviving, takes the estate to the issue of each grandchild *per stirpes*, since, had the testator intended that the issue of the grandchildren take *per capita*, there would have been no necessity for a limitation over upon the failure of any grandchild to leave surviving issue. *Ibid.*

GENERAL STATUTES CONSTRUED.

(For convenience in annotating.)

G. S.

1-38. Seven years adverse possession under color of title is bar to action in ejectment as to all parties not under disability. *Hughes v. Oliver*, 680. Date of execution of trustee's deed and not date of foreclosure is time from which adverse possession under color of the deed begins to run. *Layden v. Layden*, 5.

1-47. Foreclosure of one tract covered by deed of trust extinguishes the instrument, and later foreclosure of another tract is nullity, and grantee in trustee's deed in such later foreclosure is not mortgagee or *cestui* in possession. *Layden v. Layden*, 5.

1-47 (3). Partial payment revives debt and fixes new date for running of statute, and action to foreclose deed of trust securing note is not barred until ten years from date of such payment. *Smith v. Davis*, 172.

1-47 (4). Action for redemption of mortgage where mortgagee has been in possession barred in ten years. *Hughes v. Oliver*, 680.

1-52. Action in *assumpsit* based on oral contract to devise is barred when not instituted within three years from death of promisor. *Dunn v. Brewer*, 43.

1-73. In action by purchaser against broker to recover earnest money paid, in which broker alleges breach of contract to purchase to damage of broker and seller, seller is necessary party. *Lampros v. Chipley*, 236.

1-98. Averment that defendant "after diligent inquiry cannot be found in the State of North Carolina" is in substantial compliance with statute and supports order for service by publication. *Simmons v. Simmons*, 233.

1-122. Complaint should allege ultimate facts constituting cause of action and not evidential facts. *Wilmington v. Schutt*, 285.

1-145. Petition in proceedings for contempt which is verified in accordance with form prescribed by statute is sufficient when facts constituting contempt are stated upon knowledge and not information and belief. *Mfg. Co. v. Arnold*, 375.

1-157. Action must be prosecuted in name of real party in interest. *Jones v. Neisler*, 444. Lessor cannot maintain action against his grantee for grantee's denial of lessor's hunting privilege. *Ibid.*

1-180. Court is required to charge law upon all substantial features of case arising on evidence even without special request. *Yarn Co. v. Mauney*, 99. Instruction that if jury is satisfied beyond reasonable doubt that defendant is guilty of the offense to convict him, otherwise to acquit him, *held* error in failing to explain law or apply law to evidence. *S. v. Flinchum*, 149. Use of phrases "tending to show" or "tends to show" in arraying evidence does not violate statute. *S. v. Jackson*, 656. Prefacing of special instruction with remark that jury should disregard previous instructions if and to extent of inconsistency with instruction about to be given, not approved. *Ibid.* Instruction that evidence of deceased's violent character was competent on plea of self-defense, without charge applying evidence to question of defendant's reasonable apprehension of death or great bodily harm, *held* insufficient. *S. v. Riddle*, 251. Court's definition of "involuntary manslaughter" and its distinction between civil and criminal negligence *held* without error. *S. v. McMahan*, 293. Where defendant attacks

GENERAL STATUTES CONSTRUED—*Continued.*

G. S.

validity of plaintiff's grant, instruction that State grants introduced in evidence showed title out of State *held* expression of opinion that plaintiff's grant was valid. *Davis v. Morgan*, 78. Exception "to failure of the court to charge the jury on manslaughter" does not properly present question for review. *S. v. Brooks*, 68.

1-183. Act of driving on crossing in face of approaching train *held* contributory negligence barring recovery as matter of law. *Penland v. R. R.*, 528.

1-218. Whether resident judge during vacation and at chambers could confirm foreclosure sale of mortgage without consent of parties, *quære*. *Grady v. Parker*, 54.

1-228, 40-19, 47-18, 47-27. Decree of courts of competent jurisdiction in condemnation proceedings is not required to be registered. *Light Co. v. Bowman*, 319.

1-276. Upon appeal in probate proceedings, jurisdiction is derivative and statute does not apply. *In re Will of Hine*, 405.

1-282, 1-283. Sole method of presenting for review exceptions relating to alleged errors committed during course of trial is by case agreed or settled by court. *Russos v. Bailey*, 783.

1-283. Trial court is without authority to settle case on appeal until and unless there is disagreement of counsel. *Russos v. Bailey*, 783.

1-294. Appeal from interlocutory order stays further proceedings in lower court in respect to matters relating to specific order appealed from, but cause remains in lower court and it may proceed in regard to all other matters. *Mfg. Co. v. Arnold*, 375.

1-341. Plaintiff in ejectment is entitled to recover reasonable rental value for three years next preceding institution of action when defendants disclaim all right and title to *locus*. *Hughes v. Oliver*, 680.

1-493. Judge of Superior Court trying action involving title may restrain party to action from seeking possession by summary ejectment. *Massengill v. Lee*, 35.

1-502, 55-147. Inherent power of court to appoint receiver is not limited by prevailing statutory provisions. *Sinclair v. R. R.*, 389.

1-503. Upon appeal by plaintiff from judgment denying appointment of receiver upon filing of bond, court is *functus officio* pending appeal, and plaintiff who accepts bond is estopped from further prosecuting application for receiver, but upon later adjudication by court that appeal had been abandoned, it may ratify prior order appointing receiver. *Sinclair v. R. R.*, 389.

1-510, 1-541. Plaintiff is entitled to judgment for part of sum demanded admitted to be due without prejudice to litigation of balance, which right may not be defeated by tender of judgment. *McKay v. Investment Co.*, 290.

4-1. Common law rule that violation of statute enacted in public interest commanding an act to be done or proscribing the commission of an act is misdemeanor notwithstanding act prescribes no penalty obtains in this State. *S. v. Bishop*, 371.

5-1. Court has inherent power to punish as for contempt willful violation of its orders, including temporary restraining orders. *Mfg. Co. v. Arnold*, 375.

GENERAL STATUTES CONSTRUED—*Continued.*

G. S.

7-50, 7-70. Courts will take judicial notice of terms of Superior Courts and the judges of the Superior Courts. *S. v. Anderson*, 720.

7-63. Superior Court has original jurisdiction of all civil actions where exclusive original jurisdiction is not given some other court. *Brake v. Brake*, 609. Superior Courts have concurrent jurisdiction with justices of the peace of actions in summary ejectment. *Stonestreet v. Means*, 113.

7-64. Where recorder's court and Superior Court have concurrent jurisdiction, court first taking cognizance of offense has exclusive jurisdiction thereof. *S. v. Reavis*, 18.

8-4. Our courts will take judicial notice of laws of sister state. *Lewis v. Furr*, 89.

8-55. Cause remanded for denial of plea in amnesty without finding of material facts. *S. v. Foster*, 72.

8-71. Fact that attorney brings back sealed deposition and deposits it in mail as requested by notary does not render deposition incompetent. *Randle v. Grady*, 159.

9-11, 9-16, 15-165. Order for special venire properly specifies that veniremen are to be freeholders. *S. v. Anderson*, 720.

9-29. Failure of judge to sign order for special venire *held* not fatal. *S. v. Anderson*, 720.

14-17. Evidence of arson resulting in deaths of occupants is sufficient to sustain conviction of murder in first degree. *S. v. Anderson*, 720. Sentence of death is mandatory upon conviction. *Ibid.*

14-21. Instruction which fails to charge that carnal knowledge of prosecutrix must have been accomplished by force and against her will, *held* error. *S. v. Simmons*, 258.

14-26. Evidence of guilt of carnally knowing female child between 14 and 16 years of age *held* sufficient. *S. v. Bryant*, 641.

14-32. "A certain knife" is sufficient description of the weapon in an indictment for assault with deadly weapon with intent to kill. *S. v. Randolph*, 228.

14-45. Evidence of defendant's guilt of criminal abortion *held* sufficient for jury. *S. v. Choate*, 491.

14-58. Sentence of death is mandatory upon conviction of arson without recommendation by jury as to punishment. *S. v. Anderson*, 720.

14-87. Statute merely prescribes more severe penalty if robbery is committed by use of threatened use of firearms. *S. v. Bell*, 659.

14-90. Evidence *held* sufficient to show that defendant was "agent" within meaning of embezzlement statute in refinancing chattel mortgage for a fee. *S. v. Gentry*, 643. Fraudulent intent within meaning of statute is intent to embezzle or otherwise willfully and corruptly misapply property of principal or employer for uses other than for which held. *Ibid.*

14-100. Under indictment charging false pretense in representing that another was agent to draw drafts in payment of tobacco and that he had made arrangements for payment, there must be evidence of positive misrepresentation by defendant. *S. v. Yancey*, 313.

14-104. Warrant must allege that advances were obtained for promise to work with intent to cheat or defraud. *S. v. Phillips*, 446.

GENERAL STATUTES CONSTRUED—*Continued.*

G. S.

14-256. Each conspirator is guilty of acts which are natural and probable consequence of conspiracy, and therefore contention that conspiracy was to commit a misdemeanor and co-conspirator could not be found guilty of felony, is untenable. *S. v. Brooks*, 68.

14-291.1, 14-299. Person may comply with personal judgment imposed on conviction of possession of lottery tickets and appeal from order of confiscation. *S. v. Richardson*, 426.

14-322. Offense is the willful or wrongful separation of husband from wife coupled with willful failure to provide her adequate support. *S. v. Carson*, 151. Statute must be strictly construed. *Ibid.*

15-4. In absence of request, propriety of appointing counsel for person accused of offense less than capital felony rests in sound discretion of trial judge. *S. v. Hedgebeth*, 259.

15-79, 15-82, 8-68. Where it does not appear that defendant in criminal action was brought into State by, or after waiver of extradition proceedings, he is not immune to service of process in civil action while in State for purpose of attending the criminal term of court at which he was under bond to appear. *Hare v. Hare*, 740.

15-116. Where *sci. fa.* has been stricken out, judgment absolute on bond before issuance and service of another *sci. fa.* is premature. *S. v. Wiggins*, 76.

15-169, 15-170. Where there is no evidence of defendant's guilt of less degree of crime included in bill of indictment, court properly refuses to submit question to jury. *S. v. Bell*, 659.

15-170. Where there is evidence of defendant's guilt of less degree of crime included in bill of indictment, defendant is entitled to have question submitted to jury. *S. v. Childress*, 208.

15-173. Motion to nonsuit must be first made at close of State's evidence. *S. v. Weaver*, 39. Circumstantial evidence of guilt of homicide *held* insufficient to be submitted to jury. *S. v. Harvey*, 62; *S. v. Coffey*, 119. Circumstantial evidence of identity of defendant as perpetrator of larceny *held* insufficient. *S. v. Minton*, 518. Circumstantial evidence of guilt of larceny *held* sufficient. *S. v. Massengill*, 612.

17-3. Proceeding to obtain custody of child as between person with whom child has been placed for adoption and welfare officers seeking to place child with its parents, is not proceeding under this statute. *In re Thompson*, 74.

17-39. Finding that best interest of child require its custody be awarded its mother are sufficient to support judgment to this effect. *In re Barwick*, 113. Dismissal of petition for review or modification of order awarding custody of children because of want of service on defendant does not preclude court from considering subsequent petition. *In re Biggers*, 743.

17-39, 50-13. *Habeas corpus* will not lie at instance of father of illegitimate child to obtain custody from its mother. *In re McGraw*, 46.

18-1. Sloe gin is intoxicating liquor. *S. v. Holbrook*, 582.

18-2, 18-36, 18-49. Proviso permitting transportation of not more than one gallon of liquor from wet county to dry county is matter of defense, and burden is on defendant to bring his case under the exception. *S. v. Holbrook*, 582.

GENERAL STATUTES CONSTRUED—*Continued.*

G. S.

18-6. Jurisdiction to declare forfeiture of vehicle for illegal transportation of liquor is in court having jurisdiction of offense of driver, and when recorder's court has imposed sentence on driver, Superior Court may not declare forfeiture. *S. v. Reavis*, 18.

19-2. Is not appropriate remedy to abate operation of A.B.C. store set up under color of legislative authority. *Amick v. Lancaster*, 157.

20-16 (7), 20-17 (2), 20-25. Upon receipt of notification from another state that resident of this State has been convicted of drunken driving, Department of Motor Vehicles has discretionary power to revoke license, with right of licensee to appeal to Superior Court for review *de novo*. *In re Wright*, 301; *In re Wright*, 584.

20-129. Plaintiff's evidence *held* to disclose contributory negligence as matter of law in hitting unlighted truck parked on highway. *McKinnon v. Motor Lines*, 132.

20-138. Witnesses whose sole opportunity of observing defendant was while he was unconscious from blow received in accident had no sufficient basis for testimony that defendant was under influence of intoxicants. *S. v. Flinchem*, 149.

20-140. Evidence that defendant was driving at excessive speed and crashed into rear of car traveling ahead of him in same direction *held* sufficient on charge of reckless driving. *S. v. Holbrook*, 620; *S. v. Steelman*, 634.

20-141. Evidence of speed greater than is reasonable and prudent under circumstances, or in any event in excess of 45 miles per hour, is evidence of negligence under the statute prior to the amendment of 1947. *Steelman v. Benfield*, 651. Error in charging that speed of 45 miles per hour, rather than speed in excess of 45 miles per hour, is *prima facie* evidence that speed is unlawful, *held* harmless on evidence in view of duty to decrease speed on curve or where special hazards exist. *Garvey v. Greyhound Corp.*, 166.

20-141 (a), 20-141 (c). Driver is under duty not to exceed speed which is reasonable and prudent under circumstances and to decrease speed when special hazards exist in regard to pedestrians or traffic. *Baker v. Perrott*, 558.

20-141 (b) (3), 20-141 (c). Fact that vehicle is traveling on dominant highway does not exculpate negligence in traveling at excessive speed and hitting vehicle which had already entered intersection from servient highway without stopping. *Nichols v. Goldston*, 514.

20-141 (5) (c). Motorist must take into consideration hills and curves in determining speed that is reasonable and prudent under circumstances. *Tyson v. Ford*, 778.

20-148. Evidence of guilt of manslaughter *held* sufficient as against each driver involved in head-on collision upon evidence tending to show that each was to left of center of highway. *S. v. Wooten*, 628. Rule that motorist may assume car approaching from opposite direction will turn to right does not apply to motorist who runs completely off road to his right and hits car standing still on its left shoulder of the road with lights burning. *Webb v. Hutchins*, 1.

20-153 (a). Evidence that driver "cut the corner" and hit pedestrian, and failed to keep proper lookout and exercise due care, *held* to take case to jury. *Ward v. Bowles*, 273.

GENERAL STATUTES CONSTRUED—*Continued.*

G. S.

20-158. Failure to stop before entering intersection with dominant highway is not negligence *per se* but only evidence of negligence. *Nichols v. Goldston*, 514.

20-161. Plaintiff's evidence disclosing that he could not stop within range of lights and hit unlighted vehicle parked on highway, *held* to warrant nonsuit for contributory negligence. *Riggs v. Oil Corp.*, 774; *Tyson v. Ford*, 778.

20-174 (a). Does not apply to unmarked cross-walk at intersection of highways. *Gaskins v. Kelly*, 697.

20-174 (e). Evidence that driver did not sound horn and was driving at excessive speed when he hit child running into street held to take case to jury. *Sparks v. Willis*, 25.

22-2. Findings that there was a written memorandum containing sufficient description of land to admit of parol evidence which fully identified it, support decree for specific performance. *Russos v. Bailey*, 783. Indivisible contract to devise real and personal property comes within statute of frauds. *Jamerson v. Logan*, 540. Statute of frauds does not preclude recovery against grantee in deed poll on stipulation contained in the deed. *Williams v. Joines*, 141.

28-1, 31-16, 31-17, 31-18, 31-19. Probate in common form is conclusive until vacated on appeal or declared void by competent tribunal. *In re Will of Hine*, 405. Clerk may not set aside probate on ground that will was revoked by later instrument. *Ibid.*

28-173. Where fatally defective complaint is filed within time limit, but amended complaint curing defect is not filed until after expiration of time, demurrer is properly sustained. *Webb v. Eggleston*, 574.

28-176. Where note matures prior to date of payee's death, personal representative must sue in representative capacity, and where note was payable to testator in state of his residence, ancillary administrator must be appointed to maintain action in this State. *Cannon v. Cannon*, 211.

30-4, 30-5. Widow is entitled to dower in one-third in value of realty of which husband was seized or possessed at any time during coverture, dower to include dwelling house in which husband usually resided. *Artis v. Artis*, 754.

30-6, 30-8. Where husband conveys home site without joinder of wife, grantee takes subject to wife's dower right if she should survive husband. *Artis v. Artis*, 754.

31-27. Copy of will authenticated as required by statute may be recorded here as if an original. *Lewis v. Furr*, 89. Our courts have jurisdiction of a caveat to the recordation and exemplification of a will and the probate proceedings had in another state, in so far as it affects realty here, and when caveat asserts that testatrix was resident of this State, in regard to personalty in this State also. *In re Will of Chatman*, 246.

31-32, 31-33, 31-36. Upon caveat, neither party may take nonsuit or waive jury trial. *In re Will of Hine*, 405.

31-38. Devise generally or indefinitely with power of disposition creates a fee. *Hardee v. Rivers*, 66. Indefinite devise of realty carries the fee, and subsequent clause expressing wish, desire or even direction for

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disposition of what remains at death of devisee does not limit the devise. *Taylor v. Taylor*, 275.

31-43. Residuary clause *held* sufficiently definite to be effective as exercise of power of disposition. *Schaeffer v. Haseltine*, 484.

36-21. Private trust must terminate within a life or lives in being and twenty-one years and ten lunar months thereafter. *Trust Co. v. Williamson*, 458. Devise in trust with direction to trustees to keep principal invested and use proceeds for purposes designated gives trustees power to convey fee to realty. *Hall v. Wardwell*, 561.

39-1. Decisions under G. S., 31-38, are pertinent in construing this statute. *Artis v. Artis*, 754. Part of deed which undertakes to divest fee conveyed in granting clause and *habendum* will be disregarded. *Ibid.*

39-6. Deed revoking contingent limitation over to persons not *in esse held* effective. *Kirkland v. Deck*, 439.

41-2. Surviving partner is vested with title to partnership property for purpose of settling partnership affairs. *Coppersmith v. Upton*, 545.

41-4. Will *held* to set up contingent and not vested limitation, and call of roll of remaindermen must be made at death of life beneficiary. *Van Winkle v. Berger*, 473.

42-14. 42-26. Where occupancy is taken 18th of month, proof of notice 14th of month to quit premises on or before first of following months is alone insufficient to show statutory notice. *Stafford v. Yale*, 220.

42-26. Summary ejectment does not lie against tenant at will or at sufferance. *Goins v. McLoud*, 655. Jurisdiction of Superior Court on appeal is derivative. *Ibid.*

42-26, 42-28. Superior Courts have concurrent jurisdiction of actions in summary epectment. *Stonestreet v. Means*, 113.

44-14. Bond for public construction *held* to include rental cost of machinery or equipment hired to do the work. *Owsley v. Henderson*, 224.

45-37 (5). Presumption of payment of mortgage or deed of trust after expiration of fifteen years does not arise in favor of those who become creditors or purchasers for value prior to expiration of fifteen-year period. *Smith v. Davis*, 172.

47-18. Grantee in deed given without consideration does not come within protection of statute. *McRary v. McRary*, 714.

49-2. Offense is not bastardy but willful neglect or refusal to support illegitimate child, and failure to provide medical expenses for mother is not element of the offense. *S. v. Stiles*, 137.

50-6. Proper procedure to attack divorce decree on ground that plaintiff had not been resident of the State for six months prior to institution of action is by motion in the cause. *Bryant v. Bryant*, 287.

50-13. Welfare of child is paramount consideration in awarding its custody. *Brake v. Brake*, 609. On appeal from Recorder's Court from order in divorce action awarding custody of minor child, hearing is *de novo*. *Ibid.* Upon wife's motion after decree of divorce to require defendant to support minor child of marriage, court may order support *pendente lite* notwithstanding defendant's denial of paternity and transfer of cause to civil issue docket. *Winfield v. Winfield*, 256.

50-16. Where wife is forced to leave home by cruel treatment of husband, abandonment is his and not hers. *Eggleston v. Eggleston*, 668. Com-

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plaint alleging cause of action for alimony without divorce on ground that defendant is habitual drunkard is not demurrable notwithstanding that cause for cruelty is defective in failing to allege want of provocation. *Best v. Best*, 9. Amount of alimony *pendente lite* is within sound discretion of trial court. *Best v. Best*, 9; *Barwick v. Barwick*, 110.

52-2, 52-12. Husband and wife may enter into partnership, but where wife's separate estate is involved provisions of G. S., 52-12, must be observed. *Eggleston v. Eggleston*, 668.

55-26 (10), 55-48. Authority of corporate officers to execute deed to corporate property *held* question for jury upon the evidence. *Tuttle v. Building Corp.*, 507.

55-114. Relief against wrongful interference with corporate officers in discharge of their duties, or wrongful refusal of officer to perform duties, cannot be had in proceeding under this statute. *Thomas v. Baker*, 41.

58-176 (1), 58-177 (c). Provisions which have effect of making standard policy form more restrictive are void. *Glover v. Ins. Co.*, 195.

59-74, 59-75. Fact that surviving partner has not filed bond is not ground for nonsuit in his action on partnership asset. *Coppersmith v. Upton*, 545.

60-5, 60-6, 60-114. Carrier is under duty to collect full rates fixed in accordance with tariff schedules. *R. R. v. Paving Co.*, 94.

62-30, *et seq.* Individuals having interest of general public may not sue to compel continued operation of carrier. *Sinclair v. R. R.*, 389.

75-1. Violation of Ch. 328, Session Laws 1947, prescribing that right to work shall not be dependent on membership or non-membership in labor union, is criminal offense. *S. v. Whitaker*, 352.

75-1, 75-5. Fact that unfair practices are made criminal acts, does not preclude common carrier whose franchise rights are threatened thereby from maintaining action for injunction. *Transit Co. v. Coach Co.*, 768.

84-14. Argument of solicitor that conviction would not necessarily bring prescribed punishment because of review and executive clemency *held* to require new trial. *S. v. Little*, 417.

92-2 (b). Deceased *held* independent contractor and not employee. *Perley v. Paving Co.*, 479.

96-9 (F) (c) (4), 96-8 (f) (2). New corporation organized to take over portion of business of old corporation *held* not entitled to pro rata transfer of reserve fund. *Employment Security Com. v. Publishing Co.*, 332.

96-14 (2). Employees who belong to grade or class of workers some of whom finance or are directly interested in labor dispute are disqualified from unemployment compensation benefits during strike. *Unemployment Compensation Com. v. Martin*, 277.

96-15. Findings of Unemployment Compensation Commission are conclusive when supported by evidence. *Unemployment Compensation Com. v. Martin*, 277.

97-2 (k). Payment of hospital and medical expenses is not part of compensation payable to employee. *Whitted v. Palmer-Bee Co.*, 447.

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97-10. Compensation Act does not preclude employee from waiving claim against employer and pursuing remedy against third person tort-feasor. *Ward v. Bowles*, 273. In action by employee's administrator against third person tort-feasor, amount of compensation paid is incompetent, nor may defendant set up illegal agreement for distribution of recovery between employer and dependents. *Penny v. Stone*, 295.

97-24, 97-92. Report of accident as required by G. S., 97-92, is not filing of claim as required by G. S., 97-24. *Whitted v. Palmer-Bee Co.*, 447.

97-47. Review of award for changed condition must be made within 12 months from date of last payment of compensation or payment of medical expenses. *Whitted v. Palmer-Bee Co.*, 447.

105-109, 105-160. Where taxpayer fails to notify Commissioner of Revenue of changes in Federal income tax return, Commissioner may make additional State assessment of income tax after expiration of three years from filing of original return. *Knitting Mills v. Gill*, 764.

105-385 (c) (5). Assets of corporation sold to innocent purchaser for value are not subject to levy to satisfy taxes due by the corporation. *Roach v. Pritchett*, 747.

106-307.4. Regulation of State Board of Health prohibiting importation of cattle without health certificate into State except direct to slaughter house, *held* valid. *S. v. Lovelace*, 186.

110-21. Where mother voluntarily appears and gives juvenile court custody of children, it acquires jurisdiction, and may order change of custody for changed condition over her objection. *In re Bumgarner*, 639.

110-21 (3). Jurisdiction to determine custody of child as between persons with whom child has been placed for adoption and welfare officer seeking to place child with his family is within exclusive jurisdiction of juvenile court. *In re Thompson*, 74.

113-172. Act is unconstitutional in failing to apply equally to persons similarly situated in exempting corporations chartered prior to 4 March, 1915, from its operation. *S. v. Glidden Co.*, 664.

115-83, 115-240, 153-114 to 153-142. Even though county board of education is made custodian of school fund, surplus in the fund which is directed to be used for construction of schools is subject to County Fiscal Control Act and should be considered by board of commissioners in adopting budget. *Johnson v. Marrow*, 58.

130-117. Right of person, firm, corporation to enjoin emptying of sewerage into stream applies only when public drinking-water supply is taken therefrom. *Banks v. Burnsville*, 553.

136-19. Statute prescribes limitation rather than condition precedent to right of action, but there was no evidence of waiver of provisions in this case. *Lewis v. Highway & Public Works Comm.*, 618.

136-96. Defendant *held* entitled to introduce revocation of dedication as defense to action for trespass notwithstanding that answer did not allege revocation. *Pritchard v. Fields*, 441.

146-1. Evidence that land embraced in State grant was not covered by navigable water *held* sufficient. *Davis v. Morgan*, 78.

151-1, 151-2. Constable must be elected in each township, and must qualify by taking statutory oath. *Taylor v. Wake Forest*, 346.

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155-18, 153-2 (1). Action must be instituted in name of county or on relation of county. *Johnson v. Marrow*, 58.

156-95. Drainage commissioners have power under statutory authority to issue bonds and make assessments applicable to one section of drainage district. *In re Drainage District*, 248.

162-14. Sheriff may not be amerced for failing to serve process when such failure is due to restraining order of court. *Massengill v. Lee*, 35.

163-25 (d), 163-25 (f). "Residence" within purview of Constitution is judicial question and cannot be made matter of legislative construction. *Owens v. Chaplin*, 705.

163-55, 163-56, 163-57, 163-58. Evidence *held* insufficient to show that electors casting absentee ballots were disqualified because of residence, or that there was irregularity in oaths, or manner in which ballots were taken or delivered sufficient to render them invalid. *Owens v. Chaplin*, 705.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.

(For convenience in annotating.)

ART.

I, sec. 1. Art. I, sec. 7, Art. I, sec. 17. Ch. 941, Session Laws 1947, providing for licensing veterans in barber trade without examination *held* valid. *Motley v. Board of Barber Examiners*, 337.

I, sec. 7. I, sec. 17. Statute proscribing emptying substances inimical to fish in streams *held* unconstitutional since it does not apply equally to persons similarly situated in that corporations chartered prior to 4 March, 1915, are exempt from its provisions. *S. v. Gidden Co.*, 664.

I, sec. 17. "Right to Work Law," Ch. 328, Session Laws 1947, is constitutional. *S. v. Whitaker*, 352.

I, sec. 11. Ignorance of defendant and his unfamiliarity with legal matters are not alone sufficient to render appointment of counsel for him mandatory in prosecution for less than capital offense. *S. v. Hedgebeth*, 259.

II, sec. 30. While General Assembly cannot authorize diversion of sinking funds necessary for payment of sinking fund bonds, it may direct expenditure of unencumbered surplus in the fund. *Johnson v. Marrow*, 58.

VI, sec. 2. Residence as prerequisite to right to vote is synonymous with domicile. *Owens v. Chaplin*, 705. Legislature may not prescribe stricter qualifications. *Ibid.*

IV, sec. 4. General Assembly has power to give Superior Courts jurisdiction to hear appeals from discretionary revocation of driving license by Department of Motor Vehicles. *In re Wright*, 584.

IV, sec. 11. Clerical error in date in concluding part of commission to emergency judge *held* not fatal. *S. v. Anderson*, 720.

CONSTITUTION OF THE UNITED STATES, SECTION OF, CONSTRUED.

(For convenience in annotating.)

ART.

IV, sec. 1. (U. S.). Judgment of another state which did not have jurisdiction of subject matter does not come within protection of full faith and credit clause. *McRary v. McRary*, 714. Divorce decree entered in another state after defendant files answer and enters appearance comes within protection of full faith and credit clause, but whether provisions of decree awarding custody of children precludes our courts from determining custody depends upon whether children were or have become residents of this State. *In re Biggers*, 743.

XIVth Amendment to Federal Constitution. "Right to Work Law," Ch. 328, Session Laws 1947, is constitutional. *S. v. Whitaker*, 352. Amendment does not require a state, contrary to its own practice, to furnish counsel for a defendant. *S. v. Hedgebeth*, 259. Amendment does not preclude State from providing preferential treatment in licensing veterans to carry on particular trade or profession upon payment of same fees prescribed for others. *Motley v. Board of Barber Examiners*, 337.